

THE RULE OF LAW AND THE FUTURE OF STATES.

By JOSEPH V. GALEA

IN a well known pronouncement Jellinek declares that international law exists for the sake of States not States for the sake of international law. In truth, however, both international law and states exist for the benefit of men. When this becomes realised, it will be seen what disservice states have done men, for while internally they demand the limitation of personal interest for the common good, they themselves in their external relations will on no account give up any vestige of power for the sake of humanity at large. Apart from the morality of such a line of action, states in the end have to give up more than they wish to retain even though a victory may be won.

We have created states for our "own" good, for our partisan welfare. Institutions with such a scope would have served well enough if groups and their interests were separate but they cannot be of any use now as long as the interest of one state is at the same time the interest of all. In fact, the sort of Labour Code formulated by the International Labour Office between two wars makes this very clear : "Peace must be founded on social justice and oppressive conditions of labour imperil peace and good order." Besides, one of the fundamental axioms of its freshly defined Declaration reads as follows : "Poverty anywhere constitutes a danger to prosperity everywhere." No international law to-day is of any avail unless it takes account of the change in the character of the modern state i.e. as one essentially calling for social service. An international order in the 20th century must be a social service order, and a world social service is impossible unless we do away with states altogether and create a world state for the good of all.

The fact that the interest of one state is at the same time the interest of all is making itself felt more and more in the modern world even as regards defence and the atom bomb will knock this into the heads of all if they do not realise it by themselves. Sir Arthur Keith says "SECURITY not attachment to tribes as such was primitive man's reason for his loyalties and prejudices" (1). This is true to a great extent even nowadays in spite of national sentiment. If states have hitherto been the modern unit of defence in danger, they cannot achieve that purpose any longer. The word 'frontiers' is obsolete. If men realise this the nation-state will everywhere begin to waver and tire to give space to the largest unit of security, the World State.

In fact what keeps the nation-state together? Sentiment and power. But each of these depends on the other. In a marvellous essay Dr. West expresses the vicious circle thus : "Successful power requires loyalty and loyalty demands successful power" (2). That is why propaganda counts so much ; it replaces real power by a fiction in order to evoke sufficient loyalty for acquiring real power. And it is the same fact that loyalty demands successful power that makes statecraft the dishonest thing it often is. No limited group or mere state-loyalty can bring really successful power and that is why in the long run nations lose the very thing they are consciously seeking. However, if men become convinced that it is the very

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nature of our artificial fluctuating national set up that ensures the egoistic attitude of our governments, and realise that there is the possibility of a better way of securing their lives, rights and well being, State loyalties will begin everywhere to crumble down. It is humanly impossible to retain group interest and do impartial justice to all and the prime concern of World government should be to place human welfare before all partisan interests of all groups of men everywhere.

Contemporary history shows that the lesson that greater unity means greater economic prosperity and greater security, seems to have been at last learnt. The clarion call of that great war-leader Mr. Churchill in a university of a peace-loving nation as Switzerland, "Let Europe arise" is an admission, though only partially so, of the solution. Besides the Act of Chapultepec, the League of Arab States, the tendency of the Balkans to cooperate, and the determination towards internal unity in the composite states such as Yugoslavia and Czechoslovakia is a movement in the same direction though in different degrees.

The same conclusion is drawn from the study of the requisites of an effective government. To be effective a government must have a direct relation with the individual and an immediate power over him. In other words, a strong government must be centralized. This is the lesson of history within states and it is to be applied to the international society too; for one cannot deny the fundamental similarity between national law and government and the international ones. Therefore international government the individual must come within the direct power of the World government. In fact Professor Keeton in his book "National government and international order", says : "I doubt whether a clear authority over its member states is more essential to the international community than a certain amount of authority over the individuals of which the state-members are composed. This seems to be the lesson of history, the lesson which the repeated failures of confederation suggest." It is submitted that full and direct authority is needed over the individual, no matter how practicable it may be to subdivide territories into regions for special and temporary purposes as Sumner Welles suggests (1). Those state-lines will be a fiction. In fact, the supremacy of the national government of the U.S.A. over the states is possible only because Federal Courts have direct power over individuals and not through states. Power came from individuals and is exercised on individuals. It came from individuals : the preamble to the Constitution says : "We the people of the U.S. establish and ordain the Constitution" i.e. the people as distinct from their governments. This democratic note is echoed in the opening words of the United Nation's Charter : We the people of the United Nations etc. Besides the Constitution of the U.S.A. leaves power to Congress to build up any system of courts which shall best carry out the designs of the Constitution. It will be clear that the states-lines of the U.S.A. are only a fiction and any emergency may make it necessary to remove them.

To quote another instance, when the German states were united, the rulers of the states were to retain their titles and some of their privileges as independent sovereigns. In effect they had not only to give up such rights, but for all practical purposes their peoples were under one single with one army, one law, and one master.

(1) "The Place of Prejudice in Modern Civilization" (1931).

(2) "Psychology and World Order" 1945, Pelican Series p. 61.

(1) Vide "The Time For Decision" Chapter III.

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To be an effective government a world government must be centralized. Otherwise the words of Dr. Stubbs relating to the weakness of the Anglo-Saxon Government in the first pages of English Constitution history will have to be repeated in the first page of international or better still world constitutional history which is to be born. I refer to his words : "The cohesion of the nation was greatest in the lowest ranges : family, township, hundred, county."

The strong centralised government of Western Europe, which now possesses institutions to enable it to enforce its control at all times and in all parts of its territories is the result of a long development. Its growth was hampered by such obstacles as difficulties of communication, sparsity of population, primitive economic conditions, the confusion of religious with temporal power, and mainly by Feudalism. The growth of a world centralised government is not hampered by such difficulties. Indeed the international society of to-day spells the very opposite of those conditions. What is hampering such a development is the very nature of the state itself. In a sense world order is suffering from a system of Feudalism under another name : the state system. The unified states of Western Europe collected a certain amount of power but only a total gathering of powers in a world government will secure peace. Unless the scope of widest unity is attained it is of no use to unite groups of states together. The only effect of such grouping would be that in cases of differences the struggle will be all the harsher. The final unity of the world may be secured by war but that would involve the imminent risk of total destruction. However, before we get rid of modern Feudalism the final and perfect form of human association, the world State, will not be reached. It is as much a misuse of terms to speak of world order and government while we leave untouched the fissiparous tendencies of states as it is a misuse of terms to speak of a Feudal state which is the negation of state altogether.

The method of unification is essentially the same both in smaller as well as in larger units : respect to one law. Dr. Figgis admits the analogy : "The obedience which states render to international law to-day is probably more regular and less reluctant than was the obedience six centuries ago paid to the common law by any decently placed Medieval feudatory (1). It appears that States will have to disappear before a centralised strong world government can come into being no less than the feudal Lords had to disappear before unified national States in Western Europe could come into being.

International Law did not accept the medieval ideas of a world state, but took instead as its fundamental postulate the existence of a plurality of States, secular, national and territorial, and held them bound to one another under the supremacy of Law. Thus it asserted unity of law but took into consideration the political structure of Europe at the time (2). The very need of the various states themselves makes necessary the reassertion of the whole medieval ideal of the World State. A universal rule of law cannot be effective otherwise. There are enough material bonds of unity in the international society which calls for such law. What is to be perfected is the social consciousness. This lack of social consciousness reflected in the weakness of the institutional side of International Law has as an immediate result that while several questions are of international concern, present International Law leaves them within the domestic jurisdiction of the several states. But as Brierly says "Law will never play a really effective part

(1) "From Gerson to Grotius" p. 16.

(2) Brierly, "Law of Nation" P. 9.

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present lie within the domestic jurisdiction of the several states" (3). It will be seen that while he acknowledges the need of removing matters from domestic jurisdiction he hesitates to denominate the law which considers such matter as *inter-national* well knowing, perhaps, that such a development will have a completely different basis from international law as it stands to-day. He seems to realise that if law annexes from domestic jurisdiction matters of universal concern it may well ensue that domestic jurisdiction of States will be ousted. In fact he goes on to give examples of such matters and he includes (a) Migration of population. (b) a state's treatment of its own subjects (c) its choice of a form of government (d) its naturalisation laws and (e) the whole sphere of international economic relations. All these matters are, he says, of international concern and yet are left for each state to regulate although its action on any one of these matters may easily have repercussion on the interests of other states. One may well imagine what will be really left to domestic jurisdiction when such matters are removed from it. What will be left will surely not warrant the survival of the remaining elements of Statehood in its internal relation namely an organised government and fixed territorial limits *coexisting with a probability of permanence*.

Of course our present states do not like to give up domestic jurisdiction on any matter. In fact, even in the United Nations' Charter a clause had to be inserted to that effect on the suggestion of Australia, who was anxious to keep sovereign control over immigration. This is chapter 1 sec. 2, subsec. 7 of the Charter of the United Nations : "Nothing shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement ; but this shall not prejudice the application of enforcement measures under chapter VII (i.e. as regards action with respect to threats to the peace, etc.)".

It will be seen that the force of the first part is ousted in the second part. Nothing is "essentially" within the domestic jurisdiction and essentially not a threat to the peace. In fact section 39 chap. VIII says: "The Security Council shall determine the existence of threats to the peace and what measures shall be taken to maintain peace. So that the limitations to domestic jurisdiction are very indefinite. In truth "The frontiers of international law are not fixed. They are constantly moving like the frontiers of the United States in the 19th Century. In the development of a world order matters which were in the past solely within the domestic jurisdiction will become matters of international concern, and therefore properly considered by the organisation" (1).

Modern International relations make it necessary that law should embrace, economic, social as well as cultural and political matters. This conclusion was early arrived at by the committee of the Grotius Society set up for the purpose of studying the future of International Law (1). The new international functional organisations including the Educational and Cultural Organisation are a sufficient admission of this necessity.

For a world organisation to survive, it must be supported by the individual opinion of free men and women all over the world, and no such support will be forthcoming unless the organisation is so constituted as to offer the promise of securing peace effectively. The short but turbulent life of the League of Nations has taught men another great lesson not to be

(3) Vide Brierly, *op. cit.*, p. 62.

(1) Vide "From Geneva to San Francisco" Edition 1946 ; by Norman Bentwick p. 50.

(1) Vide "Transactions of the Grotius Society" Vol. 27, p. 226.

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forgotten : that peace should not be the subject of consultation. In other words, the Assembly should have had the power to insist and not only to advise. Then most of the disputes of states are not justifiable and states want a change in their international legal situation, not a declaration of their rights. Article 19 of the covenant of the League of Nations which empowered the Assembly to "advise the reconsideration of treaties which have become inapplicable and the consideration of conditions whose continuance might endanger the peace of the world" clearly recognised the urgency of the problem and at the same time shows the weakness of the League. As a French writer says:

"To exercise any real authority, the League should have constituted an independent Superstate..... but this was quite out of the question. The composition of the assembly and of the Council have proved it. All the delegates are appointed by Governments, remain entirely dependent on them, and can only engage their country so far as orders sent from home allow" (2).

Thus the defect of the League is an inherent one. Is the new organisation going to be anything better? If so and in order to be so it must first effect this revolutionary change from the character of the League even if this entails a revolutionary change in the present organisation of the international society. Sumner Welles speaking of those who still think that the new organisation should be erected on a consultative basis, says :

"If any such form of international organisation is all that is constructed as the outcome of the present war the people of the U.S.A. would have little ground to anticipate the maintenance of world peace for more than a few uneasy years" (3).

In truth the answer to the question mentioned cannot be given as yet. Authoritative opinion is changing rapidly in favour of an alteration in the rules of the U.N.O. whose original regulations as those of the Dumbarton Oaks task as a fundamental postulate the sovereignty of States and their equality. It is enough to recall two memorable speeches in the House of Commons debates (1). In one Mr. Eden pleads the abatement of national sovereignties rather than a Security Council in which the major Victors of the second Great War have a right to veto action. That is quite a different tune from his speech about twenty months earlier where he said : I make no secret of the objective we set ourselves in foreign policy. The maintenance of Peace after this conflict is over depends on a close intimate understanding between the nations of the British Commonwealth, the United States and the Soviet Union" (2). The other speech is that of Mr. Bevin proclaiming his readiness to meet representatives of other nations to try to evolve a basis for a world assembly directly elected from the peoples of all nations as distinct from their governments (3).

But after all, has not the composition of the International Labour Organisation—the only outcome of the first Great War charged with survival value—been an early recognition of the same truth that the people should count as much, if not more, than their governments in the consideration of the well-being of humanity? And was not the very fact that it gave scope of representation of the people as distinct from their governments that

(2) Vide "The League Fiasco" p. 34 by Marguerite.

(3) op. cit. p. 286, 287.

(1) Vide House of Commons Debates, November, 1945.

(2) Vide do. Mr. Eden, February 24th, 1944.

(3) Vide also "Bevin" by Trevor Evans Chapter 8, page. 221.

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gave it survival value? The individuals must rise above the heads of their governments and their leaders. The formulation of the International Bill of the Rights of Man" by Professor Lauterpacht is to the same effect (4).

International Law has only taught us the lesson. There must be a change and it must be such as to give power to a rule of law to annex from domestic jurisdiction all opportunities to regulate conditions which might endanger the peace of the world. This means the disappearance of the requisites of statehood with the element of probability of permanence as we know it.

The lesson of international law is only the same lesson learnt from local government after the Industrial Revolution. This is shown clearly by a quotation from a famous passage of Bagehot : "The experiment of conducting the administration of a public department by an independent unsheltered authority has often been tried but always failed... The new system has not worked well because the central authority has too little power". The Report of the Royal Sanitary Commission of 1868 is to the same effect. Since 1929 the difficult problem, which the advancement of science has brought about, can be solved in different ways but surely not by local governments. The three solutions possible are to quote Smellie "Nationalisation of Services which were once local, regionalism, and the creation of various 'ad hoc' boards" (1). This movement for larger areas in local government, a necessary development which began with the Industrial Revolution is only an echo of the need of widening the sphere of law, even beyond states, and through the same causes.

The problem under consideration acquires paramount importance when we realise the urgency of it. The world cannot afford to undergo the long slow evolution of the past and the plan of Torstein Gihl (2) towards a European or World order based on the slow development of custom and decisions "ex aequo et bono" is obviously insufficient and already out of date. The fate of humanity is too much in the balance to allow a lesson to be taught twice. If it is surely no time for the world to go on arguing the academic question whether international law is law or not. It is law but it is not an efficient law, if breaks down in the very crisis it ought to be able to control. It is absurd to go on pretending that states can be bound morally ; the only way of being bound to law effectively is to have to obey it. And thus we are brought back again to the common man. Only man is bound to law morally and law can only be enforced on man. That is why the British Secretary of State for Foreign Affairs has declared :

"We are driven relentlessly to the necessity for new study for the purpose of creating a world assembly directly elected from the peoples for whom the government who formed the United Nations were responsible to make world law, which the people would then accept and be morally bound to carry it out." And later: "The common man is the great protection against war."

Indeed, only a world Law system can nip war and aggression in the bud. Any other system of law will have the power to intervene only when it is too late and its very

(4) Vide Review thereof by Viscount Templewood (formerly Sir Samuel Hoare) in "The Manchester Guardian" 1.12.45.

(1) Vide "A History of Local Government" (1946). By K. B. Shellie, p. 138. See also p. 90 where he says: "The statistical and legal details of the question should be set against the background of an industrial society in continuous change and a political order in which the powers of Government rapidly increased."

(2) Vide "International Legislation" by Torstein Gihl

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enforcement would mean war while it is our purpose to outlaw war; I emphasise this last point in favour of a world instead of an international Law. Besides, it does not seem to have been well recognised (1).

The great obstacles to be met with in establishing this world order are not to be underestimated, but it is the only way of securing human survival. That is why—it is submitted—a tribunal for settling I-N-T-E-R-N-A-T-I-O-N-A-L disputes is a Utopian dream. However who its to decide in favour or against this world order? None other than you, myself and the common man. “Each one of us must take the lead and before effecting institutional change each must amend his life and his aims. We must realise that what is dangerous is not the atom bomb but the user of it, that the enemy is not the destructive machine but the bad traits in the soul of each and every one of us. As Mr. Lewis Mumford observes, the present crisis in man’s civilisation was not brought about by the atom bomb but by the moral disintegration that went before it and culminated in it i.e. in its *use* (2). For the same reason I maintain against the opinion of the same author in a later book of his (3), that we need not curtail the development of physical science and schools of Technology. I maintain that the scientist is not to blame ; who is to blame is the antropologist, the sociologist, the psychologist. The present crisis was brought about by this headlong advance in the physical Sciences without a corresponding and parallel advance in the social ones and for this the scientist is surely not to blame.

We should further schools of Humanities, we should re-order our ideas as to our place in nature. We should learn the lesson, taught by Christianity , “to love one another having by nature a common destiny “being all children of the same Father who is in Heaven”, and we are to put this our humaneness before our class, our political party, our nationality. And that is another lesson of the Church : We are men before we are citizens. States had cast this distance between man and man by their state-loyalty

Having thus raised our moral power to the same level as that reached by our intelligence, humanity will easily transfer the lesson of war to the sphere of peace. Unconditional co-operation is essential to conduct such a highly organised affair as modern warfare and that same unconditional co-operation is the essential factor of world order and peace. If we realise that and the fact that human life is more sacred than the pretexts for which we are often called up to fight for, we shall plan the peace instead and, in doing so, we shall not spare foibles or habits, precedents or tradition, diplomatic agents or such institutions as states.

In conclusion, one may quote a speech by Mr. Bevin : “I am willing to sit with anybody or any party or any nation to try to devise a franchise or a constitution of a World Assembly for a limited objective—the objective of peace. When we get to that stage, we shall have taken a progressive step. From the moment that is accepted the words ‘International Law’ which presuppose conflict between nations will be substituted by ‘World Law’ with moral world force behind it, rather than case-made law. It will be a world law with a would judiciary to interpret

(1) Vide Sumner Welles op. cit .Chap. 3. where he says that the regional forces should be the first to try to enforce world law, and only in the case of their failure should the world Government forces intervene and “stamp out the flames” !

(2) Vide “The Condition of Man” (1943) by Lewis Mumford.

(3) Vide “Programme for Survival” (1946) by the same author p. 57.

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it and world police to enforce it. It will be the decision of the people with their own fate resting in their own hands irrespective of their race or creed. The great world Sovereign-elected authority will hold in its care the destinies of the peoples of the world.”

NEWS AND VIEWS

Professor W. Buhagiar B.A., B.C.L. (Oxon), LL.D., Professor of Constitutional and International Laws is leaving Malta to take up an appointment in Malaya. The Professor who was very popular will be badly missed in University circles. In bidding him farewell we feel we must place on record our appreciation of the keen interest which he has invariably shown in the activities of the Law Society.

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The Society has recently received an order for a copy of the Law Journal from the Law Library, Washington, U.S.A.. Another similar request comes from the Law Section of Pax Romana.

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In the Editorial of October 1945, we expressed our disapproval of the amendment introduced by Govt, Notice No. 400 which made it impossible for intending Law students to sit for Italian in their Matriculation. This anomalous situation has now been remedied by Govt. Notice No. 168 anomalous the 18th April 1947.

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Our thanks are due to Mr. A. Ganado B.A., LL.D., Mr. M.V. Arrigo LL.D., Mr. A. Pace LL.D., and Mr. A. Attard Borg LL.D., for the law books which they have kindly presented to the Law Society Library. The library is still in its embryonic stages and every effort will be made to provide the necessary reference books which at present are conspicuous by their absence.

Any books presented by past students or well wishers of the Society will be gratefully acknowledged.

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We extend our congratulations to Notary V. Formosa LL.D., on his appointment as Assistant Director of the Public Registry. He is the first member of the Law Society to be appointed to a Government post.

