LITERATURE

BOOK REVIEWS*

India and International Law, BIMAL PATEL (ed.)
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379+xii.

The aim of this collection of essays is to examine the contribution of India to the development of international law. In addition to the introductory chapter there are 15 substantive chapters, arranged in no particular order, and concluding material relating to India's status concerning multilateral treaties and human rights provisions in UN documents and in the constitution and laws of India.

The first chapter, by Subhash Kashyap, considers the Constitution of India and international law, examining those provisions of the Constitution that relate to international law. It provides a useful introduction to the subject. The following chapter by Pemmaraju Screenivasa Rao, member of the International Law Commission, considers the position of India in relation to certain areas of international law concerning, for example, succession, recognition, self-determination and the issue of international terrorism. The chapter by Surindar Kaur Verma examines the issue of the trade in services, India and the WTO, while that by V.G. Hegde considers the international patent system and India. In the following chapter, Ravindra Pratap addresses the questions of sovereign economic freedom and the interests of other States. This is an interesting subject and the survey of relevant instruments is well done, yet the issue is not directly related to the overall theme of the collection (this may be said of a number of the chapters in this anthology). Manoj Kumar Sinha returns to the issue of the Indian Constitution in his chapter, specifically the protection of

human rights and the Indian Constitution. Sinha examines the role of the Indian Supreme Court, providing a useful introduction to its workings and the development of human rights jurisprudence in India. On a related issue, B.C. Nirmal examines the legal status of refugees in India. The following chapter by Vishnu Dutt Sharma surveys issues relating to international criminal law.

The next two chapters examine issues relating to international environmental law. The chapter by M. Ghandi considers the issue of state responsibility and international environmental law. Ghandi argues that Indian policy on environmental protection is significantly influenced by the refusal of India to consider issues concerning environmental protection in isolation from development issues. The chapter by David Ambrose discusses the issue of international environmental law and India. Both chapters examine the role of the Indian Supreme Court in the area of environmental protection. The chapter by C. Jayraj examines the law of outer space and India, which has its own space programme. Jayraj argues that India's domestic laws do not fully accord with its international obligations in relation to launching state liability, compensation for damage caused by space objects, registration and insurance of space objects, and procedures for the settling of claims. The chapter concludes by outlining the areas in which Indian law is deficient and the necessary law reform. The chapter by Bimal Patel examines the International Court of Justice and India. The concern is to analyse the way in which cases involving India have contributed to the jurisprudence of the International Court. In addition to examining the contentious cases

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involving Pakistan which related to the question of jurisdiction, the chapter also considers India's position on a number of advisory opinions that have come before the Court. Patel concludes (perhaps not surprisingly) that India's attitude towards the International Court of Justice has been conditioned by considerations of (perceived) national (self-) interest. The final chapter by Amal Ganguli looks at the law relating to the enforcement of foreign awards in India.

As noted, the aim of this collection of essays is to examine the contribution of India to the development of international law. This is certainly an important subject. India holds a unique position in the international community as the world's largest democracy and second most-populous country, with a developing market economy, serious problems of poverty, and possession of nuclear weapons. There is no doubt that India has played an important role in the development of international law, both in its participation in international organizations (notably the United Nations) and in its own state practice: the interventions in Goa, East Pakistan and Sri Lanka, and the dispute over Kashmir being notable examples. This collection of essays fails, however, to engage systematically with this legacy, and while certain of the chapters are valuable in outlining the perspective of India on developments in international law, or the way in which international norms have been or should be transposed into domestic law, certain chapters fail to engage with the overall theme of the book in any substantive way, if at all. Those concerned to discover the position of India on current developments in international law, or the impact of international norms on the market democracy now emerging in India, will find valuable material in this collection; there is, however, much more to be said on the issue.

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International Law in Korean Perspective, CHOONG-HYUN PAIK (ed.), Seoul National University Press, Seoul, Korea, 2004, ISBN 89-521-0598-2 93360, xxii + 473 pp, KoreanW17,000/US\$20.00.

Starting with an episode in 1876 when the Korean negotiator had no knowledge of "full

powers" in his encounter with his Japanese counterpart, and a second episode in 1998 when the Korean delegation made an important contribution in the last phase of negotiating the jurisdiction of the International Criminal Court, the editor, Professor Emeritus of Seoul National University College of Law, offers a brief sketch of the acceptance of international law in the Republic of Korea over the last century. (It may be recalled that in 1872 the Japanese negotiator had had precisely the same experience in his encounter with the United States Secretary of State. More or less the same state of affairs would have existed in other Asian countries in those days.)

The long and arduous efforts of the Korean pioneers of international law made a symbolic achievement in the establishment of the Korean Society of International Law in 1953 in the final phase of the Korean War. The Society now publishes its *Korean Journal of International Law* on a quarterly basis. The International Law Association's Korean Branch was established in 1964, and has since been publishing the *Korean Yearbook of International Law*. In addition to these, Prof. Paik set up the Seoul International Law Academy, a private research institute, which has been publishing the *Seoul Journal of International Law* twice a year since 1994. Almost all colleges or faculties of law in Korea, now approximately 90 in number, offer courses in international law; many have post-graduate programmes in international law.

Against this backdrop, Prof. Paik thought that it was "high time that one took stock of international law study in Korea," and has collected seventeen articles discussing "Special Issues of Particular Concern" in Chapter 1 (five articles); "Law of the Sea" in Chapter 2 (three articles); "International Economic Law" in Chapter 3 (three articles); "International Criminal Law Affairs" in Chapter 4 (three articles), and "Practice in the Domestic Courts" in Chapter 5 (three articles).

The list of contributors reveals their striking backgrounds in terms of legal education: of the seventeen contributors, including the editor himself, sixteen are graduates of the College of Law, Seoul National University, whether they proceeded to higher degrees in the United States or the United Kingdom later on. Another noticeable feature is that eleven currently have or have had some practical experience in government

agencies in their official or advisory capacities. This fact would have given some practical perspective to their writings.

While the editor's preface provides a convenient summary of each contribution in about ten to 15 lines, this reviewer would rather select certain articles or their chosen topics and make comments in his own way.

The first point to make is that the contributors generally seem to be independent and free from ideological biases. Indeed, some do not hesitate to criticize government policies or domestic court decisions. This is a most welcome attitude for a fair analysis of problems. Secondly, an impressive point is made in the preface, as well as in one of the articles, that the more "normative impact of international law" should be made in "the domestic legal arena". At the same time the editor points out the need for "a new methodology of international law that will extricate [Korean international lawyers] from the Eurocentric outlook of the present approaches". In a word, "Korean international legal scholars are confronted with many challenging tasks."

Chapter 1 starts with the editor's contribution that discusses the desired return of the Korean cultural property, especially the "Oe Kyujanggak Manuscripts", taken by the French army during the 1866 armed conflict. After a review of the law of armed conflict in those days, the author argues that the French are under legal obligation to return them to Korea. The unification of Korea is discussed by Seong-Ho Jhe, who takes up the *communiqué* of June, 2000 adopted by the two leaders at their unprecedented summit. He compares the South's confederation idea with the North's "low stage federation" proposal, extensively discussing their similarities and differences. Chin-Sok Chung deals with the role of the legislature in the conclusion of treaties, and shows that it is rather modest in that the National Assembly may give prior consent only to those kinds of treaties specified in the Constitution, without the power to modify them. The possible contribution of Korea as a middle power to international law-making is discussed by Suh-Yong Chung, who proposes the training of able negotiators and better inter-agency co-ordination as well as focusing on emerging "soft" issues, such as the environment, rather than the hard ones of international peace and security. The hard issue of

the UN Security Council is extensively discussed by Jae-Min Lee. He tests not only the "*ultra vires* action" but also the "*ultra vires* inaction" of the Security Council by examining the roles of the Secretary General, the Member States, the International Court of Justice, and the Rule of Law while subjecting these to scrutiny.

In Chapter 2, Kak-Soo Shin takes up the Korean-Japanese Continental Shelf Joint Development Agreement and makes a critical analysis of jurisdictional issues contained in it. The author says that the unique "operator" system under which the national law of the concessionaire designated as operator applies in its subzone has *lacunae* in a number of ways, and suggests that they may be filled by reference to the Antarctic Treaty, status of foreign forces agreements, condominium, co-imperium and unitization. In a well researched and reasoned paper on maritime boundaries in Northeast Asia, Keun-Gwan Lee presents a critical discussion of the method of delimitation. He criticizes China's neglect of international judicial decisions on maritime boundaries in its relations with Korea and Japan on the one hand, and the "positivist" method of the ICJ and the arbitral tribunals as seen in such decisions on the other. On this second point, he proposes a "meta-positivistic recognition of international law" on the basis of the diversity of the international society and heterogeneity of its members.

In discussing "like domestic products" in Article 3(2) of the General Agreement on Tariffs and Trade, Won-Mog Choi in Chapter 3 makes a detailed analysis of the concept of "like products" in comparison with the "aim and effect" theory. He strongly argues for a "transparency and rationality" of criteria (e.g., customs duties proportionate to the strength of alcohol) and an increased judicial nature of the WTO dispute settlement procedure, in view in part of the growing non-tariff barriers. Seung Hwan Choi succinctly describes the "garlic dispute" between Korea and China and puts the relevant issues into perspective. The Korean countermeasure of raising the tariff on the bulk imports of garlic as an emergency safeguard met the retaliatory suspension of Korean exports of electric appliances by China, which inflicted a loss on Korea 55 times bigger than that on China. Korea resorted to legal action in the WTO, while China reacted through political

retaliation, as it had not then been admitted to the WTO.

In Chapter 4 on international criminal law, Young-Sok Kim proudly introduces the Korean contribution to the drafting of the jurisdictional clause of the Rome Statute; Kim argues that the gaps in the Korean penal code should be filled to implement the Statute in Korea. Jae-Ho Sung extensively discusses the controversial criminal jurisdiction in the Korean-U.S. status of forces agreement. Its detailed analysis in comparison with the NATO, German and Japanese agreements with the United States is followed by the author's argument that the Korean agreement should be revised to ensure more extended jurisdiction for Korea, while the negligent practice of the Korean authorities should also be corrected. A Korea-U.S. extradition case involving a Swiss national is discussed by Young-Jin Jung. Criticizing the Seoul High Court decision to extradite the alleged criminal, the author suggests that under the Korean Extradition Act the Minister of Justice could have exercised his discretion so as to reject extradition.

In the final Chapter, Tae-Hyun Choi deals with the principle of restrictive sovereign immunity recently adopted by the Korean Supreme Court. The relevant aspects of the problem are fully discussed before the author concludes that national legislation on this subject, as in European and American countries, would bring greater judicial stability and predictability and would plug loopholes more efficiently than would the further accumulation of cases. Two recent cases of the Constitutional Court involving the relationship between international law and municipal law are taken up and discussed succinctly by In-Seop Chung. The cases in point are, firstly, the prohibition of outdoor assembly and demonstration within 100 metres of the premises of foreign diplomatic missions in favour of the receiving State's obligation to ensure their inviolability under the Vienna Convention on Diplomatic Relations and the freedom of assembly and association under the Constitution, and secondly, the Korean Military Service Act and the conscientious objector to military service in relation to the freedom of conscience under the International Covenant on Civil and Political Rights. The author claims that the Court has failed to pay due attention to international law in its reasoning despite the

constitutional provision that international law had the same effect as national law.

It may be pointed out in passing that some papers have grammatical errors, for example, "the" placed before "Chapter VII", "Great Britain", "paragraph 2", etc., and the erroneous use of singular/plural forms of nouns. This is not a major defect because the writers are not native English speakers, yet it may possibly give an adverse impression.

The reviewer regrets that he has been unable to touch on all of the contributions in this limited space. However, he is gratified to learn that Korean international lawyers have been and are extremely active, and have great potential for contributing to the development of international law in the years to come.

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Of the Board of Editors