Notre Dame Law Review

Volume 18 | Issue 2 Article 4

12-1-1942

# Juridical Order Fundamental for Peace

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## JURIDICAL ORDER FUNDAMENTAL FOR PEACE

The aspirations of a war-weary world continue to crystalize around the Law. All practical expressions of the hope for permanent peace use the term *lawful order,* or some equivalent. The distress of our times has burned into responsive minds an acceptance of the fact that we have world-war because we did not have world-government. As the columnist states it: "We must accept the fact that from now on, in peace as in war, only through government can the people think and act as a whole. . . . It has already been demonstrated that governmental action is necessary for preservation of free enterprise." [1] Vice President Wallace, in outlining "an administration pattern for the post-war world," says, "there will have to be an international court to make decisions in cases of dispute." [2] And Pope Pius XII, in his Christmas appeal for the "supreme dominion of God" also acknowledged that one of the fundamental points for the pacification of human society is a "juridical order." [3]

One of the most impressive considerations in favor of a juridical order for the world is the extent to which law has already been developed for world affairs. But it is the habit of public thinking to disregard all this, and to conceive of any world order as cut from whole cloth, as an entirely new creation, and as in derogation of our national government. It should be comforting and encouraging to provincially timid minds to consider not only how much law has already been established for the world, but how well it has worked whenever given support, and to what extent our own government has recognized and enforced such law.

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1 Dilworth Lupton, *Cleveland Press,* December, 1942. Walter Lippman, Dorothy Thompson, et. al., might also be cited, since their columns have almost continuously inveighed against isolationism.

2 Henry A. Wallace; radio address in commemoration of birthday of Woodrow Wilson, *Cleveland Plain Dealer,* December 30, 1942.

3 Pope Pius XII: Christmas Eve Broadcast, *Cleveland Press,* December 24, 1942.

The foremost examples of global jurisprudence are of course International Law or the Law of States, Maritime Law or Admiralty, the Law Merchant, and a development of the latter, the Law of Negotiable Instruments. Then there are more specific and minor examples such as the regulations for the control of opium traffic, regulations for the control of slave trade, rules governing commerce on international rivers and canals, the regulations of the Universal Postal Union, and diplomatic and consular laws.

The extent to which this world law (or International Law) is recognized by our courts and enforced as a part of the law of our land is readily seen by reference to our Constitution:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies . . . between a state, or the citizens thereof, and foreign states, citizens, or subjects." Art. III, Sec. 2, Par. 1.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." Art. VI, Par. 2.

Thus we see, as was stated by Chief Justice Jay: "The judicial power extends to all cases affecting ambassadors, other public ministers, and consuls, because, as these officers are of foreign nations, whom this nation is bound to protect and treat according to the laws of nations, cases affecting them ought to be cognizable only by national authority: to all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose rights and privileges relative thereto are regulated by the laws of nations and treaties, such cases necessarily belong to national jurisdiction; . . . to controversies between a state, or the

citizens thereof, and foreign states, citizens, or subjects; because, as every nation is responsible for the conduct of its citizens toward other nations, all questions touching the justice due to foreign nations or people ought to be ascertained by and depend on national authority." [4]

The two chief sources of International Law (or laws of nations, as referred to in the authority just quoted) are custom and treaties. In custom the consent of state is tacit or implied. In treaties it is express. When treaties are made a part of the law of our land their interpretation still depends largely upon International Law, that field of jurisprudence to which they belong.

It is well recognized that the common law constitutes a fundamental part of the jurisprudence of the states of this country,[5] and as such is administered by the courts of the United States in cases of which they have jurisdiction.[6] It is also well established that the Law Merchant constitutes a part of our common law so far as applicable and not repugnant to our circumstances, constitutions, and statutes. The custom of merchants throughout the world having been incorporated into the common law of England, became a part of the common law of this country.[7]

Admiralty jurisprudence finds its sources in the ancient law of the sea, which was the law of commercial nations generally and not that of any particular country. The procedure of admiralty courts as now developed is essentially founded on the civil law.[8] In the United States exclusive admiralty jurisdiction is vested in the courts authorized by the Constitution. The Supreme Court has held that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislations,

4 Chisholm v. Georgia, 2 Dallas, 419, 475, 1 L. Ed. 440 (1793).

5 15 Corpus Juris Secundum, Sec. 3, p. 614; Cooley, Principles of Constitutional Law, p. 8.

6 Cooley, Principles of Constitutional Law, pp. 131, 132.

7 15 Corpus Juris Secundum, Sec. 8, p. 616.

8 2 Corpus Juris Secundum, Sec. 2, p. 64.

as by excluding a thing falling clearly within them, or including a thing falling clearly without.[9] Thus we see our courts interpreting and enforcing law the international character of which is so recognized in the basic charter of our government that it is beyond the power of Congress to alter it.

As to International Law generally, the prevalent opinion is that it has ceased to exist. That impression is based upon the conduct of the Axis powers in commencing and prosecuting the present war, and the failure of International Law to prevent such conduct. Such an opinion, however, is as erroneous as it would be to say that there is no law in a city which is being temporarily terrorized by gangsters. The established principles of International Law still control relations between the United Nations and neutral nations. Even the Axis powers have been willing to observe the law as long as it gave them what they wanted, and they have not hesitated to claim its protection when they thought it would benefit them. The reason International Law seems to have failed is not because there was no such law, but solely because there was no power to enforce it. The object of International Law is not merely to prevent war, but also to regulate peaceful international relations and to regulate war after it has broken out. Even though it failed to prevent war, it has achieved and is still achieving a good deal of success in the other fields. No law is concerned solely with preventing and punishing thefts and murders. Law generally is much more concerned with the regulation of peaceable life. Just as municipal law has prescribed and regulated the conduct of law-abiding citizens generally in spite of robbery and murder, so International Law has controlled the conduct of most of the nations of the world in spite of war.

Law has two phases: (1) a rule of conduct which is prescribed or generally observed, and (2) a rule of conduct which is enforced in order to decide disputes, redress grievances, and restrain wrongs. For realization of the second

9 Panama R. R. Co. v. Johnson, 264 U. S. 375, 68 L. Ed. 748 (1924).

phase some government is necessary, a court supported by a police force, a juridical order. Hence the recommendations of the columnists, the Vice President, and the Pope.

The League of Nations was a noble attempt to supply the deficiency of International Law with reference to enforcement. But it too has been subjected to the indiscriminate censure directed against International Law generally. It is considered a total failure because it failed to prevent war. Because it fell short of that one great purpose, the public is inclined to overlook its very many beneficial accomplishments in other fields.[10] It is not even given credit for the instances when it did act to prevent war. The difficulty with preventive remedies always is that they are not appreciated, because the evils which they forestall are never known.

The League itself prior to the present war had settled a number of quarrels between states which, except for its influence, might have developed into war. In addition its Permanent Court of International Justice, created in 1920, had delivered thirty judgments in international disputes. And the Permanent Court of Arbitration, which was not superseded by the Court, had given twenty awards.[11]

The reason the League of Nations was unable to prevent the present war is that it lacked the authority to enforce its orders for sanctions.[12] Membership in the League was not compulsory, and some nations did not belong whose support was needed to make its orders effective. Moreover it could not compel obedience even of its members.

The League was not given the authority and support necessary to preserve world order because of prevalent errors of thought regarding nationalism and sovereignty. The

10 Howard Robinson: Toward International Organization, p. 20 *et seq.* (Harper's).

11 P. H. Winfield: The Foundations and Future of International Law, p. 11 (Cambridge University Press).

12 P. H. Winfield: The Foundations and Future of International Law, p. 109 (Cambridge University Press); See also Emery Reves: "A Democratic Manifesto" (Random House, New York).

maintenance of nationality for national and local purposes is quite proper. But international activities have expanded to the point where they cannot be regulated by national action or agencies. To expect to maintain international order through nationalism, through the assertion of from sixty to eighty different kinds of nationalistic policy, is ridiculous. We must choose between nationalism, which leads necessarily to friction and conflicts, and international organization with a practical program for enforcement of Law, which is our only hope for peace.

The greatest obstacle to proper international organization has always been the assumption that nations which joined such an organization thereby sacrificed their sovereignty. The error of that assumption lies in the belief that the individual nation can be sovereign with reference to international affairs. The value of sovereignty relates to internal rights and privileges of a nation, the political, economic, social and religious rights of its citizens and the character, organization, powers and functions of its national government. But with reference to external or international relations, such as commerce with other nations, travel, transportation, communication, means of exchange, war and peace, a state or nation is not and never can be independently sovereign. Those external interests can be managed and regulated only by cooperation with other members of the family of nations.[13]

The total independence which nationalism champions means that every nation is free to do whatever it pleases. Hence every nation must be prepared to defend itself against all other nations. A higher degree of security would be attained for each nation if certain international phases of independence were limited, regulated, and properly controlled for the benefit of all. What James Wilson said, in recommending the federal Constitution to the separate states of

13 Harry Frease: Sovereignty of Independent Nations, United Nations of America, (Canton, Ohio).

this nation, is now applicable to the nations of the world. He pointed out that man in a natural state would enjoy less liberty and suffer more interruption than in a regulated society. "Hence," said he, "the universal introduction of government of some kind or other in the social state. The liberty of every member is increased by this introduction; for each gains more by the limitation of the freedom of every member than he loses by the limitation of his own. The result is that civil government is necessary to the perfection and happiness of man."

Our adherence to a world organization would therefore be not so much a limiting of our national sovereignty as an extension of that law by which we now live. And, after all, the true significance of our nation is not so much that of a place, a bit of geography, or a flag, as it is a way of life, a way according to the law of life. The glory of our government is that it recognized at its inception that it was subject to law. The settlers of our land prided themselves on the fact that they had established a government "not of men but of laws." And as pointed out, International Law is a definite part of the law acknowledged in our Constitution.

The proposal for our adherence to a strengthened League of Nations or other world organization is not therefore a novel, strange, or chimerical suggestion. It is in furtherance of man's evolution and in harmony with American tradition.[14] It would be an advance toward the realization of our social and religious aspirations and a logical and practical development of our legal philosophy.[15] In "A Democratic Manifesto," Emery Reves declares that ". . . the democratic nations *must* — if they wish to avoid the catastrophe of war and preserve a measure of independence — arrive at a *Dec-*

14 Nicholas Murray Butler: Leadership of the United States in World Organization for Prosperity and Peace, International Conciliation, No. 371, June, 1941, and Our United States in this Backward Moving World, Carnegie Endowment for International Peace.

15 Roscoe Pound: The Revival of Natural Law, Notre Dame Lawyer, XVII, No. 4, June, 1942, pp. 328, 329.

*laration of Interdependence.*" Such Declaration, if it is to be effective, must, of course, be supported by a council (as recommended by the Vice President) and a court, with subordinate regional courts, and their orders and judgments regarding international affairs must be enforced by concerted action. That would form a basis for juridical order.

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