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## The Role of Domestic Courts in the International Legal Order. by Richard A. Falk.

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## BOOK REVIEWS

THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER. By Richard A. Falk. Syracuse: Syracuse University Press, 1964. Pp. xvi, 184. \$6.50.

A controversial case challenging the validity under international law of a retaliatory and discriminatory Cuban expropriation decree, a Department of State note of July 16, 1960, declaring the expropriation decree to be in violation of international law, a statement by the then Deputy Attorney General during oral proceedings in the Supreme Court that he regarded the Cuban act to be a clear-cut violation of international law even though he did not want the question of conformity with international law to be decided,<sup>1</sup> a Supreme Court reversal of the lower courts by applying the act of state doctrine to preclude invalidation, at least as to effects within the United States of the Cuban decree, and a book, as Professor Richard B. Lillich tells us in his Foreword (p. vii), advancing a thesis "adopted lock, stock, and barrel by Mr. Justice Harlan writing for the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*"<sup>2</sup>—these provide tempting ingredients for a reviewer liking neither the Supreme Court result nor its grounds. Temptation is multiplied by the opportunity to rest the review on the support of Congress as enunciated at least for the present in the Foreign Assistance Act of 1964,<sup>3</sup> which would apparently overrule the *Sabbatino* majority.

To yield to the temptation presented would submerge in the transient the fundamental effort of Professor Falk to free national adjudication on international law questions from subservience to diplomatic strategy and tactics. In harmony with this objective, the book is quite critical of judicial expression of fear of embarrassing the executive and of that part of the Solicitor General's *amicus* brief in *Sabbatino* asserting the primacy of diplomacy.<sup>4</sup> By means of

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1. 2 Am. Soc'y of Int'l Law, International Legal Materials: Current Documents 1125, 1134 (1963).

2. Compare Chapter V, published in article form in 1961 and critique of Judge Dimock's opinion in the district court, and section VI of Justice Harlan's opinion, 376 U.S. 398, 427.

3. "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 with the court, or (3) in any case in which the proceedings are commenced after January 1, 1966." Foreign Assistance Act of 1964, § 301(d)(4), 78 Stat. 1013.

4. 2 Am. Soc'y of Int'l Law, International Legal Materials: Current Documents 1009, 1018-19, 1022-23 (1963).

its effort to erect the act of state doctrine into a jurisdictional rule to be applied by national courts in circumstances of legitimate diversity among states, the book endeavors to free the national judicial process from all presumption of need to defer to foreign policy considerations and to establish international law as the basis of judicial restraint.

Because the book is essentially an adaptation of previously published articles and an occasional paper, readers are provided with a convenient medium for following the development of a segment of Professor Falk's thought on international law. Moreover, either despite or because of a good deal of repetition, integrating concepts are readily identified. Except for a most penetrating discussion in Chapter VII of sovereign immunity and of American judicial abdication by extending immunity to state-owned commercial ships, the argument proceeds from a view of the modern world, its legal order, the position therein of the state and its courts, and the principle of reciprocity as the basis of international relations. Discussion increasingly focuses upon the *Sabbatino* case in its progress through the lower courts and, in the Supreme Court, to the submission of the brief for the United States as *amicus curiae*. Narrow though the focus may be, as well as incomplete in not including the Supreme Court's opinion and Justice White's incisive dissent, the content of the book reflects the title. *Sabbatino* is made the medium for delineation of what the author believes to be the proper function of American courts when applying substantive international law to the acts of foreign states. Generalization of what is delineated in regard to *Sabbatino*, together with the addition concerning sovereign immunity, produces conclusions concerning the role of domestic courts in the international legal order. The effort is frankly polemical, an excursion *de lege ferenda*.

Judicial craftsmanship and not judicial decision, except incidentally, is the major topic. Consequently, the subject matter itself drives the argument away from the author's expressed preference for treating the subject "as a matter of social and political dynamics" (p. 170). Even though *Sabbatino* is dealt with in its political setting of hostile American-Cuban interaction, critical discussion of the opinions of Judges Dimock (district court) and Waterman (court of appeals) on the ground of craftsmanship forces argument in terms of what a court ought to say in order to further the cause of international law in a world of diverse systems. Search for "a conception of domestic judicial function" is placed on the theoretical level and "based upon an interpretation of international society" (p. 170). Semantics and rationalization, rooted in an admirably strong sense of values, take unavoidable precedence over the disorder and confusion of socioeconomic variables, including the distressing incapacity of societies to evolve either at an even pace or abreast. At the same time, this very disorder, when displayed in the form of conflicting substantive norms, gives rise to the statement that "domestic courts are not equipped emotionally or technically to cope with this confusion, and tend to invoke norms that correspond with the national preference" (p. 75) and the offering

of that statement as an argument for the application of formal rules of deference.

Great skill is displayed in the course of skirting the rim of persuasive illogic. For example, the author might easily have fallen into the trap of allowing his respect for economic systems differing from our own to provide room for executive interference with the judicial function. But this is precisely what he rules out by taking issue with Professor Katzenbach's advocacy of political guidance of courts<sup>5</sup> and with the Solicitor General's *amicus* brief. Rather than have the courts give effect to the act of state doctrine except when the Executive urges the judiciary to suspend the doctrine, Professor Falk would have the judiciary apply the doctrine as an international requirement of deference whenever legitimate diversity of national systems, as in the economic realm, exists. Paradoxically, the argument asserts that there are circumstances in which "law is best applied by the refusal to apply it" (p. 107). Apparent inconsistency is removed by positing an international conflicts rule of deference in the form of the act of state doctrine. Thus, a rule of international law, not executive discretion, is proposed as the ground on which domestic courts should settle or abstain from settling issues stemming from legitimate diversity.

Heuristic walls, constructed of a series of dichotomies, are designed to prevent a fall into the abyss of persuasive illogic and to provide an approach based on social and political dynamics. Falk's essential dichotomies can be grouped into two sets.

I. MORAL CHOICES

A. *Conducive to Growth of International Law*

1. Constructive attitude
2. Primacy of the legal at least in marginal areas of international action
3. Judicial independence
4. Deference in matters of legitimate diversity
5. Judicial assertion when universal standards exist

B. *Hampering Growth of International Law*

1. Scornful attitude
2. Primacy of the political in all areas of international action
3. Judicial dependence on executive
4. Deference when universal standards exist
5. Judicial assertion in matters of legitimate diversity

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5. Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L.J. 1087, 1155 (1956).

II. SOCIOECONOMIC CRITERIA FOR NATIONAL JUDICIAL DECISION

A. *Substantive Decision*

1. Vertical system and norms
  - (a) Embracing rules prohibiting certain state actions
2. (a) Nonexistence of revolutionary states or
  - (b) Areas of agreement between revolutionary and nonrevolutionary states
3. Universal standards relevant  
*E.g.*, human rights
4. Similar national economic systems  
In past, capitalist, respecting private property
5. Rule of judicial assertion

B. *No Substantive Decision*

1. Horizontal system and norms  
Embracing norms permitting state action not contravening universal standards
2. Existence of revolutionary states or of agreement with nonrevolutionary states
3. Legitimate diversity relevant  
Economic systems, etc.
4. Dissimilar national economic systems  
Today, some capitalist and some socialist, the latter not respecting private property
5. Rule of judicial deference

Because discussion is conducted in the realm of conceptualization, dichotomization is a handy analytic tool whereby a nondichotomous world can be rendered conceptually manageable. The Falk sets of dichotomies thrust farther to synthesize a model against which reality in the specific case may be set. On the basis of the match between model and specific case in which application of substantive international law is requested, the judicial calculus is to be carried out and, through the medium of the opinion, publicized.

I have endeavored to place the Falk dichotomies in a sequence indicating both a logical progression toward decision, with choice I-A necessarily preceding choices under II, and an ordering of explanation through the exercise of judicial craftsmanship. Progression through II-A might exclude Item 1 because the legal system is not vertical (hierarchical), but such exclusion need not preclude decision if Item 3, universal standards relevant to the case, were scored positively, for a horizontal (decentralized) system. Should Item II-A-1 be rated positively, as might become the case with further growth of international institutions, then the progression would be directly to Item II-A-5. For the present, Item II-A-3 is the key in that a positive rating would permit horizontal substantive norms to do more than lie at rest. Despite unintended resemblance to a preliminary stage in the preparation of a computer program flow chart, the exposition above appears to represent the essence of the recommendations made in the book under review.

As noted in part, the key determination in the second set of dichotomies entails the identification of universal standards or of legitimate diversity. What constitutes the legitimacy of diversity appears to be derived as a negative of consensus. Unfortunately, here occurs some unclear conceptualization. Until the last chapter (p. 171) no explanations of consensus and diversity are attempted,

although two simplified examples are given. Economic diversity is represented by capitalism and socialism, a dichotomy useful in the context of current global conflict but not covering, nor apparently intended to cover, the extent of actual diversity. Consensus is represented by a presumed agreement on human rights that, on the basis of examples given, is restricted to revulsion against Nazi horrors. But is consensus limited to the circumstance of revulsion? Hardly, and so the concluding chapter undertakes clarification by asserting that "consensus must include the most powerful states" and that "uniformity" provides "a basis for effective and appropriate common standards." Furthermore, "the general will of the international community, as it is formalized in the recommendations and decisions of the principle organs of the United Nations, is a formal source of international law." This "radical contention," entailing the dropping of the requirement of consent to produce international law, has the merit that "no limit is introduced to confine the claims of the political majority of nations within the domain of reason, fairness, or common expectations. Instead, law develops or fails to develop depending upon the presence or absence of a consensus that is available to transform its policy into effective action." The succession of unreconciled criteria for consensus set forth on page 171 is regrettable since, unless the existence or absence of consensus can be established in concrete cases and if resort is not to be had to whimsy or hunch, decision is left to rest on the nature of the legal system, horizontal in the case of the international legal system. Rules of deference would have to govern in all cases entailing challenge in a domestic court of the validity of an act of a foreign state. The role of the domestic court would be reduced to nothing, a role at odds with the theme that domestic courts should perform, unhampered by the desires of the executive, functions contributing to the development of international law.

As already observed, the first set of dichotomies is of a moral nature and demands a commitment prior to evaluation in accordance with the socioeconomic grounds of the second set. The first set affords a choice with the preferred commitment being that of enhancing the growth of international law. In turn, the preference as to commitment is rooted in anxiety to avoid nuclear conflict. Hence, the fundamental morality of the argument leads in three directions that require the inclusion of guiding signposts in both the moral and the socioeconomic sets of dichotomies: (1) toward avoiding disturbing events, even those disturbances that may be set off by judges, that could lead eventually to global conflict; (2) toward a deference that accepts and respects diversity; and (3) toward exclusion of political interference with the independence of national judiciaries. Morality forms the cement holding together the dichotomous building blocks from which were constructed the heuristic walls bounding the path of argument.

What the preceding paragraphs have attempted to communicate is the essence of an attempt to reach to something more fundamental and of more

intrinsic worth than comment, influential as it may have been, upon a case. Undeniably, section 301(d)(4) of the Foreign Assistance Act of 1964 indicates that at least temporarily the horse that Professor Falk has ridden has proved a bit unruly. Furthermore, in the longer run it could well turn out that a rule of judicial abstention, unaffected by executive desires, is not as desirable as judicial assertion, with or without the possibility of invocation of the act of state doctrine upon executive suggestion—a reversal of the practice of applying the doctrine unless the executive suggested otherwise as in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*.<sup>6</sup> However debatable the merits of judicial abstention as contrasted with judicial assertion, it is essential that probes toward depoliticizing national treatment of international law be made. Depoliticized law, or even relatively depoliticized law, may seem impossible, particularly since so much of law is produced through political processes and is a communication from political authorities. Yet the struggle for the law attained to date is in part the story of efforts to embed in the life of a community ethical standards surviving the whimsy of politics. That this story is not dichotomous only emphasizes for both scholar and practitioner the contrast between analysis and the labor of making, applying, and enforcing law.

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THE AMERICAN LAW OF TREASON. By Bradley Chapin. Seattle: Univ. of Washington Press. 1964. Pp. viii, 172. \$6.00.

Professor Chapin, in this tightly constructed monograph, traces the development of our law of treason from its medieval roots to early nineteenth century American practices. Looking backward from the treason clause of the United States Constitution, it is apparent that the fourteenth century statute, 25 Edward III, is clearly antecedent to the provision that "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Similarly, 7 & 8 William III, a product of the English revolutionary settlement, set the standard for the minimum procedural safeguard that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." How eighteenth century republican statesmen, drawing upon their common heritage as Englishmen, established a law of treason for the recently freed North American colonies is the central theme of this study.

Although it is somewhat beyond the scope of Professor Chapin's interest, it is not inappropriate to point out that by the time of Magna Carta treason

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6. 173 F.2d 71 (2d Cir. 1949), *mandate amended*, 210 F.2d 375 (2d Cir. 1954) (*per curiam*).