BOOK REVIEWS

NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW

By P. Weiss, with a forward by H. Lauterpacht; The London Intitute of World Affairs: Stevens & Sons, Ltd., London, 1956 pp. xxvii, 323.

Dr. Weis has written a most valuable study of one of those areas of public international law where the interplay with municipal law is direct, continuous and of great practical consequence. His experience as a member of the Office of the High Commissioner for Refugees as well as the earlier International Refugee Organization has given him a feeling for the urgent character of nationality and statelessness questions in the wake of war and the migration of uprooted peoples.

In organizing his study Dr. Weis had a number of objectives. It was necessary to examine the concept of nationality as that concept has evolved in the municipal and international doctrine on the subject as well as in state practice. One might have thought that the concept itself is sufficiently understood to prevent any real difficulty but Part I of Dr. Weis's volume takes us through a maze of refinements, sufficiently sophisticated to suggest that there is no simple, single description of "nationality". What does emerge from his analysis, however, is that the term "nationality" " . . . has developed from and is based on municipal law and has assumed a specific meaning in international law owing to the fundamentally different structure of that legal system from the system of municipal law" (p. 62).

In Part II Dr. Weis examines the relationship of municipal law to international law in matters of nationality and we have here, of course, the classical problem of reconciling the "supremacy" of municipal law in determining who are citizens or subjects of a state and the parallel supremacy of international law in determining the limits of jurisdiction of states, including limitations on authority over certain persons and their property stituated for the time being in that state. If ever there was a good illusration of the supremacy of international law, if supremacy is the right word, it is the extent to which municipal law cannot impose its norm on the international community whenever disputes arise between states involving even such a question as to who is or is not subject to the jurisdiction or the protection of the disputing states. The Tunis and Morocco Decrees case[1] retains its vitality and validity for all students not merely of the problem of nationality itself but on the reciprocal impingement of municipal law and international law on each other.

The bulk of the study, however, is to be found in Part III dealing with such matters as limitations on states to confer or withdraw nationality; the effects of territorial transfers on nationality; conflicts rules arising out of

[1]Permanent Court of International Justice 1923. P.C.I.J., Series B, No. 4; Hudson, World Court Reports, 1, 143.

statelessness and plural nationality; proof of nationality before international tribunals. All of this from the international aspect and employing source materials from the available store of international adjudications, treaties, and municipal cases and statutes.

Finally, Dr. Weis performs a valuable service in summarizing his entire thesis in less than twenty pages, including an examination of the main directions of nationality problems in the future, particularly those concerned with the elimination of statelessness and the effects of the International Law Commission recommendations in the area.

In assembling such comprehensive and useful materials Dr. Weis has had the patience to prepare with great care, his tables of cases, treaties and statutes as well as the bibliography and appendices, with the result that apart from its substantive analysis, the volume is a most helpful research tool for any one concerned with nationality questions, either the municipal or international law aspects.

For example the relevant municipal statutes are set out under the heading of the country concerned and these, of course have been listed alphabetically. The result is to give the student a quick view of the entire body of legislation on nationality enacted in each of the coutries referred to. In the case of Canada the citations seem quite complete and similarly with respect to the United Kingdom and the United States of America.

Among the more fascinating questions that are posed by nationality disputes is the matter of determining nationality for purposes of giving a state *locus standi* in a dispute with another state where some individual's claim has become the concern of the demanding state. Ever since the Lynch[2] and Flutie cases[3] it has been clear that international tribunals are prepared to reject the most positive assertion by the claiming state, of nationality for one of its residents, and this law has now been brought to a climax, of course, by the Nottebohm case.[4] One has only to reflect for a moment on the implications of the Nottebohm case to realize that in nationality matters we have certainly entered a stage of development in international law where international tribunals adjudicating such disputes will ignore the most vigorous assertion of municipal jurisdiction even where there is evidence of complete formal compliance by the state concerned when it granted nationality to an individual whose protection the state now seeks to assert abroad.

Now if one relates this development to the other extreme in municipal law exemplified by *Joyce* v. *Director of Public Prosecutions*[5] there is a quite extraordinary situation. For what we now have in Anglo-Canadian law is a rule that provides the most drastic burdens of nationality and citizenship,

[2]British-Mexican Claims Commission, 1929. Decisions and Opinions of Commissioners, (1931), 20.

[3]Ralston, Venezuelan Arbitrations of 1903, 38.

[4][1952] International Court of Justice, 10.

[5][1946] A.C. 347.

in the classic form of the duty of "allegiance" to the Crown, for anyone who has sought the Crown's protection even remotely through the mechanism of a fraudulently obtained passport. We tend to forget that Joyce was hanged when it was very likely he had been an American national; but he had obtained a British passport by fraud, travelled to Germany and made broadcasts on behalf of the Nazis. Now, by contrast, in the international forum, Nottebohm became a citizen of Lichtenstein with all due formality and seemingly in complete accordance with Lichtenstein nationality law. And yet the International Court of Justice was able to hold that this nationality was not "effective", not founded upon a true association in terms of residence or interests and that therefore, Lichtenstein could not claim that necessary link with Nottebohm so as to protect his interests abroad and assert an intergovernmental claim on his behalf.

Of course, it is possible to suggest that the Joyce case was an extreme interpretation given under the pressures of a wartime climate and that the concept of "allegiance" was extended here beyond that truly required for the effective policing of the security interests of the United Kingdom. Equally, it is possible to argue that the International Court of Justice chose is own special view of substance versus form in the relations of Nottebohm to Lichtenstein because of Nottebohm's close connection with Guatemala, the defendant State. Form hanged Joyce; substance defeated Nottebohm; and now the question is whether these two extremes can find some more doctrinal approximation to each other so as to do less damage to the unity of concepts in municipal and international law as well as to the interests of individual human beings caught in the web of abstractions.

Dr. Weis does not pretend to solve the great range of difficulties that modern life, war and politics has created for thousands of peoples whose status has not fitted into the nice categories manufactured by lawyers, or the regulations of states in determining who shall have sanctuary at home or protection abroad. Undoubtedly the question of nationality will continue to be of theoretical and practical interest not only because there are refugees in large numbers still to be re-settled, but because the bond between the individual and international law is becoming far more widely woven than the previous single strand in the concept of nationality. The United Nations Charter, the European Convention of Human Rights and many bi-lateral arrangements have given the individual a direct stake in the international legal order with procedures that afford him in some cases almost a personal remedy. As Dr. Weis's book suggests we are not far from the day when the easy distinction between "the subject" and "the object" of international law will yield to a "merger" that both need and events will have imposed on states and on doctrine.

MAXWELL COHEN*

*Professor of Law, McGill University.

OBSCENITY AND THE LAW

By Norman St. John-Stevas. First Edition, London; Secker and Warburg, 1956. Pp. xxii, 289. $3.65.

De Goncourt tells the story of M. Latour-Dumoulin — a famous commissioner of police who wanted to prosecute a contributor to *Le Paris* for a line of asterisks which he had deemed obscene.

Mr. St. John-Stevas in an orderly presentation of his subject matter, has begun with the problem of definition:

> "Apart from its subjective aspect, it must be remembered that a statement that a certain book is obscene is more than a plain statement of fact. It conceals a deduction based on certain unstated premises, the code of manners prevalent in a community at any particular time. To understand the meaning fully one must be familiar with the customs of the social system in question.
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> The attempt to understand 'obscenity' in the terms of a simple definition is fruitless and best abandoned, but when this has been said certain constant elements in its meaning can be isolated. Obscenity has always been confined to matters related to sex or the excremental functions. Although there is an ideological element in the word and it is sometimes used to describe unconventional moral attitudes, the word is normally related to the manner of presenting a theme or idea rather than to the theme itself. A book is usually said to be obscene, not for the opinions which it expresses, but for the way in which they are expressed. Further, 'obscene' is a emotive word, conveying a feeling of outrage. Mere offensiveness is not enough to constitute words or books obscene. If 'immodest' is taken as the positive, 'indecent' may be described as the comparative, and 'obscene' as the superlative.
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> A pornographic book can easily be distinguished from an obscene book. A pornographic book, although obscene, is one deliberately designed to stimulate sex feelings and to act as an aphrodisiac. An obscene book has no such immediate and dominant purpose, although incidentally this may be its effect. A work like *Ulysses* certainly contains obscene passages, but their insertion in the book is not to stimulate sex impulses in the reader but to form part of a work of art."[1]

The author gives us a broad survey of his subject: he presents a historical view of obscenity and the law, beginning with a brief discussion of Greece and Rome, Anglo-Saxon literature, Mediaeval times, printing, licensing, the Ecclesiastical Courts, the Stuart Censorship, the Commonwealth and the Restoration. There follows a more protracted discussion of the eighteenth century during which obscene libel was recognized as a crime at common law in the famous Curll case.

A chapter is devoted to the Victorian conscience. There are interesting references to specific authors, and apt considerations of related phenomena such as publishing methods, the libraries, "family literature", and the difficulties of writing against a background of censorship. The relevant social background is also drawn in — one important factor was the increase in the number of women readers in the late eighteenth century.

With the stricter standards of taste we are led to more severe laws. The Customs Consolidation Act of 1853 contained the first express prohibition

[1] *Obscenity and the Law*, page 2.

intended to ban the importation of pornography. This was followed in 1857 by Lord Campbell's Act, aimed at domestic sources of supply. In 1868 Sir Alexander Cockburn by rendering his decision in the *Hicklin*[2] case raised up a great bulwark across this field of law. During the course of his jugment he said:

> The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences and into whose hands a publication of this sort may fall.

This statement has ever since been accepted by the judges as being the English law. It was reinforced in 1877 by the *Bradlaugh*[3] case which emphasized that the particular publication was not justified by the appellant's innocent motives or object, and that he must be taken to have intended the natural consequences of his act. Thus "tendency" is the essence of the common law offence.

> "A further question which must be answered is to whom do the words 'corrupt and deprave' apply? The answer may be normal adults, abnormal adults, normal children, or abnormal children. The English law has always stressed the importance of protecting the young. Thus the old form of indictment contained an averment about the 'morals of youth', and Lord Campbell stated that he had the youth of the nation in mind when he introduced his Obscene Publications Act in 1857. In the Hicklin judgment the words occur 'whose minds are open to such immoral influences and into whose hands a publication of this sort may fall'. Chief Justice Cockburn specifically mentioned youth in his judgment and the protection of the young seems to have been uppermost in the minds of most judges and counsel who have taken part in obscenity trials. In *The Philanderer*[4] case, however, Mr. Justice Stable rejected the youth criterion. 'A mass of literature', he said, 'great literature, from many angles is wholly unsuitable for reading by adolescents, but that does not mean that the publisher is guilty of a criminal offence for making those works available to the general public."[5]

In the 1953 case of *The Philanderer,* Mr. Justice Stable gave a common sense view of the contemporary meaning of the words 'obscene', and indicated that in applying the law, contemporary and not Victorian standards were to be applied. This decision seems to have presented a sensible attitude concerning the four outstanding points relevant to obscenity:

1—Corrupt whom? The law does not "forbid all which might corrupt the most corruptible", but rather accepts something like the criterion of the *Ulysses*[6] case, where it was stated:

> "Whether a particular book would tend to excite such impulses and thoughts must be tested by the Court's opinion as to its effects on a person with average sex instincts — what the French would call *l'homme moyen sensuel* — who plays, in this branch of legal inquiry, the same role as does the 'reasonable man' in the law of torts and 'the man learned in the art' on questions of invention in patent law." (Woolsey's jdt.).

2—Is the object of the author important? The author's sincerity of purpose is important in judging what is the essential nature of his book.

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[2][1868] L.R. 3 Q.B. 360.
[3][1878] 3 Q.B.D. 509.
[4][1954] 2 All E.R. 683.
[5]*Obscenity and the Law,* page 128.
[6][1933] 5 F. Supp. 182.

3—Is it the publication as a whole which will be judged, or parts of it? It is the essential or dominant nature of the publication, taken as a whole, which is to be considered on a charge of obscenity.

4—What standard of obscenity is to be applied? A contemporary one: not a Victorian standard.

This decision differed on all four points from the prior attitude of the English courts. But since this decision, their attitude seems to have regressed to its former state. For this reason, in November 1954 the Society of Authors set up a committee presided over by Sir Alan Herbert to examine the existing law of obscene libel and to recommend reforms. The Herbert Committee presented a Bill which was introduced into the House of Commons in March, 1955. It has not yet been passed. The Bill did not attempt to define obscenity, but instructed juries and magistrates to take into account literary or artistic merit in all cases of obscene publication. In general the Bill follows the *Philanderer* decision.

The failure of the English legal system to break away from the *Hicklin* case naturally leads the author to a consideration of the United States experience. If we can speak of evolution in the law, the *Ulysses* decision of the United States Court of Appeals, rendered August 7, 1934 by Augustus Hand, Learned Hand concurring and Manton J. dissenting, was a mutation. Here the *Hicklin* case was for all practical purposes discarded, and in its place was set up the same attitude concerning the four outstanding points as was almost twenty years later presented in the English decision of *The Philanderer*. Concerning the *Hicklin* case, Judge Augustus Hand ruled: "The rigorous doctrines laid down in that case are inconsistent with our own decision(s) . . . , and in our opinion do not represent the law."

The *Ulysses* case suggests that there had been a sort of progression in the law concerning obscenity, and that in England a similar progression has so far been blocked by the bulwark of the *Hicklin* case and by the refusal of the English courts to follow the innovations of the *Philanderer* case. Progression seems similarly blocked by the fact that the proposed Bill to amend the law relating to obscene publications has not been passed.

It may be well to note in addition to Mr. St. John-Stevas' observations, that in this development or "progression" of the Law, neither England nor the United States has reached the position of several continental countries where if a work has artistic merit it cannot be subsumed under the law regarding obscenity. That is: a book may be obscene, but because it has artistic (or scientific) merit it is not obscene, or, to put it another way, it cannot be successfully prosecuted. This goes beyond the *Ulysses* decision, for there it was held that though parts of the book were obscene, the book as a whole was not, and therefore did not violate the law. If the book as a whole were obscene, it would have been condemned by the courts, despite its

great artistic merit. One may wonder if the position of these continental countries is not a desirable goal to attain in legal development.

Mr. St. John-Stevas devotes a chapter to the Irish censorship, which he considers as an experiment.

The last chapter is a discussion of the law in relation to society, and we meet that taunting question as to whether or not pornography corrupts. It would appear that there is much evidence on either side, and our knowledge of psychology and sociology is not sufficiently advanced for us to answer this question, which the author of necessity leaves open. He merely presents enough evidence so that any categorical reply will be immediately suspect.

> "Undoubtedly, the general moral standards and social customs prevailing in a community are frequently formed or changed by the influence of books. 'I am convinced', wrote Bernard Shaw in his preface to *Mrs. Warren's Profession*, 'that fine art is the subtlest, the most seductive, the most effective instrument of moral propaganda in the world, excepting only the example of personal conduct'. In our own time we have the example of André Gide, whose books changed the outlook of a generation. The law, however, cannot be invoked to protect prevailing moral standards, first because this assumes a finality which such standards do not possess, since much of what passes for morality is merely convention, and secondly, because in a country such as England there is no common agreement on ultimate moral attitudes."[7]

The appendices contain material on the law relating to obscenity as legislated in sixteen countries, plus information about the Roman Index. Thus we are also provided with material to begin a comparative law study. There is a helpful bibliography, though one might wish it were more complete.

The author has dealt thoroughly with the problem of what is obscene, but he does not go deeply into other aspects of the legal problems of obscenity. For example, he does not discuss what constitutes distributing obscene matter or possesion with the intent to distribute. However, he has laid the foundation for a more comprehensive study of the legal issues involved.

The Canadian law relating to obscenity was derived from the English law, and the *Hicklin* case is constantly referred to by the Canadian courts, though the recent decisions of *Rex* vs. *Conway*,[8] *Rex* vs. *National News Co.*,[9] and *Rex* vs. *Stroll*[10] seems to dispose of it much as the later Philanderer case in England did. Hence Mr. St. John-Stevas' book will be of equal interest to Canadian and English lawyers. And since the prose style is familiar and the presentation is well ordered and clear, the book can in fact be read with as much interest and enjoyment by the layman as by the lawyer.

PETER E. GRAHAM*

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[7] *Obscenity and the Law*, page 196.
[8] (1944) 81 C.C.C. 189.
[9] (1953) 106 Can. C.C. 26.
[10] (1951) 100 Can. C.C. 171.
*B.C.L. (McGill), 1956.