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In Tribute

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By FREDERIC L. KIRGIS*

When I was a Boalt Hall student in the late 1950s, I took Creditors' Rights—not International Law—from Stefan Riesenfeld. Of course, he was not "Stefan" or "Steve" to me then; he was Professor Riesenfeld or (occasionally) Herr Professor Riesenfeld. It was inconceivable that I would ever actually converse with him except as a student sitting at his knee, trying in vain to understand the nuances of his thought.

His thought, in fact, reflected and still reflects an amazing range of interests and areas of expertise. How many international law scholars are authorities in such bread-and-butter fields as creditors' rights? How many legal scholars with a world view interest themselves in the private law of a single state of the United States, such as creditors' rights in California? How many scholars of any stripe immerse themselves in law and pedagogy at the age of nearly ninety, and do it with verve? How many international lawyers would carry a full teaching load in California while serving as Counselor on International Law at the State Department in Washington, D.C.? The answer to each of these questions is *one*: Steve Riesenfeld.

The image I have from my student days at Boalt is of Professor Riesenfeld taking off his glasses in the middle of Creditors' Rights class and bending over until his nose almost seemed to touch the podium. He would then read something from his own casebook while we in the great sea of classroom faces sat transfixed or perplexed, as the case may have been. I was mostly perplexed. Nevertheless, I came away knowing a bit about the subject and, more importantly, feeling that I had spent a semester in the presence of a great man. When I see him these days at a meeting of The American Society of International Law, I still feel that I am in the presence of a great man. And so he is. In areas of the law that capture his attention, he continues to provide insights in conversation and writing. Within the international law field, he is as comfortable with the law of the European

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Union or of some individual European countries as he is with the broader law of nations or with the foreign relations law of the United States.

Of Steve Riesenfeld's many scholarly contributions, one dealing with U.S. foreign relations law stands out in my mind.[1] It concerns the self-executing treaty doctrine. Courts in this country have struggled for a very long time with the concept of self-executing and non-self-executing treaties. Although federal judges acknowledge that certain treaty provisions could be self-executing in the sense that they could act as federal law in the United States and be enforced in the U.S. courts without any implementing Act of Congress, those same judges often seem reluctant to apply treaty provisions in the absence of an implementing federal statute. Perhaps they perceive some sort of democratic deficit when a normative provision is asserted as judicially-enforceable without the imprimatur of adoption by both Houses of Congress. This, despite the dictate of the Supremacy Clause (which, as is well known, accords treaties made under the authority of the United States the same supremacy in judicial proceedings as the Constitution and federal statutes).[2]

Riesenfeld took exception when the U.S. Court of Appeals for the Fifth Circuit held Article 6 of the 1958 Convention of the High Seas non-self-executing in a case involving Coast Guard confiscation of marijuana from a Cayman Islands vessel on the high seas and subsequent prosecution of the crew on drug charges.[3] Article 6 provides in part, "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. . . ."[4] The court found that the United States, by boarding the vessel and seizing it on the high seas, had violated Article 6, but the violation did not deprive the court of jurisdiction. Had the court held Article 6 self-executing, it would have had difficulty getting around *Cook v. United States*,[5] which could be read to require dismissal of a prosecution stemming from a seizure in violation of a self-executing treaty provision. The court in *Postal* pointed out that the Convention

1. Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980).

2. U.S. CONST. art. VI, cl. 2.

3. United States v. Postal, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

4. Convention on the High Seas, Apr. 29, 1958, art. 6, 13 U.S.T. 2312, 450 U.N.T.S. 82. Essentially the same provision appears in the United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 92(1), U.N. Doc. A/CONF.62/122 (1982).

5. 288 U.S. 102, 53 S. Ct. 305, 77 L. Ed. 641 (1933).

on the High Seas is a multilateral treaty ratified by more than fifty nations, "some of which do not recognize treaties as self-executing. It is difficult therefore to ascribe to the language of the treaty any common intent that the treaty should of its own force operate as the domestic law of the ratifying nations."[6] Riesenfeld demolished this reasoning. He pointed out that the intent of all parties was relevant only to the question whether the treaty meant to give private parties protection in domestic courts against prosecutions in violation of its provisions. If so, how that protection is to be given—by the treaty itself or only by implementing statute—is a matter of the domestic constitutional law of each party.[7]

There is no apparent reason why Article 6 should not be held self-executing in the United States. Be that as it may, Riesenfeld's contribution deserves the attention of the courts in this country because it outlines the approach they ought to take when they are faced with a relevant treaty provision in a criminal prosecution or even a civil action. Riesenfeld has shown how misguided they can be, and what they *should* be looking for when they try to determine whether a particular multilateral treaty provision is self-executing or not.

Riesenfeld's critique of the *Postal* case is typical of his scholarship. It displays a deft touch for making subtle but important distinctions, without simply being academic. In fact, what he has to say is often intensely practical. His experience as counselor to the State Department must have benefited from, and contributed to, his performance as a scholar with a practical bent. Those of us who follow international law can only be grateful to him for just that. I suspect, but cannot say from experience, that those who follow the private law subjects in which he is interested are equally grateful for his insights in those areas. He has enriched the law, its students and its practitioners, in more ways than one.

I feel privileged to have learned at his knee and still to be learning there.

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6. 589 F.2d at 878.
7. Riesenfeld, *supra* note 1, at 895-96.