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*OBSTACLES TO A WORLD LEGAL ORDER AND THEIR REMOVAL**

THE present need for a world legal order is obvious. In an atomic age the settlement of international disputes by resort to force rather than by recourse to law is so likely, if not absolutely certain, to mean the end of civilization that it involves a risk which no wise man, if he can avoid it, will take.

One may well ask why in the face of this fact, evident to all, recent attempts at a legal world order have failed to achieve their goal. Certainly the time has come when the cause of this failure must be determined and if possible removed.

A clue to the cause of failure may be found by determining what prerequisite is present in those cases in which the settling of disputes by recourse to legal institutions is effective. This prerequisite has been indicated in Ehrlich's Fundamental Principles of the Sociology of Law.[1] In this great work, Ehrlich draws the very important distinction between what he terms the "positive law" and the "living law." The positive law is the law appearing as propositions in constitutions and legal statutes. It is also embodied in the legal institutions for formulating, applying and enforcing these propositions. The living law, on the other hand, is the *de facto* behavior and normative practices and beliefs of the majority of the people in the community quite apart from the positive law. It is one of Ehrlich's great achievements to have shown that positive law is never effective by means other than those of force imposed by a dictator or absolute military monarch,[2] unless the positive law corresponds to the living law.

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1 Harvard University Press, 1936.

2 Ehrlich even questioned the validity of this qualification. All that is necessary for the purpose of this inquiry is his rule in his qualified, rather than in his unqualified, formulation of it.

One can have a positive law unsustained by the living law of a minority of the community providing that the positive law does correspond to and is sustained by the living law of a majority in that community. The majority will then give the moral support to legally constituted political officials and the police enabling them to enforce the positive legal norms on the minority of individuals whose behavior and normative beliefs otherwise would not conform to those norms. But one cannot, in any society in which force under dictatorship is not the means of settling disputes, have an effective positive law corresponding only to the living law of a minority of the community.

The recent experience of the United States with respect to the Prohibition Amendment is a case in point. During the First World War a well-intentioned minority succeeded in establishing the prohibition norm as positive Federal Law. It soon became evident, however, that this positive legal norm did not correspond to the spontaneously accepted moral and social norms of either a majority of the people or of many moral, social and religious leaders whose intellectual and moral integrity could not be questioned. Thus the Prohibition law failed because it was a positive law which did not correspond to the living law of either many moral leaders or the majority of the people generally in the community.

The recent introduction of Western law into China is another case in point. The results show concretely in the experiences of Professor Francis S. Liu as reported by him in his lectures on Chinese law in the Yale Law School during the academic year 1947-1948. Professor Liu in the early part of his career took, in his own country, the regular pre-revolutionary Chinese examinations for membership in the Chinese legal profession. Following this he came to the Western world where he took a degree in Western law in the United States and studied in Germany under the great Western legal thinker, Stammler. While pursuing these studies, his country formed its National Government and established a legal constitution built upon the Western legal model. It was natural, therefore, when Dr. Liu returned to China and to its most westernized city, Shanghai, that he should proceed to practice in the Western manner, handling his clients' disputes according to the norms and methods of the Western type of law of the National Government of China which was then in power. He found, however, when he did this that he lost his clients.

He found furthermore that he won his clients back when he proceeded to practice law according to the traditional moral and legal norms of Chinese Confucian philosophy. The fact was that the new Westernized positive law of recent National China was not sustained by the living law.

Once these considerations are noted, the cause of the present failure to achieve a world legal order, notwithstanding the suicidal nature of war in an atomic age, becomes evident. Proponents of world government have been acting on the erroneous assumption that all that is necessary to achieve a legal world order is to have lawyers write out a world constitution defining such an order and then to propagandize for the popular acceptance of this constitution. In short it has been assumed that all that is needed is the positive law, completely overlooking the fact that positive law is useless if it is not sustained by the living law.

Once this cause of the failure of previous attempts to obtain a world legal order becomes evident, the cure for this failure becomes equally evident. We must direct attention temporarily away from the positive law to the living law. More specifically we must determine the living law norms of the major peoples and cultures of the world. For unless the positive law norms and institutions of the world legal order have roots in, correspond to, and are sustained by the *de facto* cultural living law norms of the majority of people and their ideological and moral leaders in each of the major nations and cultures of the world, the positive world constitution and world legal institutions will not have the living law sanctions in the hearts, beliefs, and social behavior of men, necessary to sustain them; in fact the peoples of any culture or nation will not commit their values and fate unreservedly to the world legal order in the first place.

It becomes clear, therefore, that a world constitution or a world legal order, which is to be effective, must be rooted in the living legal and cultural norms of the major peoples and cultures of the world. This means that we must turn away temporarily from practicing lawyers, statesmen and practical propagandists for world government, to cultural anthropologists and sociologists, and to students of the philosophy of the world's cultures for a solution of the problem. It is cultural anthropology and sociology which make evident to us the *de facto* living law, social institutions and behavior of men. But it is not behavior of *any* kind as revealed by cultural social science

which is important. The living law of any culture is defined by the normative beliefs and behavior of the majority of people in that culture. Thus cultural anthropology and sociology must be pursued to the point where the basic concepts defining the living law norms of that culture and their attendant effective positive laws are discovered. The basic concepts of any subject are by definition the philosophy of that subject. Consequently only a cultural anthropology and sociology which pursues its study of any culture to the point where the study exhibits the philosophy of that culture is capable of exhibiting its living law.

In this connection recent developments in cultural anthropology and cultural sociology are very important. It was originally thought by many social scientists that facts alone, objectively determined by observing the behavior and institutions of a given people or culture, were sufficient. This rested on the naive error that it is possible in science to convey facts without bringing them under concepts. Yet science which is of any use to men must report the facts which it finds in scientific journals or describe them verbally at scientific meetings. But facts described verbally in public or by writing in journals are facts brought under concepts, and when one has concepts one also has theory. Thus what happened when many social scientists attempted to be purely inductive and factual was that they did not watch their concepts, and thus unconsciously and surreptitiously tended to define a foreign culture in terms of concepts brought to that culture by modern Western social scientists. The result was not an objective description of the foreign culture but its facts as seen through modern Western conceptual eyes.

The longer, however, that Western social scientists stayed with a given culture, the more it became evident to some of the more critical and acute of them that they did not understand or correctly describe the behavior and institutions they observed until they conceptualized these factual materials in terms of the concepts used by the people in the culture in question. Since philosophy is but the name for the basic concepts used by anyone to conceptualize the facts of his experience, it has happened that recent developments in cultural anthropology and sociology lead straight to the philosophy of culture. This is the point in the sociologist Pitirim Sorokin's observation that causality in social phenomena is logical-meaning-

ful.[3] It is the point also in the anthropologist Clyde Kluckhohn's demonstration[4] that even a so-called primitive people such as the Navaho Indians are not understood until their particular philosophy is discovered. Only by specifying the elementary assumptions or philosophy, in terms of which a given people conceptualize the facts of their experience and order and evaluate their cultural and legal institutions and judge those other people, does cultural anthropology and sociology become truly objective, understanding a given culture in terms of its concepts rather than one's own.

We possess, therefore, in the methods of contemporary cultural anthropology and sociology and the philosophy of culture a scientific and philosophical procedure for determining the living law of any specific people or culture in the world.[5] The first step, therefore, on the way to an effective legal world order is evident.

But once this step is taken the difficulties in the way of reaching a legal world order become specific and even more evident.

The kind of phenomenon experienced, as indicated above, by Professor Liu when he practiced law in Shanghai on the basis of Western positive legal norms, becomes evident everywhere internationally. The living law norms of one country or culture are not those of another, and when introduced into that other culture often not only do not work but, as Professor Liu has written, result in positive harm.[6]

That this is as true of Western Christian religious norms, when they are introduced into Asia, as it is of Western legal norms is demonstrated by the objective study over twenty-five years by the Indian sociologist Professor N. G. D. Joardar of the Indian Christian community in Lucknow, India.[7] His findings are all the more impressive because he is not merely sympathetic to Christianity but a Christian.

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3 Pitirim A. Sorokin, *Society, Culture and Personality*, Harper & Bros., New York, 1947, pp. 146, 313-341, 537-554 and 635-658.

4 Clyde Kluckhohn, "The Philosophy of the Navaho Indians" in *Ideological Differences and World Order* edited by F. S. C. Northrop, Yale University Press, 1949.

5 F. S. C. Northrop, *The Logic of the Sciences and the Humanities*, Macmillan Co., New York, 1947, Chapters XIV, XVI, XVIII, XX and XXI. *"Philosophical Anthropology and World Law,"* in *Transactions of the New York Academy of Sciences*, Ser. II, Vol. 14, Dec. 1951, No. 2, pp. 109-112.

6 Liu Shih-Fang, "Westernized Administration of Justice and Chinese Racial Characteristics." English translation by Alfred Wang. Typewritten copy in the Yale Law School library.

7 N. G. D. Joardar, *The Indian Christians of Lucknow, India.* Ph.D. thesis deposited in the Yale University Library.

Put in more general terms, studies of the diverse cultures of the world by cultural anthropologists and sociologists who have stayed with the people or cultures being observed long enough to find the basic concepts and attendant norms of the culture under observation, reveal that different cultures have differing basic concepts and hence differing philosophies and attendantly different living law norms. An independent investigation of the philosophical assumptions underlying the economic, political and cultural ideologies of the major nations of the contemporary world confirms this conclusion.[8]

There are, to be sure, identities rather than differences, as the latter study and some social scientists such as Pitirim Sorokin,[9] G. P. Murdock[10] and Clyde Kluckhohn[11] emphasize. Of the importance of the identities, more later. Even so an approach to world legal order which does not face the differences is doomed to failure for, as present relations between the traditional democracies and Soviet Russia indicate, the question of whether war or peace ensues is more likely to turn around a resolution of the differences in their respective economic, political and religious norms than on the assumptions which the nations have in common.

At last we find the basic cause of the failure of all attempts to date to achieve an effective legal world order: The living law norms of the world differ and in certain cases even conflict, being in fact many rather than one. In other words the living law of the world supports and sustains the contemporary legal pluralism of sovereign nations; it does not provide a single sufficiently determinate legal norm common to all peoples and cultures such as is required to define and sustain a positive effective legal world order capable of resolving disputes between nations by recourse to legal processes rather than to force.

We seem to be faced, therefore, with an irresolvable paradox: In an atomic age there is a living law *need* for a legal world order. It is difficult to conceive of anything more required by the living law than the need for life itself. Ehrlich, however, has made it clear that no positive legal constitution or political institution will be effective

8 F. S. C. Northrop, *The Meeting of East and West,* Macmillan Co., New York, 1946.

9 Pitirim A. Sorokin, "Lasting and Dying Factors in the World's Cultures" in *Ideological Differences and World Order,* loc. cit.

10 G. P. Murdock, "The Common Denominator of Cultures" in *The Science of Man and the World Crisis,* edited by Ralph Linton, Columbia University Press, 1945.

11 Clyde Kluckhohn, *Mirror for Man,* Whittlesey House, 1949, Chapter X.

unless it is sustained by the living law, and the fact is that the living law of the world is many rather than one—opposing often rather than sustaining an effective positive legal world order. In short, while there is a living law *need* for an effective positive legal world order, the *content* of the living law of the world, without which no positive legal constitution or institution is effective, is not such as to sustain such an order.

It is precisely because the latter fact is the case that the competing unrestricted nationalistic legal sovereignties are here and have the public support which they enjoy. It would seem, therefore, that the necessity of having the positive law sustained by the living law renders all attempts at a legal world order misguided and incapable of achieving their goal.

This is the real consideration behind the contention of many students of international relations who affirm that the only hope for peace is by a power politics balancing of the nationalistic and pluralistic legal sovereignties. Any other policy rests on the misguided assumption, they maintain, that positive law can be effective when the living law is contrary to it, and will as a consequence notwithstanding its good intentions do more harm than good.

It is to be emphasized, however, that from Ehrlich's thesis that the positive law must be sustained by the living law and from the fact that the living law of the world is diverse, often conflicting, and many rather than one, it does not follow that all attempts at world government are misguided and incapable of achieving their aim. What does follow is that the aim can be achieved only by creating a new universal living norm to correspond to and sustain the positive law norm of a legal world order.

That living law norms can be transformed, history demonstrates. The living law of the Romans originally was not even that of a nation; it was first the norm merely of a city and before that merely the collection of diverse norms of diverse families. The living law of the present Western nations is not the original living law of either the Greeks or the Romans or of any other ancient people of the Western world. Thus, the very existence of the present diverse and conflicting nationalistic living law norms in the world is itself a demonstration that living law norms can be transformed. In fact the Romans went directly from the living law norm, believed to apply only to the individual family, to a living law norm *believed* to hold

for all men the world over; they did not go first from a family living law to a national living law and then from a national living law to a living law the norm of which is universal. Thus history shows that it is possible to transform the living law from pluralism toward universality.

There are two methods by which this can be done. The one is the method of the philosophy of the world's cultures. The other is the method of the philosophy of nature.

The method of the philosophy of the world's cultures proceeds, building upon cultural anthropology and sociology, to seek out the present living law philosophical and legal norms of the major cultures and peoples of the world. In many of these there are already living law norms with content which will sustain a positive universal legal world order. The wise framers of a world constitution and world legal institutions will use words and other symbols from the cultures in question which have roots in and take advantage of these sustaining living law factors.

Also, as was noted earlier, contemporary cultural social science and the philosophy of the world's cultures find basic concepts and norms in common as well as concepts and norms different, or even in conflict, in the different nations and cultures of the world. A wise world jurisprudence will frame its doctrine in terms of these common factors, pushing the differences out of the focus of attention for the moment, so as to take advantage of the factors present in the living laws of the world, which are universal and which will sustain a world common law.[12]

In this manner a new, truly world *jus gentium* can be achieved in part precisely in the manner in which Gaius and his successor, Justinian achieved the partial and, in fact, provincial *jus gentium* which is traditional Western law. At the beginning of his *Institutes* Gaius writes as follows:

> Every human community that is regulated by laws and customs, observes a rule of conduct which in part is peculiar to itself, and in part is common to mankind in general. The rule of conduct which a people has settled for its own observance, and which is peculiar to that people, is termed the *jus civile*. Those principles which natural reason has taught to all mankind,

12 See Gray L. Dorsey, "Two Objective Bases for a World-wide Legal Order," *Ideological Differences and World Order*, loc. cit., Chapter XXI; also Pitirim A. Sorokin, "Lasting and Dying Factors in the World's Cultures," ibid, Chapter XX.

are equally observed by all, and collectively are termed the *jus gentium.*[13]

This method of the science and philosophy of the world's cultures will, however, not be enough. A world law restricted to a *jus gentium* composed of nothing but the living law norms which Russian Communists, capitalistic democratic, socialist democratic, Chinese Confucian, Hindu Indian and Latin psychological living norms have in common would be entirely too weak and would lack the contemporary technical content from natural science necessary to provide a criterion for resolving the international disputes of a Twentieth Century world in which scientific knowledge, sought by Asiatics as well as Westerners, is so important. Also, as previously noted, the living law of the world exhibits normative ethical, ideological and legal differences and even incompatibilities as well as common factors, with the issue of war and peace between the nations turning more on the normative differences and conflicts in the world's living law than on the identities. These considerations make it necessary to supplement the living law sanctions for a positive legal world order which are obtainable from cultural anthropology and sociology and the philosophy of culture with new living law sanctions from some other source.

The authors of ancient Hindu law suggest their source. *Dharma* derives from *Rita* which has its source in nature.

The framers of Roman law agree. They were Stoic philosophers who went beneath the conventions of culture to one *logos* of nature for their criterion of one legally first and good. They introduced Stoic philosophy in the religious teaching of children in the family as well as in the positive codification of Roman law which they carried through. Thus while creating a new positive law they also created the new living law necessary to sustain it.

But this Stoic philosophy, as they continuously emphasized, drew not from the philosophy of diverse constitutions and cultures, of which they were well aware, but from the philosophy of natural science and of nature. They noted that while men live in differing cultures with their differing pluralistic and competing legal norms they nonetheless live in the same nature. Consequently they saw that by supplementing the philosophy of cultural social science with the philosophy of natural science, as the criterion of living law ethics in

[13] David Nasmith, *Outline of Roman History from Romulus to Justinian,* "The Institutes of Gaius," Butterworths, London, 1890, p. 200.

the family and the positive law statutes and institutions in the state, they could create the new positive law of the *jus gentium* and the living law foundations necessary to sustain it. This is the point of their doctrine, that *jus gentium,* the philosophy of culture or the humanities for all men, is grounded in *jus naturae,* the philosophy of nature.

It appears, therefore, that the need for a legal world order in an atomic age can be met providing we take very seriously Ehrlich's dictum that any positive law to be effective must be sustained by the living law and proceed to create not merely new positive statutes and institutions for a legal world order but also to lay bare and reconstruct the new living law necessary to sustain them. The laying bare of the living law of the world can be achieved by cultural anthropology and sociology coming to articulation in the philosophy of the world's cultures. The reconstruction of the living law can be obtained by the natural sciences coming to articulation in the philosophy of nature.

Both of these ways are, however, for the future. They will take time. The present fact is that of a world of many nations governed by different and even conflicting living law ideals and deeds. The immediately effective world law must correspond to this present situation. In other words, it must base itself on living law pluralism. This is practicable immediately providing two things are done. First, the right of any people to build their living and positive law in terms of their own traditional values and any others they choose must be guaranteed. Second, in return for this guarantee each nation must assume its share of the responsibility for outlawing and policing any violation of this right. Under law there are no rights without corresponding duties.[14]

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[14] For a further development of this point, see the author's "Contemporary Jurisprudence and International Law," 61 *Yale Law Journal* 623 (1952).