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INTERNATIONAL LAW AND AUTOCRACY

158

A Public Lecture delivered before the University of Pennsylvania

BY

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Fellow and Librarian of Corpus Christi College, Cambridge.

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TO

THE LAW SCHOOL

OF

THE UNIVERSITY OF PENNSYLVANIA

WITH GREAT RESPECT

PREFACE

EARLY in the present winter the University of Pennsylvania kindly asked me to deliver a lecture on international law. I should not have reprinted what I then said if I had not since noticed that the particular false analogy which I there tried to expose seemed to be exchanging the decent obscurity of legal periodicals for the publicity of popular journals. Some considerable occupation since my return is my only excuse for not rewriting in more formal shape this attempt to treat briefly one point in that most dubious question of all legal questions, the analogy between municipal and international Law.

G.G.B.

Corpus Christi College, Cambridge.
February 6th, 1917.

INTERNATIONAL LAW AND AUTOCRACY.

THERE is not at the present time any broad question of jurisprudence which puzzled man would rather solve than the question as to whether there is, or there is not, a good prospect for the developement of international law and a good prospect of seeing grow up before our eyes a state of society based upon it, in which it shall reign supreme.

It is easy both for the simple and the learned to be pessimistic. Here, as always, those who can supply no background of history in which to set current events, however abnormal, in their true perspective are the people who are most sad about the future; but it is more serious to notice that, in the case of this particular question, we find in certain quarters despair combined with learning. The last twenty years have seen great changes in our ideas about the origin of law, and there is to-day a certain school of social psychologists who have lent the weight of their undoubted learning to pessimistic and, as it seems to me, erroneous views. They maintain that what we have discovered about the origin of "municipal" law (I use this phrase throughout in the technical sense of national as opposed to international law) is

not cheerful reading to those who call for the immediate establishment of the law of nations upon a firm foundation by the spontaneous general act of the nations of the world.

From the old-fashioned theories as to the origin of law the international lawyer could draw nothing but encouragement, for the analogy was such a perfect fit. One used to read in the old text-books how Rousseau's "noble savage," ranging wild and free, was smitten one day, like Caliban, with finer thoughts and nobler aspirations. Thereupon he called his fellow-savages together, and they, after the solemn signing of a contract, inaugurated law by which thereafter they and their descendants should be bound. The transition in argument from municipal to international law was easy. How manifestly a meeting of this kind foreshadowed the meeting together some day of representatives of the savage nations in the determination to lay down their arms, and in international affairs to inaugurate the rule of law.

All this is impossible to us as we see it now. The theories of Rousseau, and of the contractualists before him, always—and especially, perhaps, to their originators in part symbolical—were beginning to appear inadequate to our grandfathers. They have been torn to pieces by our schools of law. We began to change our views when archæologists protested that instead of theorising about the "noble" savage of an older day we should proceed to study the real savage and savage life and primitive institutions of our own day. Even unskilled observation soon suggested doubts as to the ability of a redskin or an Australian bushman to grapple with, still less to express, legal conceptions other than those of the simplest kind. It soon appeared self-evident that it was absurd to find the origin of national law in an imaginary meeting of half-clothed savages such as the contractualists described, or to transfer to it by some strange anachronism the highly-developed attributes of, let us say, a New England township meeting

of to-day. "They may be savages," wittily said the late Professor Maitland of a similar anachronistic conception, "but I think they are in evening dress."

The idea of a primitive and formal "social contract" being once exploded, there soon appeared a more correct view of primitive society and the origin of law. It was seen that the Australian bushman or the more highly-developed redskin is indeed a savage, and that the chief characteristic of the savage is the elimination of personal volition and the idea of self as independent from the tribe. In studying the human race, the nearer to the beast we get, the less do we hear of the point of view of self, and the more do we hear of tribe and tribal custom. Starting with the beasts themselves, one remembers the picture painted by Rudyard Kipling in his Jungle Books. There one may see beasts of all kinds, lovable—such is the skill with which they are painted—rational up to a point, but all bound by an iron rule—the Law of the Jungle—to which an unquestioning obedience was enforced by the fear of instant death at the hands of other members of the pack.

> Now this is the law of the Jungle,
> As old and as true as the sky;
> And the wolf that shall keep it may prosper,
> But the wolf that shall break it must die.

Mowgli would not have found himself ill at ease among many of the tribes in Central Australia bound by unreasoning obedience to the custom of the fetich or the totem. He would have understood much that we now find it hard to understand in English history of the Anglo-Saxon period.

Now the social psychologists tell us that liberation from the bonds of this all-embracing savage custom came to pass in different ways with different tribes, but that there was probably one type to which most instances conformed. Some one savage, perhaps the successful warrior, perhaps, as we are told nowadays, the tribal medicine-man, sometimes no doubt a savage who

combined the offices of both, made it known to all his fellow-tribesmen that, on certain points, it was his will that had to be carried out, even though it meant a conflict with the tribal custom hitherto observed. One can picture the hesitancy which at first existed, but after a time the tribesmen would learn that the risk of incurring possible death at the hands of an outraged totem spirit was preferable to immediate and certain death at the hands of this one among them who made these new claims and assumed this hitherto unknown authority. It is easy to see how this authority, once manifested, was extended till it obtained an equal and a greater share of the tribe's obedience than the old customary rule. When that is the case we have passed from a rule of custom into a rule of law, depending upon the intelligence of an individual, not upon the mob instinct of a drove, a rule of law sustained by and based on fear of human force. Later developements there would no doubt be. The successor to the original law-maker might not be able to bend Ulysses' bow. The power which he inherited as his alone he might have to share with the old or the wise or the active men of the tribe. Law might in time lose its originally despotic character and become the blend of compound and conflicting currents. Freedom might slowly "broaden down from precedent to precedent." The original fact, however, remains unaffected. Men had lived like animals, ruled by herd morality and custom. It had needed one despotic authority to free them from this state. By the authority of one, not by their own effort or combination, they had been saved.

In many respects the developement of international comity cannot be regarded as an event *in pari materia* with the rejection by a savage tribe of the control of totem or fetich in exchange for a system of positive law. Nevertheless there is a school of modern thinkers who believe that no force but that of a single predominating power can make a system of international law an abiding influence in world affairs. According

to this theory the nations may agree to observe such a system by the most solemn promises or contracts, but none the less history has shown that sooner or later one of the nations which has most to gain by doing so will break away to follow, perhaps under cover of the noblest professions, interests that are particular to itself and selfish. There is no half-way house, so we are told, between remaining as we are, with world peace at the best, but in a state of suspended animation, and the establishment of international comity by the uprising of a preponderating power which will make it impossible for the separate nations to follow their divergent interests. This preponderating power may itself be guided by self-interest, but it will be argued that the historical archæologists are right in telling us that at an early stage of a new system of society that which marks advance is the quantity, not the quality of government. When in the settlement of international relations international law has been a force, not a mere aspiration, for two hundred years, then it will be time to insist that other nations beside the preponderating power shall have a voice in what international law shall be.

It is in some such terms as these that the social psychologists whom I have mentioned would express their views. Their points are clear. Primitive man was freed by despotism. The society of nations has nothing to fear from, indeed has much to gain by, the emergence of one strong, forceful power, longsighted, efficient, persevering. Egotistical it might be, but some price must be paid for what it would give, and one must trust that the power might later be moralised and democratised.

Now, before proceeding to examine this contention, and to see if it is as well grounded in history and social science as its supporters maintain, it will be well to see exactly what it claims, and to acknowledge truth in it where truth exists. It is on firm ground when it makes clear that international law rests and will always rest on force. It is idle to dispute this, but it remains to see

whether those nations who accept certain conceptions of international law can unite to give these the support of force, and whether historical analogy drawn from the origin of municipal law really does render this an improbability. Secondly, in condemning as unnecessary to the furtherance of international law the call for a preponderating power to enforce it, we are not concerned to discuss (and we must not score dialectic points by discussing) whether human or national life would be less pleasant than it is now under the contingency suggested, nor whether, as has happened in history, almost mechanically, as it seems, many times before, a balance of power would raise itself among the nations as an offset to that preponderance. These are pertinent questions, but we are here concerned only to discuss if it is the case that the historical analogy of the growth of municipal law points to the necessity of one preponderating power, or whether the social psychologists are overlooking any further factors.

They lay themselves open to criticism from the start on a question of method. Supposing the general analogy with the developement of municipal law is admitted, it is none the less absurd to concentrate upon any one point in the history of municipal law, particularly if that point be its origin, and to say " thus was municipal law shaping, at this moment, in the same way we must expect international law throughout its whole developement to shape." A study of the developement of municipal law over a number of years, on the contrary, may be helpful in that it throws light, not only upon the stages of developement through which international law is likely to pass, but also perhaps upon the origin of municipal law itself, revealing that the origin of municipal law was more complex than some social psychologists would have it. Moreover, the early days of a system of law are not necessarily more important than the later stages. The biographer does not dwell upon the birth of his hero, which may or may not have resembled that of other men; he leaps forward

to the years of education and apprenticeship. It will be well, therefore, to cast an eye upon the actual developement of law in different countries, not merely upon its origin in remote and distant ages; and this can best be done, on the only scale here possible, if at least three great countries are taken for examination.

Look first at England of the twelfth century, when the law which governs us in England to-day first took shape. It was a wonderful period. The nineteenth century, with its Edisons and its Listers, has changed the face and habits of the world our fathers knew, but the comfort and serenity of life throughout the English-speaking world to-day is due more to the brains of certain thinkers about law and administration eight hundred years ago than to all the inventions of the last two centuries. We are fortunate in having many descriptions of the period. On the various old roads out of London you will come to cities and towns where, in mediæval days, rose famous abbeys. Often one thinks of an abbey as a spot of seclusion and of silence. With the great abbeys of the twelfth and thirteenth centuries in England that was far from the case. They were the calling point of all men outward bound from London, and couriers from Scotland and the Marches would put up there upon their inward journey. Few places in England were as well informed with the news and gossip of the King's Court and his advisers. These abbeys had each their own historian. Mostly they were men with a picturesque pen and an insatiable appetite for news. They wrote great books in folio volumes and illustrated them, often with their own hand, with drawings that have been reproduced in many modern history books. These books are the sacred books of mediæval English history; some of the most famous of them are to be found in the library of which I am librarian at Corpus Christi College, Cambridge. Now it is good to read all books of history, but in these books there is something more than the mere events they chronicle; for in them live and move the King, Henry II., and the

band of talented men whom he chose to summon to his Court to break the power of the barons and to check decentralising forces in the kingdom—in a word, to give England a law, a process which some of the monkish historians regarded sourly, being more than a little conservative in their views.

Up to the reign of Henry II. England had been given over to an antiquated law administered in local courts of custom rather than of justice by antiquated methods such as that of the ordeal by fire and water, or again, in feudal courts in which the barons were supreme. It was the task of Henry to establish order and a definite system of law throughout the country much as Americans or Englishmen of a later date undertook similar work in the Philippines or India. He made no sweeping general declarations, he laid down no high-sounding principles, but he preferred the method of solid administrative work like that of the fine band of the servants of the Crown and the United States in British India and our and your various tropical dependencies. The names of his advisers live now, and we can picture their idiosyncrasies and see them even sit and speak in court. Ranulf Glanvill the Justiciar, Richard of Ilchester, John of Oxford, Geoffrey Redel, Bishop of Ely, Hubert Walter and Richard FitzNeal were there, scholars and statesmen and writers, some of whom have left us treatises upon the work they did. It was a slow process —the invention of a new writ whereby a whole fresh category of cases were brought into the King's Court; the perfecting of a system of assize whereby good justice was taken to the remotest parts of England; the establishment of new good methods of law which have stood the test of all the intervening years.

It was the popularity of the King's law which gave it strength. It was hated by the barons, who retaliated whenever the chance was offered, and endeavoured to shake themselves free from it. But the fact that its judges and administrators were experts, and the popular support it enjoyed, enabled the law to endure through

the troubled times of King Richard, King John and King Henry III. to the reign of King Edward I. who, by similar methods and by working in a similar spirit, was to give it new strength and to bring forth from it even finer fruit.

This analysis of the harvest time of our jurisprudence shows undoubtedly a leader, in the shape of a king, overthrowing bad custom and substituting good law for it. It shows however something more. It shows good law resting on national support and able to grow only because of it. It shows a court of justice so strong that, although the personality of the King was obviously more dominating than any contemporary force, it could, when the King was weak or absent, preserve its position unimpaired. Indeed, the King never attempted to take the place of the Court and to pass judgments by himself. "Take heed to yourself," growled the violent King Rufus to a bench of judges not half as strong as those appointed by King Henry II.; "if you will not condemn him as I wish, by God's face I will condemn you." It indicates that the King's law only ran as good law when administered through constitutional channels, and we are introduced to a conception, now a truism to Americans and Englishmen: the position of a man powerless when acting in a private capacity, but all powerful when acting within the constitution and bent on giving to the nation what the nation wanted—a good law. "When he does justice he is vicar of the King Eternal, but he is the devil's minister when he declines to injustice." This is the contemporary conception of the English King as creator of the law. It was because the King's Court had proved that it was set upon the path of justice that one finds in 1258 a petition from the representatives of the nation for an extension of its power. Only because it was acting under such conditions do we find pressed and pressed again, from the nation's side, not from the monarch's, the novel doctrine of the omnicompetence of the King's Court. How different is this from despotism; how clearly is the municipal law

of England seen to hang not only on the will of a predominating power, but upon the consent of those who are governed and upon the constitutional exercise of the law's administration. We are even tempted to reframe our account of the action of the despotic savage who first brought law to light, and to see more clearly than before that his act of usurpation depended in some degree upon the other savages' consent.

The suspicion becomes a certainty when we examine the history and growth of national law in France. Here, if anywhere, the strong monarchy of the Renaissance might have placed itself behind a national law. It did not do so. France was not to know a common law till it was given it by the "red hand of the revolution." There was much beneficence in the despotism of Versailles, but in that it formed no centres of good law framed to meet the nation's need, in the manner of the English Kings, it was found an insufficient basis for the nation's municipal law. Here was an all-powerful crown, comparable by analogy to the law-making despotic savage, but because it acted alone it failed. There was an absence of even subconscious consent on the part of those whom it governed. Brute force was powerless alone.

The constitution of the United States of America, and the municipal law that may be said to hang upon it, form the supreme example of a new legal system, this time more specifically in the realm of constitutional law, arising by agreement or consent, and not issuing from the despotism of a controlling power. It forms, too, in that it was an agreement between States, the closest analogy to a possible developement of international relations when the war is over. How far does it encourage those who believe in a future for a society of nations governed by international law? It should be noted that the analogy is far from perfect. The United States was organised as a nation *vis-à-vis* the other nations of the world. It does not therefore supply a complete analogy to what should be a world-wide

organisation. On the other hand, the conditions of the Monroe doctrine and geographical isolation have made the United States a nation standing more alone, less *vis-à-vis* the other nations, than any other country. It is noteworthy, too, that it possesses most markedly the idea of a union of sovereign States which the federal unity, though supremely dominant, has never swallowed up.

Thus England, France and the United States in turn furnish, each in its special fashion, convincing proof that the power of agreement or consent between two or more parties has proved, under the most exacting tests, sufficient force upon which to rest a creation in the realm of municipal law. This being so, the contentions of the social psychologists that the analogy of municipal law is fully on their side does not stand a close examination. Judged from the point of view of this analogy, there seems no reason to doubt that international law might arise strong and supreme, depending only on the union of those nations which accept certain conceptions of that law and unite to give them force. What form will such a union take? It is a riddle. Not, probably, the form of the World State of which the mediævalists dreamed, not, probably, a world federation comparable to the Union of the United States of America, because of the cumbrous form it would so have to take, but rather an agreement between sovereign states to enforce in a world restored to peace conceptions of justice and ordered law for which they must be prepared in unison to fight.

Peace, however, is not yet. The learning of Europe is on the field of battle. The descendants of those teachers and students who thronged Bologna, when the law school of Bologna was *sans pareil* in Christendom, are shedding their blood in the Trentino or on the mountain precipices of northern Italy. It is a moving story of the great palæographer who remained at work doubly hard in the *Bibliothéque nationale* all the time the Germans were besieging Paris in order that the

learning of France might suffer no eclipse; but men like Delisle are not found twice in a century, and the learning of the Sorbonne, of Paris, of France, has sprung into line at the magical word "*enfin*," which is heard on all sides in the land of France. The universities of Russia and England are even as Louvain. The learning of Europe has handed on the torch to the learning of America. With the American law schools rests the future of international law. Study the analogy of the common law once more, and you will see that it resisted all attacks, not only because it was popular and good, but because it was a studied law, thought out, speculated upon by the loving care of students. Who knows what effect the same kind of study, this time in American, not in European universities, may have upon the future developement of the law of nations? A school of law knowing the tradition of a jurist as pre-eminent as Hare [1] will have already laid down certain maxims for the guidance of its scholars. It will have enjoined that the study of the law of nations must not be conducted by narrow or pedantic methods. There is no code of the law of nations to exercise its dead hand upon the law. It will see that other subjects equally must play their part with him who seeks to learn; history, geography, political and economic theory, all illuminated by the play of legal principles. Study agreements, will be the maxim of the law school; look at maps, and let your maps be big. Bear in mind that geography is not static but dynamic. Remember the world forces that ebb and flow behind the scenes. If Panama is the key word to one of these, remember there are others—"the open door," the Yangtse Valley, the Shan States, Bokhara, Jugoslavia, Italia Irredenta, the Holy Places, Mesopotamia, Hamburg to Baghdad. It is in the measure that these and other forces like them are realised that a study of international law ceases to be jejune and fruitless.

[1] Hare, one of the great American commentators upon the Law, taught at the Law School of the University of Pennsylvania and sat on the bench of that State for many years.

The opportunity was never like this. Law is always there waiting to be discovered. May I remind you that two very different men, St. Augustine and John Ruskin, have left it on record that, at the beginning of their lives, they found tedious the cxix. Psalm—the lawyer's canticle—but that, as they grew old, it became their favourite because each verse seemed to contain all wisdom? I like to think that it enshrines the answer of the American law schools to what I conceive to be a call to a unique duty at the present time.

"Great is the peace that they have who love thy law: and they are not offended at it.

"I am as glad of thy word: as one that findeth great spoils.

"As concerning thy testimonies, I have known long since: that thou hast grounded them for ever.

"I am thy servant, O grant me understanding: that I may know thy testimonies."

Do all the horrible things that one has lived with these two years forbode evil for the law of nations? No. For lo, "I see that all things come to an end: but thy commandment is exceeding broad."

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