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POSSIBILITIES OF LAW FOR WORLD STABILITY*

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Law is a word of more than one meaning. Hence at the outset we should ask in what sense we are using it in the present connection. Here, generally in the social sciences, in my way of thinking, we should begin with the idea of civilization—the raising of human powers to their highest possibilities, the maximum of human control over external or physical nature and over internal or human nature. It is the control over internal or human nature which has made possible the high degree of control over external nature which humanity has attained and it is only with that side of civilization that we are concerned here. The control over internal or human nature may be exercised by the individual himself. But it is chiefly attained by social control, by the pressure exerted upon each of us by his fellow men in all the relations and activities of life in society. Law is the most highly developed of the agencies of social control. It is a need of society to maintain and secure social interests against anti-social self assertion of individuals. But it is a need of the individual also, although he is likely to think only of need of restraint of his neighbor. He needs it as an aid to his self control, as is abundantly shown even in law-abiding communities when fire or flood or explosion or earthquake puts the everyday legal force of maintaining order in abeyance. Looting, if nothing worse, seems to break out spontaneously.

Law, as lawyers use the term, has three meanings. In the first sense it is better called the legal order. It is a regime of adjusting relations and ordering conduct by the systematic application of the force of a politically organized society. The second sense refers to what has been called by the name of law since the classical Roman jurists, namely, a body of norms or models of decision as an authoritative guide to conduct, to judicial decisions and administrative determinations, and as advice to those seeking counsel as to their rights and duties. It is made up of norms or precepts, of technique of interpreting and applying them, and of received ideals as

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the background of interpretation and application. In a third sense the term "Law" is used to mean the judicial and the administrative processes in action. Thus law in the first sense, made effective by law in the third sense, applying law in the second sense, is the paramount and most highly developed agency of social control in the world of today. What are the possibilities, or, better, the probable possibilities of law for social control of the relations and conduct of peoples and states?

International law or the law of nations, as we knew it from the seventeenth century to the world wars of the present century, was based on a theory of natural law, a postulated ideal law of universal validity and applicability, governing the conduct of all men at all times and in all places, derived from and demonstrated by reason. Its immediate origin was in the jurist-theologians of the sixteenth century. A cardinal proposition was that law in the lawyer's sense was an authoritative promulgation of moral precepts. Hence international law was a system of moral norms for international relations. International law so conceived of encountered two difficulties. One was the lack of any effective machinery of compulsion. In practice, whenever called upon to solve any conflict of pressing interests its precepts proved to be mere preachments. Hobbes put the matter epigrammatically: "Covenants without the sword avail nothing." The second difficulty was that morals are not equal to covering the whole domain of human controversy. The clashing or overlapping of human desires or claims, or demands, which call for adjustment with a minimum of friction and waste if society is to endure, require more than moral precepts for solution. Much of the dissatisfaction with adjustment of the relations of individuals by the law of the state arises from a broad area of relation and conduct in which morals offer no solution or no clear solution, where, nevertheless, there must be a clear and authoritative body of precepts if the legal order is to achieve its end. Law has struggled with problems in this area and still struggles with many of them for which numerous solutions have been tried from Roman times to the present none of which has proved wholly satisfactory from the standpoint of morals. We have had to do the best we could with such questions through experience of what comes nearest to a practical solution. For law in the second sense is experience developed by reason and reason tested by experience. The attempt from the seventeenth century to the nineteenth to treat this area by theories of morals worked out by reason has proved futile.

For three centuries we proceeded on the basis of the classical work of Grotius (1625). In his time the main reliance of jurists was reason. The relations and conduct of men and so of nations were to be governed by natural law and natural law was discoverable and to be discovered by revelation and by reason. Beyond a few broad and universally recognized precepts of justice revelation was silent. It did not touch the wide area where morals provide no adequate precepts and fell short of covering adequately

the area where the domain of law and that of morals coincide. Hence the real guide of the jurists of Grotius's time and of the time of his successors was reason. But Grotius took Roman law to be embodied reason and so his system was one of adjusting the relations and ordering the conduct of nations by idealizing the precepts of Roman law as to the relations and conduct of individuals and applying them so idealized to the relations and conduct of states.

This was not difficult when Grotius wrote. The seventeenth century was an era of absolute personal sovereigns. The monarch of the seventeenth century, the Spanish king after Charles V, the French king of the old regime, the Stuart king in England, the Hapsburg ruler in Austria, was analogous to the masterful head of a Roman household. The relations of Philip, and Louis and James and Ferdinand with each other were enough like those of the Roman *paterfamilias* to his neighbor to make the precepts worked out by Ro[illegible]ists for the latter give useful analogies for the former. So long as [illegible]tical organization of society remained what it was in the days of abs[illegible]lers, and later when political ideas remained much as they had been, the law of nations worked out by Grotius and developed by his successors served its purpose well. But with changed political ideas it became increasingly inadequate to its tasks. Its fundamental idea is out of line with the democratic organization of societies of today. It has, therefore, conspicuously failed in the present century. If a regime of legal adjustment of relations and ordering of conduct of peoples is to achieve its task competently in the world of today it must proceed on a different theoretical basis from that of the international law of the past.

This is not the place to discuss what that basis should be. It is enough here to point out that the law which is to govern the relations and the conduct of peoples in the future will be able to and must use the experience of three and a quarter centuries under the Grotian system.

One obstacle, then, to an effective legal regime of international justice is lack of an international law adapted to the world it is to govern. An international law framed for individual absolute rulers and thinking of democratically organized peoples in terms of such personal rulers is out of touch with the relations it must adjust and the conduct it is to order. Indeed, three requisites of world stability through law have to be considered: (1) An international law, using the term law in its second sense, adapted to a world of peoples rather than of sovereigns, in which the social interest in the individual life is increasingly valued and the social interest in the general security must be kept in balance with it; (2) an effective political organization equal to making a system of world justice according to law possible; (3) effective bringing about of an ideal universal background, a background of universally received ideals of right and justice behind the world legal order.

As to the first requisite, a legal order is a regime carried on according

to law in the second sense. We may assume, therefore, that it will require an international law or law of nations adapted to the world as it is. The first step toward an adequate body of law for a system of world justice is to set up a strong, independent world judiciary with the courage, the imagination and the knowledge of comparative law as well as of international law as it is, enabling them to apply general principles of law developed in the courts and juristic writings of municipal law as Grotius applied the principles of Roman law in such a way as to create a natural law of nations.

Sir Henry Maine has pointed that among the peoples where laws have come to maturity the judge preceded the law. Although that proposition was doubted or denied for a time, recent studies have fully justified it. The judicial function is first developed, while the legislative function develops last. Law grows from experience of adjudication. Jurists as commentators and teachers as well as the courts develop this experience by reason. It is supplemented by legislation conceived by reason applied to experience and tested by further experience. But the foundation of law is a customary course of decision which has found how to adjust relations and order conduct with a minimum of friction and waste. Shall we not find a foundation for a world legal order in the same process of judicial ascertainment of workable solutions of concrete controversies?

A politically organized society must be an organization applying force or an organization applying law. It can only maintain itself permanently as one directed toward justice and administering justice according to law. Ambitious plans for a world order are being urged which begin with a universal service state before a world regime of maintaining the general security against aggression has been well established. Experience has been that the first service performed by the state was maintenance of the general security, securing social institutions and at length the individual against aggression, and interference with the normal course of relations in social life. Only after the system of maintaining the general security was mature did the state begin seeking to perform every type of public service.

As to the second requisite of world stability through law, a world organization adequate to making a system of world administration of justice according to law possible, little need be said. Lack of effective enforcing machinery has been a radical defect of international law in the past. As Jhering puts it: "A legal proposition without legal compulsion behind it is a contradiction in itself; a fire that burns not, a light that shines not." Even if we think of law as a body of norms, that is models or patterns of decision or determination or of desired conduct, the legal norm must be an authoritative model—one which is both enforceable and backed by effective means of enforcement. As Llewellyn has well put it, "the legal norm has teeth."

Chiefly, however, we should be at work to provide an ideal universal background for world organization and for a world law. The legal order

operates on a background of religion, ethical custom, received morality and public opinion, taking form in codes of professional ethics, rules of trade and labor organizations, enforced by professional and trade organizations, and by household discipline and inculcated by home and school training. When these several agencies of social control are in reasonable accord, when they give a homogeneous background to the legal order, the law is effective. But in times of transition or of reorganization of ideas, when ideas of the ideal relation among men become seriously divergent and general conceptions of justice clash as well as individual interests, claims and demands, even in communities long accustomed to justice according to law, the legal order is less effective and may even fail. How much more, then, must we bring about a harmonious background of a world legal order, before we can have much more than a paper organization and paper regime of world justice.

Today the law of the state suffers from increasing weakening of the authority of the received ideal element of the body of norms by which the courts administer justice. The old jural postulates, the old presuppositions of right and wrong to which legal precepts have been shaped have been losing something of their hold, and new ones are formative and are pressing in crude form upon law makers, courts, and law teachers. Until we can formulate an assured set of jural postulates of a world order we cannot expect our world legal order to come up to what we demand of it.

Mere machinery of political and judicial organization of the world and a world code of international law cannot of themselves achieve what is sought. Laws, courts to apply them, and a political organization behind them will not of themselves, however well conceived, secure a world legal order. Even in the everyday law of the state dead-letter laws are a well known phenomenon. The world must be well prepared for the universal legal order before it can be effective.

It is noteworthy in this connection that recent projects for a world bill of rights proceed after the Continental rather than the Anglo-American model. They are abstract preachments, declarations of broad abstract guarantees, instead of precepts drawn from experience of concrete abuses and how to meet them. Magna Carta was drawn up to meet detailed grievances against the crown. Courts and lawyers later developed guaranteed legal rights of Englishmen by analogy from the grievances and promised remedies. These were further developed in the Virginia Bill of Rights of 1776 and later in the Bill of Rights added to our federal constitution.

As developed by the common law courts in England from the thirteenth to the seventeenth century, this became a body of legal precepts which any Englishman whose rights had been interfered with could invoke against the officials and ministers of the crown by proceedings in the courts or could assert defensively in court against attempts of the crown to make the interferences effective. In carrying this out we in America set up, as was done

by the English Bill of Rights in 1688, an independent judiciary able and bound to enforce the guarantees when their protection is sought by individuals. Thus our Anglo-American Bill of Rights is a bulwark of individual liberty. On the contrary Continental declarations of rights are hortatory. They set forth as abstract declarations what officials and agencies of government ought not to do, but afford no security to the individual through an independent judiciary to which the individual may appeal for redress against unlawful invasion of the guaranteed rights or before which he may set up the guaranteed rights against attempted infringements. An Anglo-American Bill of Rights is a part of the supreme law of the land. A Continental declaration of the rights of man is a preachment, not a body of legal precepts in the lawyer's sense.

Compare the provision in the Fourth Amendment to the federal Constitution: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures," with a declaration in a proposed world bill of rights that all men are entitled to be relieved of the burden of poverty, or a declaration that all men are entitled to be relieved of the burden of fear. When one's house is invaded without a valid search warrant our American Bill of Rights gives him an action for damages against those who break in and enables him to resist use in evidence against him in court of the papers or property unlawfully seized. How are we to enforce in a world organization a declaration that all men are entitled to be relieved by the world state of the burden of poverty? Shall the individual citizen or subject be recognized as a legal unit of the world political organization with *locus standi* in its tribunals against their own governments? Shall individual states of a federal union be able to sue the national government in the international court? Will all states submit to decisions of a world tribunal as to whether they are adequately securing their citizens against the burden of poverty or the burden of fear? Are the individual nations prepared to give effect to such declara[illegible]n their internal polity? That such declarations will be accepted and [illegible]e good by the states affected is assumed by those who have been drawing up ambitious abstract declarations as world bills of rights. In the meantime, we read of a serious proposal that Great Britain withdraw from the United Nations if that organization is to question British administration of the colonies and dependencies.

Granting that some advanced societies may be willing to guarantee whole peoples against the burden of poverty, how of the societies with hundreds of millions of people more or less on the verge of starvation or at least extreme destitution? Can the states with less population and more abundant resources be constrained or will they be willing to relieve conditions in destitute lands to the extent required? Is there not danger of breaking down the whole regime of guaranteed rights by putting too heavy pressure upon it? May not the formulation of such humanitarian precepts,

with no means of making them effective, seriously affect the setting up of a regime which we may have some reasonable expectation of establishing? Experimentation with an idea of the involuntary Good Samaritan, who is to pull every victim of ill from his own improvidence or fault out of the ditch, transport him to a sheltering inn and pay for his reception and care, is making difficulties for the law of the state. How may we expect to realize an ideal of universal relief from poverty, distress, frustration or fear before we have found out how to bring about such a condition in the local society?

Sheer reason will not do the work. It must be applied to experience and the experience must be had at home before we may develop it by reason for the government of the world at large. The idea sometimes urged that a law is a protest of society against wrong gives a law in the books which fails to become law in action and tends to weaken all law.

[redacted]ery is told that on one occasion when Lord Ellenborough, Chief Justic[redacted] England, was sitting at circuit, Hunt, the well known agitator, persistently claimed his attention. When the Chief Justice recognized him he said, "My Lord, I appear in behalf of the boy Dogood." On the Chief Justice's answering that he found no case of the boy Dogood upon his docket, Hunt exclaimed dramatically: "But, My Lord, am I not in a court of justice?" "Oh, no, Mr. Hunt," responded the Chief Justice, "you are in His Majesty's Court of Oyer and Terminer and Jail Delivery to deliver the jail of this county." "Then," said Hunt, "I desire to protest." "Certainly, Mr. Hunt," said the Chief Justice. "By all means, Usher, take Mr. Hunt to the corridor and allow him to protest as much and as long as he pleases." Laws which are only protests of society against wrong are as futile as were Mr. Hunt's declamations in the corridor of Lord Ellenborough's Court.

Renard lays down that a nation has behind it a feeling of relation to a defined soil, a feeling that it is called to be independent, and an atmosphere which sets it off from other peoples and binds the individuals for the time being together. We have seen examples recently of the importance of such an atmosphere in the case of some states newly created after the end of the first World War. If Renard's proposition is sound, a world state will require a universal feeling of relationship to the world as a whole, a feeling that the people of the world have a vocation to be a political unit, and a universal atmosphere which binds the individual inhabitants of the world together and sets off a world citizenship as something of which they are conscious. Thus we shall need for a long time to give more attention to creating these universal feelings and this universal atmosphere than to paper world constitutions and world bills of rights and world codes of law. Laws will achieve little in a world not prepared for them.

If one has faith in the ultimate possibilities of law for world stability, he must nevertheless be cautious in prophesying any immediate achievement in that direction either through projects for a world state or a world union of many states or through a world law. A world in which a world state can

function and a world law can operate effectively must come first. Such a world cannot be brought about by laws. It will require law in order to achieve its ends. But matured law is found only in matured states. A matured world state cannot be set up overnight by even the most qualified political scientists. They may provide the best of instruments as a frame of government. But without a world community prepared for it, the instrument will be in action nothing more than paper.

Yet the world is less divided legally than it was. Comparative law is becoming much more than comparative law of the countries which build on Roman law. Also, the world of the English common law is turning to comparative law. An era of better understanding between the two great legal systems of the modern world seems to be approaching.

If a spiritual unification could be promoted political and legal unification would be assured. How to achieve such a spiritual unification is something out of the province of the lawyers. There has been no small measure of it in Europe and between Europe and America. America has been in a sense a New Europe. Yet I note that in a recent program of an Institute of World Relations the possibility of European political unity is put as a debatable question. How much more is the question of political unification debatable as between Europe and America and between both or either and Asia and Africa or either? At any rate there can be a more effective international law for the world as it is now constituted politically and this would help toward a more ambitious ultimate objective.

An international law which can secure fundamental rights to oppressed minorities, racial groups, objects of discrimination, and individuals deprived of what is guaranteed to them by local declarations of rights, without referring them to representation by a government dominated by those against whose rule or conduct they complain, could do much to make straight the path of a world legal order. Such an international law could bring about a generation accustomed to being treated and so prepared to think of itself as a generation of citizens of the world. American experience shows that allegiance to a particular state is not incompatible with whole-hearted allegiance to a higher and more inclusive politically organized society. As things go in world history the three generations after the Revolution which it took for us to establish thoroughly this double allegiance is all but a negligible period. It is true that it took a civil war to give it full development and permanent standing. But it was necessary to overcome a difficult clash of economic interests and bitter animosities arising therefrom. It is significant that a system of coexisting and to no little extent coordinate courts, and of courts of the greater organization to which citizens of the lesser have access, and in which they may complain of the actions of the latter or of its officials, is one of the conspicuous features of this double allegiance.

In that system of double allegiance, however, perhaps the chief element

of strength has been its foundation in history. Both nation and state have the same historical, linguistic, and institutional background and have had a spiritual unity and a unity of legal tradition from the start. Such a background is less easily developed for Continental Europe where there is no linguistic and no complete institutional historical unity, although much unity of legal tradition. It will be harder to develop between Continental Europe and the Anglo-American world, although easier to develop between Continental Europe and Latin America. As between Europe, America and Asia it will be much harder and will take longer. But legal institutions of England and America made much headway in Japan in the latter part of the nineteenth century and in China in the present century. A true world court is something we may reasonably foresee.