

PEACE THROUGH LAW: THE RÔLE AND LIMITS OF  
ADJUDICATION—SOME CONTEMPORARY  
APPLICATIONS

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Before taking up my main task, which is to test the rôle of adjudication on a sampling of actual current disputes, I should like to point out one special reason that makes this discussion timely—its relation to the Connally amendment. It has recently struck me that most of the “scare” arguments we have been hearing from the opponents of repeal are based, not just on a misconception of the scope of domestic jurisdiction, but even more on a misconception of the scope of the adjudication function.

Let me read you a typical example of the kind of circular that helped produce the flood of letters that helped delay action on this issue in the Senate. If the Connally amendment were repealed, according to this circular from the Patriotic Letter Writers, Inc.,

This Court, loaded with members of the Communist Party and their dupes, would have jurisdiction over all areas of our lives, for Congress

will NO LONGER control our . . .

<i>Trade and Tariffs</i>	<i>Mental Health and Birth Control</i>
<i>Civil Rights</i>	<i>Post Offices and Censorship</i>
<i>Economics and Education</i>	<i>The Military</i>
<i>Foreign Trade</i>	<i>Welfare</i>
<i>Immigration and Emigration</i>	
<i>International Bank for Reconstruction and Development</i>	

In short, this circular says that the International Court is going to usurp—not the functions of domestic courts—but the legislative functions of Congress. The authors are not expressing fears about what would happen in the process of interpreting the law and applying it to the facts in a case between litigants, but are in effect saying that the Court will dictate legislative policy to Congress, foreign policy to the Executive and military policy to the military.

I have been repeatedly struck by the fact, as I discuss this issue around the country, that most people have a very imperfect conception of the real function of a court. I suppose this is why a preposterous leaflet like this can create as much reaction as it did.

But just as there are some exaggerated misconceptions about how fifteen men at The Hague (of whom fourteen are “foreigners”!) might conspire to take over the dictatorship of the entire world, so there are some misconceptions that err in the opposite direction of underestimating the possible contribution of law to peace. People often say to me, “I think this Peace through Law idea is all very fine, but, after all, aren’t most of the real disputes in the world political, and hence out of place in court?”

Let’s run down a list of some current disputes and see what the answer is. To do this, we will have to confine ourselves to actual active identifiable disputes, as distinguished from more generalized situations of tension and unpleasantness. And, of course, we are concerned with the question, not whether in this imperfect world of today the parties realistically are going to submit these disputes to legal settlement, but whether the questions themselves are of a quality that is inherently suitable for adjudication.

#### I. BERLIN

Berlin is once more in the headlines as the result of Khrushchev’s speech in Baku. Certainly this is one of today’s most important disputes, and hence a good proving ground of the importance of the potential, or at least theoretical, place of adjudication in the preservation of peace.

Perhaps the most straightforward way to identify the quality of this dispute is to recite methodically the precise legal issues that seem to be imbedded in it. The list would include the following:

- (1) The extent, if any, of the obligation of the U.S.S.R. to permit German personnel and goods traffic between West Germany and West Berlin under the Jessup-Malik agreement of 1949;
- (2) The extent, if any, of the obligation of the Soviet Union to permit Allied military (a) rail, (b) motor vehicle or (c) air communications between West Germany and West Berlin under

- (i) an alleged agreement by Presidential correspondence, acceptance by non-reply or action or estoppel in 1945,
  - (ii) an alleged agreement by practice,
  - (iii) an alleged agreement by incorporation into technical day-to-day agreements in Kommandatura committees, especially the Committee on Air Travel;
- (3) The extent, if any, of the obligation of the Soviet Union to permit the Western Allies to communicate between West Germany and West Berlin under an alleged rule of customary international law such as easement by necessity (a question which is the subject of a memorandum inserted in the *Congressional Record* for April 12, 1960, written by Charles S. Sullivan at the request of Congressman McCormack);
  - (4) The right, if any, of the U.S.S.R. to transfer the execution of its obligations, if any, under the above headings, to the German Democratic Republic without divesting itself of its own liabilities to the Western Allies;
  - (5) The right, if any, of the Soviet Union to divest itself of these alleged obligations completely by according the German Democratic Republic "full" sovereignty (We have Khrushchev's opinion on this in the Baku speech, stated not as a political fact but as a *legal* consequence of a separate peace treaty);
  - (6) The obligations, if any, of the German Democratic Republic under (4) and (5) above; and
  - (7) The question whether, in view of Article 107 of the U.N. Charter, the International Court of Justice has jurisdiction, even if the parties agree to jurisdiction.

It may be of interest to note that the Soviet Union is apparently not arguing what would be another legal issue: the question whether the quadripartite agreements have been frustrated and rendered obsolete by subsequent events. The reason seems to be that the U.S.S.R. places strong reliance on the Potsdam Agreement, which was almost contemporaneous with the quadripartite agreement.

At this point we should recall that, even if a court finally disposed of all these legal questions, this does not mean that the job of social ordering has been completed, or that the controversy is closed. The dissatisfied party has a perfect right to go on from there and try, through one of the other forms of social ordering, to get the legal position changed to one more to his liking. In the Berlin case, and in the question of the future of Germany generally, this might involve either further negotiation, or voting, or both. The important thing, in a well-developed system of peace through law, is that the justiciable issues be first disposed of by adjudication, and that we be not turned aside from this course by the fact that there might also be political features to the case. Indeed, putting to rest quarrels about existing legal rights might go a long way toward facilitating a satisfactory political settlement. Thus, to change the example, if two

states are trying to work out by negotiation the utilization of waters in an international river basin, and if one state has an exaggerated idea of its present right under international law to divert water for its own use, this unsettled question of present rights may of itself be the stumbling-block which prevents a reasonable diplomatic agreement.

Moreover, just as a court does not necessarily dispose of questions with finality, so a court also does not necessarily decide all the questions in a case presently before it. If a party is asking relief which could only be granted by the kind of law-changing that is beyond the power of the court, the court will simply refuse the relief requested. The probable presence of such issues, mixed in with the issues which the court can handle without resort to unauthorized law-changing, should not scare us out of letting the court perform its proper part of the dispute-settling job. This sort of thing is certainly familiar enough on the domestic level. There is probably no cliché of judicial language that has occurred more frequently in the last paragraph of judicial opinions than the sentence: "This, however, is a matter for the legislature."

As to Berlin, then, a large part of the current controversy revolves around legal questions. It is not the function of adjudication to work out a whole new set of revised treaties to govern the future of Berlin or of Germany, but adjudication can help to keep the peace while any change, if change there is to be, is worked out by other means.

## II. SUEZ

Since I am confining myself to current disputes, I will leave aside the Suez Canal nationalization issue. This issue, which was discussed at the Society's meeting three years ago, seems to be fading into the past. It might only be said in passing that there were legal issues at the heart of that dispute, notably the right of Egypt to nationalize the Universal Suez Company, and the obligations stemming from the 1888 Treaty of Constantinople.

There is, however, a Suez problem that is both older and newer. This is the dispute over the actions of the United Arab Republic in asserting belligerent rights against Israeli ships and cargoes destined for or coming from Israel, desiring to transit the Canal. Throughout the nine years that this question has been under discussion, it has been consistently recognized as involving a question of international law by all parties. The first sentence of the note of Israel to the President of the Security Council in 1951 asking that the case be placed on the agenda states:

In contravention of international law, of the Suez Canal Convention (1888) and of the Egyptian-Israel general armistice agreement, the government of Egypt continues to detain, visit, and search ships seeking to pass through the Suez Canal, on the grounds that their cargoes are destined for Israel. . . .

Most recently, the *Times* editorial of Sunday, April 10, charges that the continued stoppage of Israel-connected cargoes is in violation of international law.

This being so, in view of Article 36(3) of the U.N. Charter, which states that legal disputes should normally be referred by the parties to the International Court, one might have expected a referral to the International Court some time during the nine years. What actually happened? The admitted legal questions were simply by-passed, under the leadership of the United Kingdom, the United States, and France, in a resolution passed by the Security Council finding Egypt at fault and calling on her to desist from the practices complained of. The United Kingdom representative, speaking on behalf of the three co-sponsoring Powers, said: “. . . these legal issues are no doubt debatable, but I do not consider that it is necessary for the Security Council to go into them. . . . The view which the Council takes on this question should depend, in our opinion, on the actual situation as it exists rather than on any legal technicalities.” The objections to this brushing aside of the legal issues came from Egypt, as a party in interest, and from China and India.

It is too obvious for discussion that the central issues here are justiciable in quality, as has been conceded by all the countries involved. There are such familiar questions as the law concerning contraband, visit and search, blockade, the belligerent status of parties, the effect on the alleged state of “war” of the Armistice of 1949, and the effect of the outbreak of hostilities in 1956 on the Armistice of 1949.

It is sometimes said or implied that one obstacle in the path of international rule of law is that some other parts of the world do not share or understand our conception of law. The present case may be a salutary corrective to any undue resort to this excuse. It is interesting here that it was India and China that were on the side of giving respect to legal rights. It is particularly ironic that they were demonstrating this devotion to law in connection with a body of law which was the peculiar creation of European and American countries, *i.e.*, contraband, blockade, visit and search, etc., a body of law which, far from rejecting as alien, they understood perfectly and wanted to have applied.

It is still not too late to take this issue to the International Court. Egypt's Declaration of Acceptance of the Court's jurisdiction is broad enough to permit the question to be raised by one of the parties to the 1888 Treaty of Constantinople. The Secretary General urged this as recently as last year. But Israel—and this is a commentary on what happens when the judicial function is usurped by a political organ—has said the Court action is unnecessary on the ground that the Security Council action had disposed of the case.

Once more the conclusion is clear: the thing that is keeping this case out of court is not inherent non-justiciability; it is voluntary choice.

### III. SINO-INDIAN BORDER

Another dispute currently on the front page is the Sino-Indian border dispute. Both parties here are claiming certain border territories and, as I understand it, both are claiming as of legal right. The rules of law

applicable to the settlement of boundary disputes are rather limited, since ordinary common sense and logic places a limit on the number of ways in which boundaries are established and claims to territory made good. There appears to be no real misunderstanding between Communist and non-Communist countries on what the criteria are. In this case, the issues are numerous, and vary from segment to segment of the frontier, but they include the question whether there are in some cases boundaries agreed upon by the parties or their predecessors in interest, and whether in some places effective control has been established by one or the other party up to the boundary claimed. These are eminently justiciable issues. The issues are examined in a 30-page article in the January, 1960, issue of the *International and Comparative Law Quarterly* by Alfred P. Rubin. The latest reports in the paper are that the attempts of Chou and Nehru to work out a settlement are heading for failure. After looking at this 30-page article, and trying to imagine Chou and Nehru struggling to superimpose a political settlement on the complex legal uncertainties involved, one can feel only compassion for the negotiators.

I suppose it could be said generally that boundary disputes, where there is a reasonable amount of history behind the dispute, as distinguished from disputes which are the raw, unhealed wounds of recent conflict, are normally proper subjects for adjudication. And some current instances are in themselves potential threats to the peace.

#### IV. REFUGEES

Since this is World Refugee Year, it is appropriate to include the refugee problem, particularly the Arab refugee problem, among current festering sources of tension.

Some of the legal questions would be these: Did the refugees leave voluntarily or involuntarily? Were they forced to leave by violence or terror? Have they a right to return? Have the original legal rights and duties now been made obsolete and incapable of implementation by continued Jewish immigration to Israel? If the Arab refugees do have continuing rights, can these be satisfied by payment of damages? Again, if these legal questions were cleared up, perhaps we could make progress on the difficult political problems surrounding the plight of refugees.

#### V. AQABA

Finally, we cannot close this list without mentioning Aqaba, because the controversy over the right of passage presents the international lawyer with an entire symposium of questions of law. Does the Gulf "comprehend international waters"? To what extent is the Gulf not part of the coastal states' territories? To what extent is the Gulf an international historic bay? To what extent is the Gulf a series of territorial seas? To what extent historically is the Gulf an Arab gulf without any international character?

If the Gulf comprehends international waters, to what extent do the laws of war apply to the Gulf and to the Straits of Tiran? What is the law applicable to the Straits? Does it include Article 16(4) of the Convention on the Territorial Sea and the Contiguous Zone of the Geneva Conference? Are the laws of war in force since the adoption of the U.N. Charter, and, if so, are they applicable to Israeli or Israeli-bound ships? To what extent is there a "war" between Arab states and Israel? Was the so-called war legal? If not, is reliance on the laws of war admissible? Has the Armistice of 1949 ended the "war" and thus rendered irrelevant any of the laws of war? Has the 1956 fighting affected the 1949 Armistice? Even if war continues, what are the rules applicable to innocent passage anywhere? In the Gulf? Through the Straits? To what extent is the right of innocent passage restricted by the "rights of protection of the coastal state"? If there is no war between the Arab states and Israel, to what extent is the relevant Israeli-bound traffic not "innocent passage"? Here again, both sides are grounding their claims on rights under international law.

This, then, is a sampling of current controversies in terms of their suitability for adjudication. Quantitatively, some of them might clearly rank as major issues and some might be called minor issues. However, in the world's present condition, it is a serious mistake to assume that international controversies can be measured with a tape measure and assigned a quantitative rating, and then to conclude that the danger to peace involved in the controversy is in direct proportion to this quantitative size. The Aqaba dispute is perhaps small in size, but it could very well be the spark that blows up the Middle Eastern powder keg. When the powder keg has blown up, it is not going to matter whether the spark was a big one or a little one. I think it is important to keep this in mind when people raise the question whether the movement to strengthen the international rule of law and the judicial settlement of disputes really has a major part to play in averting war and building peace. People who raise this question will sometimes say, in effect, "It is all very well to settle disputes like Aqaba; but if the land armies of the U.S.S.R. start grinding across Poland and middle Europe, what can these fifteen old men in The Hague do to stop them?" The answer is that this is only one conceivable way that the peace might be seriously broken, and it is by no means the most likely way. It seems to me it is pointless to try to calculate whether most of the world's controversies threatening the peace are capable of final settlement through the judicial process. The important fact is that there are many disputes threatening the peace that are in whole or in part justiciable, and to the extent that these are cleared up by the application of law through judicial or arbitral procedures, the prospects of peace have been measurably increased.

In any event, at the present time it is the legal and judicial approach to international dispute-settling that most needs strengthening, and that presents the most promising prospects of improvement, among the three varieties of social ordering.