

# YALE LAW JOURNAL

---

Vol. XXVI

DECEMBER, 1916

No. 2

---

## THE RIGHTS OF STATES UNDER INTER- NATIONAL LAW

There is a marked tendency in most men when their interests are endangered to protest loudly against the invasion of their "rights." If they are uncertain concerning the legal basis of their "rights," they appeal to "natural rights" and to the "rights of humanity." This is also true of nations. We have heard much of late of the "rights" of neutrals. In the case of both men and nations, what is frequently at stake is not a *right*, but an *interest*.

A recent interesting example of this tendency to assert a "right" in the abstract is the action of the newly-formed American Institute of International Law, composed of representatives of the Latin-American nations, in issuing to the world a heroic "Declaration of Rights," a kind of international Magna Carta. We here find asserted in phraseology recalling the 17th and 18th century school of political theorists, the "rights" of States to existence, independence, sovereignty, and equality, in accordance with "the laws of nature and of nature's God." Mr. Root, ex-Secretary of State, a member of the Institute, has felt impelled to come forward as a valiant and needed champion of this extraordinary Declaration.

It would seem as if no argument were required to demonstrate that legal rights cannot be based on abstractions, on assumptions, on "inherent," "absolute," "primordial," "fundamental," rights—to quote the terms used by many writers on international law. Rights spring from the legal recognition of definitely

determined interests. Any other kind of alleged right belongs in the sphere of morals and has no place in a science of law.

International law has been badly discredited of late; and it has been discredited quite as much by its friends as by its enemies. The attempts to base international rights on mere abstractions, on vague appeals to the Law of Nature and the rights of mankind, are bound to awaken distrust, and even derision. The interests of nations, as of men, cannot be regulated by any such so-called system of law.

It is profoundly discouraging that the Great War, with all its appalling losses and lessons, does not yet seem to have convinced many earnest thinkers that international law has heretofore rested on a false basis: that the interests of nations have not been accurately formulated or adequately safeguarded. A calamity of this magnitude surely should compel men to abandon abstractions, and deal with the great realities of international existence. Instead of vainly trying to adjust these realities to conform with theories of law, it is time we endeavored honestly to reconstruct the law to meet the actual necessities of nations. That, at least, is the task we have here set ourselves. It would therefore seem necessary to weigh and consider these fundamental postulates of international law; namely, the "right" of a State to existence, independence, sovereignty, and equality.

When it is asserted that a State has the "right" to exist, it can hardly mean that all existing States have the right; the Barbary pirates, Morocco, Persia, Turkey, for example. If a State deteriorates in its domestic life, and becomes incapable of maintaining a political organization, it may require something of the nature of a protectorate or an international receivership, as in the case of Persia. If it misbehaves in such a way as to become a menace to the welfare of other nations, it will deserve either restraint of its freedom or actual extinction as a separate nation. Society does not guarantee to the individual any legal or moral right to exist. It protects him from assassination but does not allow him to continue to exist if he is a menace to the community as a whole. His right is not "absolute": it is a qualified right. And so it must be with nations: they have no "absolute right" of existence.

Nor does this "right" to exist imply the maintenance of a sacred *status quo*. Though great respect is due the established order of things to avoid uncertainty and unrest, there is no possibility of perpetuating under the name of law an iniquitous

*status quo* created after the manner of the Congress of Vienna and Berlin, in flagrant disregard of the legitimate aspirations of whole nations. If justice is not done to the just demands of nationalism, revolution and war are bound to establish a new *status quo*.

The right to exist, therefore, becomes primarily the recognition of the tendency of men to group themselves together in separate national communities in accordance with their different preferences and interests. This is the solid rock of international law. Before an interest can be protected, it must be properly defined; and there should be no protection of unjust interests. Before international law, therefore, can effectively apply between definite international persons, it must make sure that these entities, these national interests are normal, logical, and worthy of protection. We must first determine the basic factors before we can create a system of law: we must first show the right of States to exist.

In what sense, then, may we properly speak of the legal right of a State to exist? In its essence it would seem to flow from the formal recognition which States extend to each other in one form or another. When States are confronted with the fact of the existence of another State, they have practically the choice of three alternatives. They may do as Rome often did, seek to destroy the State; they may decide on non-intercourse—a practical impossibility under modern conditions; or, realizing the inevitability of intercourse, they will extend to the new State a formal recognition. This recognition constitutes, then, a mutual guarantee between nations, great and small, of their legal right to a separate existence in order to realize their own aspirations and destinies.

This legal right, moreover, applies to all States without discrimination, once they are definitely recognized. International law, therefore, is not restricted, as some writers would hold, to the so-called civilized States. Though European in origin, the law of nations is universal in its application and in its evolution as a science.

The "right" of independence is theoretically a necessary corollary of the "right" of a State to exist. It was particularly of value in the 17th and 18th centuries when the smaller nations were struggling to emerge from the control of kings and emperors. The separate existence of States required that there should be no intermeddling, no intervention in each other's

affairs. It was logically necessary to postulate a "right" of complete independence.

As a matter of fact, the conception of States completely independent of each other, living, as it were, in a fictitious state of nature, is in antagonism with the conception of a community of nations accepting a common law. Once States have recognized each other's existence; have adjusted themselves to the necessity of intercourse; and have acknowledged mutual rights and obligations, they have ceased to be truly independent. They have admitted their interdependence. Take for example the question of the rights of aliens. It is evident that nations are not free independently to do as they please with the stranger who may be travelling or sojourning within their borders.

Furthermore, it is not necessary that a State should be absolutely independent to entitle it to international recognition. Cuba, for example, though seriously restricted both in its internal and external freedom of action by its treaty engagement with the United States, is nevertheless a nation having all the essentials of an international personality. Panama with much less freedom, owing to the paramount interests of the United States, is also a separate nation. Switzerland, though denied the right of aggressive action, as a neutralized State protected by the Powers, is none the less a nation.

It is of particular interest to note that Canada and Australia, though integral parts of the British Empire, are in process of assuming an international status. Sir Wilfrid Laurier has been quoted to the effect that Canada possesses the essential characteristics of a nation. It has carried on diplomatic negotiations with the United States and Japan; and has been conceded the right to become a party to certain international agreements relating to the Postal Union and Wireless Telegraphy. There is nothing inherently incompatible in admitting the possibility of such States as Canada, Australia, and South Africa becoming, as Bavaria has already become, international States, though still retaining a dependent relation to their respective Empires.

For these reasons, therefore, it is erroneous both in theory and practice to speak of a "right" of independence: it is without justification, and is entirely misleading. It is an abstract assumption having little relation to reality.

In its simplest terms, the claim to the "right" of independence is merely the claim of a nation to a certain degree of freedom. "The international State"—to quote the words of

Lorimer—"Whether great or small, must thus be a *separate* State. As the claim to recognition is a logical abandonment of independence, it is a logical profession of separate political life."<sup>1</sup>

The "right" of sovereignty, like the "right" of independence, is theoretically a logical corollary of the "right" to exist. If a State is to be allowed to enjoy and maintain its own separate existence; if, as a responsible international personality, it is to possess a "reciprocating will," it must possess freedom of will: it cannot be subject to the sovereign will of another.

This concept also had a special significance in the 16th and 17th centuries when the smaller States were endeavoring to assert their own personalities, and were called on to acknowledge allegiance to sovereigns of both Church and State. It was desirable to stress the idea of sovereignty: to emphasize the complete freedom of nations to work out their own problems as "sovereign, political units."

In this sense, then, sovereignty and independence are virtually synonymous terms, when employed by writers on international law in respect to the external freedom of the State. "External sovereignty," in the words of Wheaton, is "the independence of one political society in respect to all other political societies."<sup>2</sup>

If we attempt to apply this idea of sovereignty to concrete instances we find not only that it does not work, but that it results in a *reductio ad absurdum*. In the case of Cuba, or of Panama, which do not possess complete freedom of action, there is evidently an *impairment* of sovereignty: it is necessary to admit the existence of a *super-sovereign*. To speak of a "Suzerainty," as in the case of Egypt, is to employ a euphonism. To speak of any of these States as "Half-Sovereigns" is to render the theory of sovereignty ridiculous. To meet such dilemmas; namely, the existence of certain international personalities having a qualified status as nations, defenders of the "right" of sovereignty are driven to invoke the fiction that such States are still sovereign by reason of the fact that they have exercised their sovereign will in consenting to restrictions on their sovereignty. "What the King consents to, he commands."

It is difficult therefore to see any real value in a modern doctrine of sovereignty. Even if applied to the internal freedom of the State—to its "exclusive, sovereign jurisdiction" within

---

<sup>1</sup> *Institutes of the Laws of Nations*, I, p. 140.

<sup>2</sup> Dana, *Elements of International Law* (8th ed.), p. 32.

its own borders, the theory breaks down. As we have already noted, no nation, for instance, is absolutely free to do as it pleases with the stranger within its gates. A large part of diplomatic negotiations is concerned with the protection of aliens from arbitrary and unjust claims to "exclusive, sovereign jurisdiction."

For the practical purposes of international law, therefore, it would seem eminently desirable to discard completely the idea of the "right" of sovereignty. It is particularly desirable, if one looks forward to the time when portions of Empire like Canada and Bavaria, having no pretensions to sovereignty, may assume a more definite international status; when the nations of the earth may be willing to merge their interests more completely, and the claims of petty "sovereign" States would stand in the way of international harmony and order.

No political dogma has had greater acceptance or been in more flagrant opposition with the facts than the assertion of the Declaration of Independence that "All men are created equal." As an ideal, a goal of perfection, it is worthy of all respect. As a statement of fact or as a sacred guarantee, it is of doubtful value.

The more one studies actual conditions in human society, the more one must be aware of the existence of obvious inequalities and serious handicaps among men from the moment of birth. He sees that even "before the law," position, wealth, intellect, and personality, are all factors likely to affect the administration of justice. In fact, it would seem to be the first duty of courts to clearly admit such inequalities in order that a real equality may be restored and justice accorded. Moreover, when we speak of "the equality of men before the law," we must bear in mind the fact that if any men as individuals or as a class are denied an equal participation in the making of the law, they cannot be said to be equals when it comes to the application of the law. All such disabilities, whether inherited, accidental, physical, intellectual, or political, testify to the fact: all men are not created free and equal nor can even be guaranteed a perfect equality. It is obvious that the much vaunted "equality of men" vanishes in the light of cold reality. It is hardly anything more than a pious moralization, an abstract assumption, a remote ideal.

So it has been with the doctrine of the equality of States, which has been curiously assimilated to the doctrine of the equality of

man. It has been loudly and frequently proclaimed as a self-evident truth. A familiar statement of this sort was made by Chief Justice Marshall, that "No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights." And now we have the brave assertion of the American Institute of International Law: "Every nation is in law and before law the equal of every other State composing the society of nations, and all States have the right to claim, and according to the Declaration of Independence of the United States, to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them."

The equality of States is of course as much a logical deduction from the theory of the "right" to exist, as the "right" of independence and sovereignty. At a time when States were struggling to emerge and to assert their separate existence; when their claims and their diplomatic representatives were treated with contempt; it was expedient to insist on the equality of nations. The admission of inequality, like the admission of dependence and allegiance, was to endanger the separate, free existence of a State claiming a distinct international personality.

The original utility of the concept of equality is apparent. What, however, is its value and truth in relation to the facts and conditions of to-day? Are States truly equal "in law and before the law"? Have they the "right" to "claim and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them"? Have Liberia and Great Britain, Haiti and the United States an "equal station"?

It is of slight value to invoke the "law of nature and of nature's God" as the basis of the legal organization of society. Appeals of this character to a vague absolute law, to Divine ordinances, are in themselves a confession of weakness of argument, an inability to appeal to man's reason, an open evasion, in fact, of the realities which lie open to every man's comprehension. Men do not accept with blind allegiance any law imposed by an absolute sovereign. They are not inert atoms: they make their own laws.

When we come to examine dispassionately these realities, we see that nations are obviously unequal with respect to population, natural resources, geographical location, wealth, etc., etc. As

peoples they are unequal in physical stamina, moral worth, and general efficiency. We are bound to recognize the "primacy" of certain Great Powers.

In great international conferences such as at The Hague or the Naval Conference of 1909 at London, it is evident that the opinions of Liberia and Great Britain cannot possibly be of equal weight when it comes to the enactment of positive legislation. In fact, the Naval Conference, consisting as it did only of representatives of the Great Powers, was an open denial of the claim of equality.

Not only are the Great Powers unable to admit a "perfect equality of nations" in the making of international law; they are unable to admit an equality of representation on the International Prize Court—already agreed on but never established—or on any proposed Court of Arbitral Justice.

Nations such as Great Britain, Germany, and the United States, cannot safely entrust their vast interests to the decision of judicial representatives of the great majority of smaller States, or to the free vote and disposition of an unrestricted democracy of nations. The pretensions to a perfect equality constitute, in fact, the greatest obstacle in the way of any kind of international organization, even of the limited character of the Conferences at The Hague. If it should be found possible to organize the community of nations so as to ensure greater security and justice for the weak as well as the strong nations, then the smaller States, in return for such great benefits, would do well to abandon their pretensions to equality. The frank admission of the palpable fact of their inequalities would do much to facilitate the task of international polity.

From every point of view, therefore, whether of theory, of practice, or of hopes for the future, the theory of the equality of States is unsound. Except as the claim to what Bonfils has well termed "respect for political personality"—a sort of plea for international good manners—it is of doubtful value. The law of nations demands something more solid as a foundation.

By way of summary, then, these "inherent," "absolute," "fundamental rights" of States would seem, in last analysis, to be reduced to the following "inherent" values.

The "right" to exist springs from the mutual recognition which States accord to each other as a guarantee of their separate freedom. This right is not absolute: it is qualified by the



behavior of a State and by its ability properly to maintain its separate existence.

The "right" of independence does not mean that States are truly independent of each other. It merely means the right to a separate existence: the possession of a distinct international personality.

The "right" of sovereignty with reference to both the external and the internal freedom of will of a State has no real significance apart from the idea of independence.

The "right" of equality is evidently nothing more than the claim of nations to an equal right of recognition and to the respect due them as separate political personalities. It belongs rather in the realm of international etiquette than international law. As an alleged principle of law it is essentially unsound and dangerous, a step backward, an obstacle in the way of international order and organization. Liberia and Haiti might well be cautioned not to stress too urgently their claims to what the American Institute of International Law has seen fit to characterize as "the separate and equal station to which the laws of nature and of nature's God entitle them."

In conclusion, therefore, it must be reiterated that rights spring from the legal recognition of definite interests. The Rights of States cannot be based on assumptions, on abstractions, on "fundamental postulates." No true system of law can be erected on so false a basis. It must be based on solid realities, on genuine interests definitely recognized and legally protected.

Whatever may have been the services of political theorists in behalf of the general rights of man, it would seem clear that international law cannot now fall back on mere theories. Its most ardent champions have rendered it poor service in recent times by appeals to natural law and "absolute rights." It will never be entitled to full respect as a comprehensive, rational system of law until we have the courage to undertake anew to lay its foundations on the firm foundation of international realities.

PHILIP MARSHALL BROWN.

Princeton University.