

EQUALITY BETWEEN NATIONS AND INTERNATIONAL CONVENTIONS, AS DETERMINING FACTORS IN SHAPING MODERN INTERNATIONAL LAW*

Law (that is, human law looking to political ends), is in none of its branches an exact science. It changes with the times. But particularly is this true of international law. It has, in great measure, to deal with those periods in human society when in certain places, municipal law is silenced by arms; when the force of government is exerted, not against individuals, but against the force of government, and private rights of property and security must give way to the overmastering demands of public necessity.

The progress of international law in modern times has been largely in the direction of preventing war. It has also been largely in the direction of ameliorating the conditions which war brings. One is as important as the other; for the absolute prevention of war, in however remote a future, is to the scientific student of history and psychology impossible, unless all nations climb to an equal plane of civilization and morals, and that a far higher plane than any nation has yet attained.

Everything tends to prevent war, which brings many nations into friendly intercourse with reference to their mutual concerns, on an equal footing. Especially is this true of international conferences to give new force and precision to international law. We cannot, however, expect nations to agree on sanctioning rules to which they know that they will be unable to conform.

It must be frankly acknowledged to be precisely here that is found the most serious obstacle to the reform and codification of international law. The different powers still represent very different states of social advancement. Conduct to be confidently anticipated from an enlightened nation cannot be reasonably looked for on the part of one not yet accustomed to follow the principles which sound politics prescribe for the just regulation of public duties.

Nevertheless the theory of equality between independent nations is the very soul of public international law.¹

*In preparing this article free use has been made of the Inaugural Address, delivered by the author, as Honorary President of the Conference of the International Law Association held at Portland, in August, 1907.

1. See an able exposition of this theory in its application to a Central American power by Jackson H. Ralston, as umpire in the Sambiaggio Case, Venezuela Arbitrations of 1903, 679.

It differs in this respect essentially and radically from the national laws of most of the leading powers. These recognize distinctions of birth or title, that is, the inequality of men in the relations of society. International law for those whom it governs has always asserted that they are equal in rights, however unequal they may be in power. Each is the legal peer of every other. This is the necessary result from the possession of independent sovereignty.

It is by universal insistence on this rule of equality that those who would advance the place of international law, whether public or private, as a social force can best secure their end. Only by such insistence can the moral support of the world be fully gained. Universal public opinion can be rallied to the defence of any theory of modes of regulating relations between nations which is based on indubitable principles of social justice, and of no theory based on anything lower or less.

Those principles will in every case ultimately determine the judgment to be pronounced on any international dealings by that court without appeal, unseen but not unfelt by men, that is always in session,—truly named by Daniel Webster “the great tribunal of modern civilization.”

The rule of equality has been less often violated in practice in the domain of private than in that of public international law. Questions of private international law are peculiarly for the courts of justice to determine, and no nation presumes to dictate to the courts of another.

To the settlement of many of the most perplexing of those questions the world hardly yet realizes what progress has been made through the several conventions emanating from the four Hague Conferences for the advancement of Private International Law of 1893, 1894, 1900 and 1904.

Two of the great powers—Great Britain and the United States—took no part in those Conferences. Their absence was attributable first to their territorial separation from the continent of Europe; second, to their adherence to the principles of feudalism respecting lands; and third, to their acceptance of the rule that domicile should determine *status*.

That rule, though long and firmly imbedded in English and American jurisprudence, cannot be said in either country to be the declaration or result of national policy.

We, in the United States, took it originally from English law as part of our colonial inheritance, and it has spread naturally from our older to our newer States. English law took it from the older continental jurists and from European practice.

European practice has changed. The drift of the last century, particularly in its closing quarter, was away from the test of domicile to that of nationality. This drift first assumed the force of a strong current in Italy,—a sign of her new life as a united kingdom. It has been greatly accelerated and broadened by the conventions proceeding from these Hague Conferences on Private International Law.

England and the United States cannot shut their eyes to the fact, for instance, that ten European nations have thus agreed, with regard to an institution on which all human society depends, that, as between their subjects, nationality shall be the criterion of civil rights in respect to assuming or dissolving the marriage relation.

It is not to be forgotten that whichever standard be adopted—nationality or domicile—for the determination of any question of *status*, the result will ordinarily be the same. Few ever have a domicile in a country to which they do not bear allegiance.

On grounds both of convenience and of right much certainly can be said in favor of the test of allegiance.

It is to his nation that every one looks for the protection of his rights of person or property. He looks to it only, when at home. He looks to it ultimately, when abroad.

These rights, while he remains one of its inhabitants are determined by its will. Why should they not be, when he calls upon it, from a foreign land, for protection? Has it a duty to protect abroad what it would not give at home?

It was formerly argued, with more force than it can be now, that a man's domicile could be ascertained more easily than his nationality. The steady extension of the system of public records to the incidents of the life of the private individual, and the tendency of the world to subject both emigration and immigration to governmental inspection and regulation have made it easier than it once was to determine questions of nationality with promptitude and accuracy.

The most valuable asset of a new country, under the conditions of modern society, it has been said,² is apt to be its annual accession of adventurous foreigners. Thorold Rogers, twenty years ago, estimated the value to the United States of those who entered it as a hundred million pounds a year. These men are gained without the cost of rearing and educating them.

No wonder that modern immigration laws require strict records of who thus arrive, and when and whence they come, and where they plan to go.

No wonder, on the other hand, that if a naturalized citizen leave

2. Rhodes' History of The United States, I, 355.

his adopted country to refound a home in his native land, it should proceed to cast him off and make his long-continued absence presumptive proof of his renunciation of its protection.³

In regard to the English and American doctrine as to the *lex situs*, as determining matters of succession to real estate, it must be conceded also that it is not in entire accord with the spirit of modern society. The right of aliens to inherit is every year more generally conceded by law or treaty. The general growth of the recording system, as to land transfers, the facility with which real estate can thus be made a basis of credit, and the comprehensive mortgages, privileges, or hypothecations to which it has been everywhere subjected, for the security of contractual obligations, have all contributed to mobilize the soil. The gradual detachment of political rights from land-owners, as such, has had a similar effect, and it is to have a still greater one.

The days of feudalism, as an existing institution are long past. The day is passing when its theory can be preserved, in a world increasingly devoted to freedom of commerce and freedom of government.

It seems, therefore, to be not impossible that on both these points of difference England and the United States may yet fall in with the modern trend of European opinion.

Every international congress or conference in which they or their citizens participate has a certain influence in that direction. Such gatherings naturally make, in some degree, for the unification of world-opinion as to the proper rules of social order to be, in each particular nation, formulated in law. Through them the last hundred years have created a new force in this direction, which has been continually gaining strength. Through them came the Declaration of Paris, the three Hague Conventions formulated in 1899, and the setting up of the Hague Tribunal as a working institution. Through the last of them, which has just closed a four months' session, attended by every considerable civilized nation, is likely to come an international prize court that will speak for the world.

Since the Congress of Vienna, more than seven hundred such assemblages, of real importance, counting those both of a public and of a private character, have taken place in Europe and America.⁴ Every one of these, in bringing the representatives or citizens of different and distant powers into friendly intercourse on topics of common interest, has done something towards drawing the world together, and making it acquainted with itself. Every

3. See, *e. g.*: the Act of the Congress of the United States as to Immigration and Naturalization, of June 29, 1906.

4. See the American Journal of International Law, I, pp. 565, 579, 808.

one of these is a witness to the equality of nations and to the power, of fraternal association to equalize their opportunities for advancement, assimilate their institutions, define their relations between themselves in the interest of justice, and gradually unite the forces of civilization. Every one of them of a public character, which leads to an international convention, emphasizes the equality of the contracting parties, both in respect to the manner of making the convention and the possibility of its future alteration.

International law is that body of rules which civilized States generally have agreed to apply in determining their mutual relations. Every international convention setting up such a rule, whether between two only or between many powers, is a step in the direction of extending the rules which international law embodies. If it be a convention of a world-wide character, like the Universal Postal Union, or the Geneva Red Cross Convention, its effect will be great and immediate. If it be but a temporary arrangement between two minor powers, its effect will be slight, and may be evanescent. But in either case progress has been made. A new force has been taken on, though it be one acting only within a narrow sphere. An example has been set which, if it stand the test of time, may be followed elsewhere.

International conventions not infrequently are the indirect outcome of international assemblies of mere private individuals. The Geneva Red Cross Convention originated in such a way. Popular sentiment is awakened by public discussion, and sometimes all the more when that discussion can have been dictated by no selfish motives of national policy. In diplomatic conferences national selfishness is not always out of place. In conferences of private individuals it is; and this often gives the results of their investigations a double strength in the public mind.

The progress of all law is mainly dependent on the initiative of private individuals. The scholar in his study conceives an idea and gives it to the world. If it have merit, it will some day catch the eye of some one in public life, and it may become his grateful work to incorporate it in the institutions of his country. The jurist sets in scientific form what before lay unarranged and apparently unrelated. The codifier, though not perhaps till centuries later, adopts his work. So especially in international law may advancement be hoped for from the results of private reflection and research. They become tangible when nations make them the subject of conventions, and because all nations are political equals, the influence of such conventions will depend less on the importance of the parties to them than on the merit of the provisions which they contain.

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