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# Pan-America and International Law

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## I.

The question is often put in rhetorical fashion, sneeringly: "Is there any such thing as International Law?" If you wish to be in the company of the vast majority of superficial observers who read the newspapers and nothing else, you will admit weakly that there does not seem to be any such thing in the muddled world today. The explanation that you will be expected to give for the absence of International Law is the lack of any established political superstate, capable of enforcing legislation for the conduct of sovereign states internationally. Implied in your excuse for denying the existence of International Law, is the popular belief current in this country and inculcated in text-books of law throughout our land, that the chief source of law is the physical power to enforce the will of a determined government and that of the courts; and that the sovereignty of national states is unlimited.

The opposite to such a positivistic interpretation of all law is sometimes slurringly referred to as the *idealistic* approach to law, which by its very label would be damned to the limbo of worthless ideology. Fortunately the metaphysician and legal academician is allowed the "poetic" license of weaving a theory of law which finds its being in an abstract *authority* with priority over organized force. Though it is not common knowledge, the truth of the matter is that the philosopher, who honestly and logically probes the ultimate nature of law, serves society in its most urgent needs of peace, liberty and prosperity, infinitely better than the self-styled "realists" who limit all law to rules enforceable here and now by a national state and its protected subordinate members.[1]

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1 Cf. Commentary on the Politics of Aristotle, Bk. 1, Chap. 1, pp. 90 and 470 et seq.: *Thomae Aquinatis Opera Omnia.*

Especially in a society organized into states with such strong nationalistic loyalties as people have today will the truths of a sound philosophy of law, civil and international, be found to fructify in values incomparably superior to the Dead Sea apples of international Leagues and world-empires.

When the cynic asks you to explain the potential source of international law you will find that you are led to investigate the genesis of all law. For the question involves the claims of two rival concepts of "law": one giving primacy to "authority," the other to "power."

## II.

The positivists argue bluntly that unless subjects of a state are persuaded by sanctions of one kind or another, the mandates of governments will not become effectual. The immediate conclusion which is commonly drawn is that therefore it is useless to insist upon any ethical theory of "authority". This is an unwarranted inference, hardly deserving of comment. For when there is so little support given to wise laws that they have become dead letters, it is then most necessary for an examination of their true worth in the light of fundamental principles of jurisprudence. Public opinion is then in need of reeducation so that the true values of law can be inculcated and the popular support of right minded men may be rallied on the side of regulations wisely designed for the common good.

The right to use force must arise from some title in justice. Bandits are not essentially supermen. It is sufficient for the present discussion to point to the disastrous consequences that follow from the identification of authority with the *will* of an organized mob.

That great philosopher, St. Thomas, emphasizes this point, viz., that competent authority, even though it may not possess the physical power to enforce all of its prescriptions, still

remains the source of law. "All law proceeds from the reason and will of the lawgiver; the Divine and natural laws from the reasonable will of God; the human law from the will of man, regulated by reason. Now just as human reason and will in practical matters may be manifest by speech, so may they be made known by deeds: since seemingly a man chooses as good that which he carries into execution. But it is evident that by human speech, law can be both changed and expounded, in so far as it manifests the interior movement and thought of a human reason. Wherefore by actions also, especially if they be repeated, so as to make a custom, law can be changed and expounded; and also something can be established which obtains force of law, in so far as by repeated external actions, the inward movement of the will, and concepts of reason are most effectually declared; for when a thing is done again and again, it seems to proceed from a deliberate judgment of reason. Accordingly, custom has the force of law, abolishes law, and is the interpreter of law." [2] The customs of a nation and the free customs of nations in their formal relations with one another retain the essential elements of law, as long as the conditions implied in the international customs remain the same.

We see that in early societies, sanctions are of a moral character, emerging from the reverence for the gods, custom, and public opinion; at times they are arbitrary, springing from private vengeance or royal will.[3] The ideal of law precedes that of sanction. "Law is enforced by the state because it is law; it is not law merely because the state enforces it." [4] Justinian accepts a similar view regarding sanctions and laws.[5]

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2 Cf. Aquinas, *Summa Theologica,* Ia, Iae, Q. 97, art. 3.

3 Cf. Maine's *Early History of Inst.*, lect. II. 30.

4 Cf. Pollock's *Jurisprudence,* chap. 1. 27.

5 "Sanctae quoque res, veluti muri et portae civitatis, quodammodo divini juris sunt; et ideo nullius in bonis sunt. Ideo autem muros sanctos dicimus, quia poena capitis constituta est in eos qui aliquid in muros deliquerint. Ideo et legum eas partes, quibus poenas constituimus adversus eos qui contra leges fecerint, sanctiones vocamus." (*Inst. of Just.*, 11. I, *de Rerum Divisione,* & c., 10).

To define law as any rule of action which will be enforced by the entrenched power of politicians whose sole title has been obtained from the people by conquest or political intrigue is to crystallize and glorify a radically unreasonable principle. Those who occupy the seats of the mighty need to be reminded constantly that continental "power-politics" of itself will eventually prove a boomerang to those who rely thereon. It is true that the disciples of power-politics in Europe have their prophets who teach that *might* precedes right. They can point to Machiavelli, Hegel, Treitschke, Lasson, Austin, Von Hartmann, and a host of others for confirmation of their belief that an omnipotent party towers above ethical criticism. On the other hand, the great philosophers of all times, from Aristotle to Orestes Brownson, (a great political philosopher of American origin) have proved beyond doubt that the primary requisite for law and peace is the principle of reasonable plan.

## III.

In American Jurisprudence, *natural* rights are recognized as prior to the powers or rights that are delegated by the people to the government of the United States. Among the Constitutional powers for the conduct of inter-national relations, is the right conferred upon the President and the Senate to make treaties.

By article 2, section 2, of the Federal Constitution the "power to make treaties is delegated expressly, and by article 6, treaties made under the authority of the United States, along with the Constitution and the laws of the United States made in pursuance thereof, are declared the supreme law of the land. . . . Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." Thus spoke Mr. Justice Holmes in the decision of the Supreme Court, denying the State of Missouri the right to interfere with a fed-

eral officer acting under authority of a treaty (with Great Britain) proclaimed by the President, December 8, 1916.[6] A treaty is "law" in all essential details. As soon as a treaty is ratified with the concurrence of two-thirds of the Senate, (in the United States) it may be enforced by the sanctions that are applicable in the case of any other law. Just as sporadic violations of civil laws do not rob them of their essential authority, so it is with International Law.[7] As long as laws are commonly observed by the generality of those who have consented to their restraint in one way or another, and as long as those who have an interest in their observance see to it that the laws are adhered to by those who remain disdainful of law, the perfection of the law is achieved by their sanctions. So it is again with the rules of International Law. They remain *in force* just as long as public opinion and international good-will recognize their value as a means to the good end of international society, and are willing to sanction them by the effective instrumentality of force.

To be sure, the imperfection of International Law, lies in the frequent inadequacy of sanctions to support the law, be it a treaty, custom, or any other rule. The absence of sanctions is rendered more lamentable by the exercise of arbitrary coercion by interests which can profit by the nullification of reasonable international rules.

## IV.

Society and the politico-geographical face of the earth like ancient Gaul in the time of Julius Caesar is divided by virtue of several seas into three parts: Asia, Europe, and the Americas. These parts have indeed many interests in common; and each has other interests which concern but one continent at any time and place. One or two of these continental units

6 Missouri v. Holland, 252 U. S. 416 (1920).

7 Cf. Cunard S. S. Co. v. Robertson, 112 U. S. 580 (1884); De Geofray v. Riggs, 133 U. S. 258 (1889).

may for a considerable period be at war or peace within itself without necessarily breaking down the intra-oceanic (relative) self-sufficiency of the third section of our globe.

What significance does this picturization of three continental units reveal? On the American continent, looking from west coast to east coast, one observes that peace for many years has reigned supreme. Following the example of the United States, Canada, and Mexico in the Northern Hemisphere, our South American republics in their own sphere manage to settle their most difficult problems without resort to total war. The reverse is true with respect to the Asiatic and European continental worlds. Neither of them is at peace within itself. In Asia you have Japan at war with China; and Japan is hardly at peace with Asiatic Russia. In Europe you may be sure that the latest truce has not settled the deepest quarrels which clamor for decision. Their armed camps are, at a moment's notice, ready to disgorge tons of destructive explosives into enemy territory with the resultant collapse of their civil societies.

Let one look again at the unit which is North America. It is no idle self-glorification that inspires the motto which is inscribed upon the coin of an American dollar: "E pluribus unum." That ideal might well be contrasted with the mottoes which epitomize the philosophy of other continental powers, such as "Deutchland ueber alles," or "Britannia rules the waves," or "the Mikado is divine." If there be any secret of North American order and peace, it is to be found in the unity which takes vital possession of all the multiple local parts, causing them to function both separately and organically in dependence upon the reason and will of the whole nation. This is perfectly clear to any legal student who has studied the Constitution of the United States and the Declaration of Independence, which together articulate the political needs of the New World. Canada, living her own life, at the same time accepts the leadership of the United States

as a necessary condition for her own political welfare in the family of nations. Mexico is likewise more than a neighbor; in her foreign policy she relies in the main on the protection of the Northern Colossus whose course in world politics is mapped out in Washington for the American ship of state and in some degree for those that follow in her wake.

This chartered course of American statecraft is not so easily changed as those who are uninitiated in the science of our particular American Jurisprudence may imagine. Settled as a constitutional issue long ago, and proved to a powerful minority in a civil war three quarters of a century past, is the plan of local state subordination to the federal organism.

Mr. James Wilson, one of the signers of the Declaration of Independence and of the original draft of the Constitution, later appointed a Justice of the Supreme Court, leaves us a detailed analysis of the philosophy of law which is ever needed for an enduring continental unity and peace. Said he, for example:

"Whatever object of the government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operations or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States." [8]

And again:

"If a difference can be discerned between them, it is in favor of the federal government; because that government is founded on a representation of the whole union; whereas the government of any particular state is founded only on the representation of a part, inconsiderable when compared to the whole. Is it not more reasonable to suppose that the counsels of the whole will embrace the interest of every part, than that the counsels of any part will embrace the interests of the whole?" [9]

The practical effect of such an understanding of Continental needs has been to entrust the responsibility of coining

8 I Works 533. Ed. by James DeWitt Andrews (1926).
9 I Works 534.

money, commanding the army, regulating interstate commerce and transportation, and regulating tariffs, to one central government under constitutional rules of law. To one Supreme Court go all the states of the Union, without brandished weapons of coercion, and all "sovereign" clients, with claims at times rejected, return home to carry out the rules of "nine lonely old men."

Herein, is *Law* that conforms to the juristic ideal: the rule of reason over physical force. This is the practical use of "right before might." Fortunate beyond measure is that part of humanity resident in America where people are governed by the rule of *law* and not by the rule of *men,* whose autocratic will is on the whole a cheap and painful substitute for reasoned *law*.

There is no juristic impediment to a further expansion of the sphere of law that will subtend the entire hemisphere of the Americas. Clearly, there is no league or superstate which is qualified to lay down rules for the Americas. It is left for the established states acting through their governments to make effective the law which is higher than any human court or society and to make treaties that will have all the authority and value of law in the international order.

## V.

When the United States' Secretary of State and his advisers enter upon the difficult task of collaborating with the statesmen representing South American republics in formulating new declarations of principle and in drafting a multilateral treaty between several American States, we have good reason to anticipate a valuable contribution to International Law. Without benefit of any super-state to dictate the rules of procedure for inter-American political relations, our nations can under the law of nature and of nature's God establish treaties which will have *de jure* and *de facto* all the elements necessary for Public International Law.

It is the *natural* duty of the people and government of the United States to cooperate with all other nations in positive action reasonably calculated to promote peace and order in world affairs. In the western hemisphere, the Monroe Doctrine has the force of custom and it is reasonable for the North and South American states to incorporate their common interpretation of this American doctrine into the concrete terms of a treaty. There is danger indeed that a treaty such as that contemplated by several in the recent Conference, might overstep the bounds which justice to European and Asiatic people requires. Dollar diplomacy and American imperialism must not be permitted to spoil the work of far-sighted statesmen engaged in this pioneering enterprise. Their efforts must be seconded by the Senate of the United States upon whom much of the responsibility for the constitution of our just treaties depend. Public opinion, in the last analysis, will judge whether or not this latest adventure in international cooperation will be more reasonable in relation to its social and juristic purposes than some of the projects which in the past have ended in alliances and "associations" leading to war.

Public International Law, like civil law, is capable of growth and development, as well as decline. One generation may often witness the eclipse of old law and the establishment of new law and new customs that grow out of new conditions in the world. The opportunity is at hand for the Americas to give to Europe and Asia a Christian example of Pan-American International Law.

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