THE LAWLESS LAW OF NATIONS

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P. 4:

Yet, we read the utterings of diplomats and search the archives of governments and the textbooks of publicists in vain for anything resembling the fundamentals evolved by man as a moral and social being in his municipal systems. Not only do we fail to discover them but, to our astonishment, we meet with the constant repudiation and denial of their validity with respect to the relations of nations. It is this utter irreconcilability and actual conflict between the essentials of the municipal and international systems that presents the most serious puzzle to the new student of The Law of Nations. He cannot comprehend how a principle solemnly enunciated in one branch of jurisprudence and its opposite, as categorically affirmed in another, can both be true. And when he reaches the chapter on The Laws of War--not laws against war but laws conceding it as an unlimited right--and finds such concrete instances as murder by mutilation, torture and starvation, and robbery, sanctioned on a national scale by this Law of Nations, he can only abandon the faculty of reason and take refuge in faith.

PP. 31-32:

Again, Cicero, who contributed so much to the philosophic development of law, describes it as "the highest reason, implanted in nature, which commands those things which ought to be done and prohibits the reverse"; as the highest law "born before all the ages, before any law was written or State formed"; and, "law did not then begin to be when put into writing but when it arose at the same moment with the mind of God."16/ The jus gentium

16/ De Legit II, 4. Sir Henry Maine, in his Ancient Law, Chap. III, pp. 51, 52, says:

> The oldest Greek philosophers have been accustomed to explain the fabric of creaton as the manifestation of some single principle which they variously asserted to be movement, force, fire, moisture, or generation. In its simplest and most ancient sense Nature is precisely the physical universe looked upon in this way as the manifestation of a principle. Afterwards, the later Greek sects, returning to a path from which the greatest intellects of Greece had meantime strayed, added the moral to the physical world in the conception of Nature. They extended the term until it embraced not merely the visible creation but the thoughts, observances and aspirations of mankind. Still, as before, it was not solely the moral phenomena of human society which they understood by Nature, but the phenomena considered as resolvable into some general and simple laws.
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> Now just as the oldest Greek theorists supposed that the sports of chance had changed the material universe from its simple primitive

was more and more considered as flowing from and embodying the natural law of mankind, with which there necessarily arose the conception of natural rights, a consequence that was to exert so profound an influence on the political condition of manking in centuries to come.

P. 36:

Within half a century a worthy disciple appeared to carry on the work of his great master, in Samuel Pufendorf, a native of Saxony, who, in 1672, published De Jure Naturae et Gentium, in which he denied that any voluntary, customary or positive Law of Nations had the force of real law; that the law of Nature, of reason and morality, alone held sway between nations.

P. 37:

As to what this natural law is, that is equally binding upon individuals and nations, the definition of Justinian[25] is accepted, as those rules

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16/ continued:

> form into its present heterogeneous condition, so their intellectual descendants imagined that but for untoward accident the human race would have conformed itself to simpler rules of conduct and a less tempestuous life. To live according to Nature was to rise above the disorderly habits and gross indulgences of the vulgar to higher laws of action which nothing but self-denial and self-command would enable the aspirant to observe . . . . Now on the subjugation of Greece that philosophy made instantaneous progress in Roman Society. It possessed natural fascinations for the powerful class who, in theory, at least, adhered to the simple habits of the ancient Italian race, and disdained to surrender themselves to the innovations of foreign fashion. Such persons began immediately to affect the Stoic precepts of life according to Nature--an affection all the more grateful, and, I may add, all the more noble, from its contrast with the unbounded profligancy which was being diffused through the imperial city by the pillage of the world and by the example of its most luxurious races.

25/ It is necessary for the reader to bear in mind that when Justinian's Digest was promulgated at Byzantium, the seat of the eastern empire, the people of Rome were in fact ruled by an Ostrogothic king, Athalarich, grandson of Theodorich. And while the laws of Justinian speak in terms indicating that their authority is from the people, the people had been under the absolute rule of emperors for five centuries. Tribonian and his assistants, who formulated the Corpus Juris Civilis at the order of Justinian, drew all their

established among all men by natural reason; and again, Vattel describes it as "the immutable laws of justice and the voice of conscience." Although Vattel was the first writer on The Law of Nations to found the modern State upon the free subjection of its equal citizens to the public authority of the whole, in all that relates to the common good, he nevertheless had to reckon with the existence of emperiors and kings, possessing absolute power. His law must, therefore, operate upon "nations and sovereigns," a coupling of terms appearing constantly in his treatise. Yet he boldly denies that there can exist such a thing as a "patrimonial kingdom," admitted by Grotius and Wolff. This pretended right of ownership attributed to princes is mere fancy,[26] he declares; the State is not and cannot be a patrimony, since a patrimony exists for the advantage of the possessor, whereas the prince is appointed only for the good of the State.

Vattel finds that there may exist a conventional Law of Nations founded in treaties expressly, and a customary Law of Nations, founded in long usage and tacit consent; yet both of these draw their entire binding force from the natural law, which demands that nations keep their compacts. Throughout the whole branch of the subject dealing with the laws of peace, he applies his principle of justice, morality and reason with a courage remarkable for one of his time and situation.

In his treatment of the subject of war, he confined that extreme right to cases of self defense, to put an end to injuries received or threatened, devoting an entire chapter to "The Just Causes of War," in which he bitterly condemns that Sovereign who, without necessity, wastes the blood of his own subjects and heaps injustice upon those whom he attacks.

P. 40:

When Austin turned to consider the rules of The Law of Nature and Nations, he could find no overruling world army and navy to enforce them;

25/ continued:

norms from the language existing under the republic, where the people had actually legislated in their Comitia. With the coming of the empire under Augustus the change to absolutism was considered as conferred on the emperor by the people, and hence not inconsistent with the theory that they were still the source of law. It is from the philosophy of the republic that we get the three great precepts at the foundation of all law: to live honorably, to hurt nobody, and to render every man his due.

26/ Book I, Sec. 61.

hence he denied that there existed any true Law of Nations. Austin had spent a part of his youth in the army, on leaving which he studied law at Heidelberg and Bonn, where he imbibed deeply the spirit of the Roman law. It is not surprising that his doctrines, so agreeable to autocratic authority, should have been favorably received and encouraged by governments, but it is puzzling that so many so-called legal scientists, in no way the stipendiaries of government, should continue blindly to accept them.

PP. 42-43:

From the nineteenth century onward we are assured by a constant succession of so-called international authorities that The Law of Nations is founded first, in the practices of Sovereign States, a plurality of like acts thereby creating customary law; and second, in treaties, special and general, thereby creating special or general conventional law. Whether these practices and treaties are moral or immoral, just or unjust, whether they violate reason or the natural law, is no longer the concern of legal science, the Positivist writers tell us. Morality, justice, humanity,--these are terms known to ethics but no longer known to The Law of Nations since its divorce from the Law of Nature. Thus Austin asserts that a law may be unjust but it is nevertheless binding; wherefore to resist it may be virtuous but can never be legally right.[35] And as late authority as Sir Frederick Pollock declares:

> Though much ground is common to both, the subject-matter of law and ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules, and is not included in it; and the purposes for which they exist are distinct.[36]

By the same process of reasoning that deduces the existence of a valid rule of The Law of Nations from the like practices of Sovereign States and clothes any act, however outrageous with the sanctity of law as soon as there are imitators, the repeated bank robberies and other crimes inflicted upon us would repeal our Criminal Codes. Lorimer is the only outstanding author who has perceived this absurdity. He says:

> There are many forms of crimes and folly which differ from ordinary crimes and follies only in that, being committed by large numbers of persons simultaneously, they partake of the

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[35] Lect. VI, 275.

[36] First Book of Jurisprudence, 44.

character of customs. Customs of this class, though as reactions against each other they occasionally yield a resultant which becomes a source of law, have in themselves no claim to that character. Agragrian or communistic outrages are not sources of law, even in cases in which they lead to more accurate definitions of the natural rights of persons or the limits of private property.[37]

Elsewhere Lorimer posits this unanswerable argument:

> It is obvious that, as there is no intermediate region of indifference between justice and injustice, so there can be no jural relations which are partly normal and partly abnormal. Indifferences between related entities is a contradiction in terms--an attitude which is not abnormal alone, but anti-jural--which carries us out of jurisprudence altogether.[38]

But he immediately attacks the foregoing argument in these incomprehensible words:

> In consequence of their abnormality they are right relatively only, not absolutely--temporarily, not permanently. They are right only in relation to conditions that are wrong, because not wholly independent of human volition.

Then he wavers, as though not quite convinced that conditions that are wrong can be the source of rights, saying:

> ,But these conditions are not natural phenomena, either ordinary, like the changes of the seasons, the alterations of day and night and the processes of growth and decay; or extraordinary, like earthquakes and thunderstorms. They are aberrations from the natural life of man--unnatural phenomena like preventable disease--the existence of which and of their consequences, can be jurally recognized only with a view to their removal. A system of jurisprudence which rests on the assumption of the fundamental rectitude of human nature, this admits the laws of belligerency and neutrality only conditionally and under protest.

37/ Institutes of The Law of Nations, Chap. II, 32.

38/ Ibid. I, 6, 7.

PP. 46-47:

As Jackson H. Ralson has pointedly said in his admirable little volume, Democracy's International Law:

> If a thousand times men have been overcome by their enemies and despoiled of their pocketbooks, there is not thereby created a law of robbery. A thousand like instances between nations cannot create a law of war sanctioning such conduct. The fact that under given circumstances men or nations have taken advantage of one another does not create a law of wrongdoing, but only indicates a tendency on their part, their passions being excited, to ignore the laws of decency.44/

While Mr. Ralston appears to blame the nations for thus having created a spurious law of international robbery, they are actually but secondarily culpable. For the instincts of peoples are, in the main, fair and honorable and their love of peace is a genuine one. The phenomena of war and violence, constantly afflicting the earth, are not of their origination--the necessity for the conscription of armies reveals this plainly enough--but are the product of the indulgence of the vices of power by their governments; they follow the adventures of the Sovereign State, with which the people are denied any connection but for which they are compelled to make every sacrifice. So long, however, as people permit a few of their number, deceptively garbed as Sovereign States, to wield so awful a power, they cannot escape some measure of responsibility.

Many suggestions of the advisability of codifying The Law of Nations have been put forward in recent times but it must now be clear that a system so essentially vicious cannot be codified without stereotyping the most grievous wrongs. Codification of law, even nationally, as we find it in our statutes, is largely an artificial device working in the interest of the power-holders and against that of the citizen. It is custom alone,--the freely developed usages of society,--that has any elasticity and that alone maintains a close connection with the sources of law. Statute law can be maintained only by the constant action of a legislature, which, it is devoutly to be hoped, will never be imposed upon man universally. The warning is very clear in our individual societies where, as Lorimer remarks,45/ obsolete law has a tendency to become encrusted in a mass of intricate technicality from which it is exceedingly difficult for common-sense or common honesty to dislodge it. It can do nothing to advance jurisprudence; it actually retards progress since every step in advance is a violation of the code.

44/ Chap. III, 35.

45/ Institutes Chap. II, 35.

PP. 104-105:

It was true that Germany was a guarantor with France and Great Britain, of the neutrality of Belgium, and that the forcible entry of German troops into Belgium constituted a violation of this treaty; but it is also true, as will be seen later, that the Law of Nations declares that when performance of a treaty becomes self-destructive to the party the law of self-preservation overrules its obligations; or as the late Professor Oppenheim, a naturalized British subject says:

> When, for example, the existence or necessary development of a State stands in unavoidable conflict with such State's treaty obligations, the latter must give way, for self-preservation and development in accordance with the growth and the necessary requirements of the nation are the primary duties of every State.[11]

In the view of the overwhelming masses of mankind the march of Germany into Belgium was a shockingly immoral and illegal act, judged by their own national codes, but since the Law of Nations recognizes no principles of morality and permits any act of necessity which the Sovereign State may determine upon, Germany's action towards Belgium was wholly within this lawless law. In the propaganda circulated by the Entente Allies the acts of Germany in Belgium were vehemently denounced as though the test of their criminality were the principles recognized in our national legal systems; and the peoples, wholly ignorant of the utter lawlessnes of the Law of Nations, were successfully duped in that belief.

Yet there was no legal guilt upon Germany by the Law of Nations, even for "letting loose the war," since war is an exercise of sovereign or high political power--a right inherent in sovereignty itself,[12] which none may question. As for the moral guilt of Germany, no such thing as morals is known to the Law of Nations.

The invasion of neutral territory by Germany was by no means novel; it was quite in accordance with usage. Only ten years before we witnessed a more extensive example in the war between Russia and Japan, which was fought almost wholly on the neutral territory of Manchuria, belonging to China. Of course, the Chinese are a yellow race and a violation of the rights of such a people is not as serious as in the case of the white; so we heard very little of that during the Russo-Japanese War.

11/ I, Sec. 539.

12/ Hershey, 349; Oppenheim, II, Sec. 53.