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THE VESTING OF SOVEREIGNTY IN A LEAGUE OF NATIONS

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The general movement in human society is from the simple to the complex. The family, expanding into the tribe, is the first political unit, and the will of the patriarch is its rule of conduct. Gradually the operation of that will becomes in some measure limited. Several tribes come to constitute a nation. The nation, as civilization advances, distributes governmental power among several depositaries. It creates departments, each wielding a portion of the sovereign power, and each to some extent independent of the others. Society is still national in character, but each country enters into certain relations to other countries. There is a law of the sea, as to the nature of which it is desirable, and perhaps necessary, that all of them shall agree. There is a law, that is generally recognized, of international relations, in many matters; made up of treaties and usages. It has been said that this international law is the only law worth studying by philosophers or statesmen, because it is the only one broad enough in its groundwork of facts to justify scientific confidence in its precepts. Without going to that length it is certain that the necessary breadth and complexity of any plan for the general and permanent regulation of international relations give it a special attraction to those interested in the development of political sciences, particularly in the present century.

As it is a natural step to proceed from the government of a family to that of a tribe, and thence to that of a nation, so it seems a not unnatural progress in social order to advance from the government of a nation to the government of the relations of nations to each other.

No doubt such an advance would have seemed, before the nineteenth century, an idle dream to most of those capable of forming an opinion as to its possibility. But the extension of the practice of international arbitration during that century, and the first Hague Peace Conference at its close, together worked a marked change in public sentiment. Then came the second of those Conferences, which was a friendly meeting of the whole Society of Nations. Never before had this Society come together. In 1907 it did come together, and reached an agreement on many points for the regulation of intercourse between its members. The field of this regulation was the earth, the sea and the air. But it left the enforcement of all such regulations to rest on public opinion and national good faith. The sanction did not prove sufficient. The world is now pledged, as a result of the wars of 1914-1918, to establish something that promises better. As expressed by the President of the United States, and already assented to by Great Britain, France, Italy, Germany, Austria-Hungary, and Turkey, it is to take the shape of a "general association" of nations. Its nature is thus determined by the last of his fourteen points, as formulated on January 8, 1918:

"A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike."

On July 4, this was expanded by supplying more definite sanctions, as follows:

"4. The establishment of an organization of peoples which shall make it certain that the combined power of free nations will check every invasion of right and serve to make peace and justice the more secure by affording a definite tribunal of opinion to which all must submit and by which every international readjustment, that can not be amicably agreed upon by the peoples directly concerned, shall be sanctioned."

Later the President added this new provision:

"Third, there can be no leagues or alliances, or special, selfish economic combinations, within the league, and no employment of any form of economic boycott or exclusion, except as the power of economic penalty by exclusion from the markets of the world may be vested in the league of nations itself as a means of discipline and control."

Will this league of nations be entitled to be regarded as in any degree invested with sovereignty?

Will it have, as to such matters as may be confided to its care, legitimate legislative power?

Most differences of view as to abstract questions arise from misunderstandings as to the terms in which the conflicting positions are stated. Let us begin at the beginning and ask first what sovereignty is.

Its possessor has a certain public *status*. The Austinian theory of law is, briefly, that sovereignty imports supremacy, and that as there can be no such thing as half supremacy, so there can be no such thing as half sovereignty. It must be complete, in order to exist.¹

Professor W. Jethro Brown, in his analysis of this theory, regards it as historically unsound. If it, he observes, be so that in every political community unlimited control must exist somewhere, it does not follow that it must be wholly undivided.

"In taking a different view, Austin sacrifices essentials to verbal precision. In reality, States are the creation, not of logic, but of history. We find them in every stage of being, becoming and ceasing to be. Whatever tests we may apply, we must always remember that the first function of a classification is to represent facts; that if facts are infinitely varying, the classification must not be inflexible. If we find that between the political community, which is an independent State, and the political community which is only a part of an independent State, there are other political communities more nearly allied to the former than to the latter, I do not see why we should allow any abstract doctrine of sovereignty to prevent us from applying to such States the obvious epithet of imperfectly independent, or even imperfectly sovereign. As Pradier-Fodéré remarked, metaphysically there ought not to be half-sovereign States, but historically there have been, and there may be again. In refusing to recognize the fact Austin is unhistorical. Further he endeavors to force upon the very diverse material with which the International lawyer is called upon to deal, a generalization suggested by a science avowedly limited to highly developed States."²

Austin's doctrine is unreservedly accepted by Professor Willoughby in his "Constitutional Law in the United States,"³ where he formulates it thus:

"Sovereignty . . . connotes, upon the one hand, complete freedom of its possessor from the legal control of any other political authority whatsoever; and upon the other hand, the right of absolute and exclusive jurisdiction over the legal rights and obligations of those subject to its authority, whether these be considered individually or as grouped into larger or smaller associations of men. As thus expressing a supreme will, sovereignty is necessarily a unity and indivisible. . . . It has however been widely asserted that the sphere of political authority may be divided into two or more distinct parts, and political organizations established in each which, within their respective fields

¹ Austin, *Jurisprudence*, Lect. VI.

² Brown, *The Austinian Theory of Law*, 141.

³ Willoughby, *Constitutional Law*, 4.

may be wholly independent of the control of one another. And this has been, and still is, often spoken of by the Supreme Court of the United States, as well as by other tribunals, as a division of sovereignty and as exemplified in the American constitutional system. The statement is, however, an erroneous one, and due to the confusion between the ideas of State and Government, and to a failure to distinguish between the possession of sovereignty by the State and the exercise by governmental agencies of powers delegated to them by this sovereign authority."

This position is, of course, contrary to plain and repeated decisions of the Supreme Court of the United States, according to which the United States by inherent right exercises certain of the powers of sovereignty within each State of the Union, while the State by inherent right exercises others.

It would also exclude any league of nations from a share in the possession of sovereignty over its component parts, for, if it were to have no legal control of any other political authority, it would not be worth having at all. The sole object of instituting a league of nations is that it should control some actions of nations towards each other and the ideal for such a league is that it shall be a combination of all nations.

The term "legal control" calls for an examination of the nature of law as related to sovereignty.

It is from sovereignty that law proceeds. But how is this process of establishing law conducted and its results proved and approved? How did this power of sovereignty to prescribe and enforce the process originate? On what footing does it rest? What is law?

An American lawyer, writing for readers who are themselves mostly American lawyers, may content himself, at this point, with a brief answer; for the material is furnished by the words of Mr. Justice Holmes, speaking for the Supreme Court of the United States in two recent cases. "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the Courts." . . . "The very meaning of sovereignty is that the decree of the sovereign makes law."⁴

The doctrine that a sovereign is exempt from suit "is not confined to Powers that are sovereign in the full sense of juridical theory but naturally is extended to those that in actual administration originate and change at their will the law of conduct and property from which persons within the jurisdiction derive their rights."⁵

A right of action, therefore, for the foreclosure of a mortgage on land in the Territory of Hawaii was held by the court, in the second

⁴ *American Banana Co. v. United Fruit Co.* (1909) 213 U. S., 347, 356, 358, 29 Sup. Ct. 511, 512, 513.

⁵ *Kawananakoa v. Polyblank* (1907) 205 U. S., 349, 353, 27 Sup. Ct. 526, 527.

of these cases, not to be enforceable against the Territory, which had acquired an interest in the mortgaged premises. Hawaii stood, in that respect, so far in the position of a sovereign that she could not be sued in her own courts without her own consent, notwithstanding the United States, as the owner of the Territory, was the ultimate sovereign. In other words, an absolute sovereign could legally vest a part of its sovereignty in a part of its dominions.

There are three great schools of legal thought for determining the rightfulness of a claim that a certain rule of human conduct is entitled to the place and name of a law. They are the historical school; the philosophical school; and the pragmatic school.

The historical school decides such a claim with special reference to its historical basis. It asks if the rule in question can be deduced from precedent, either directly or by analogy.

The philosophical school asks if the rule is one in harmony with the nature of things, and can be deduced or justified as an institute of justice and right.

The pragmatic school asks if the rule is one that can be justified as an institute of social convenience which works satisfactorily, and gives form to the ascertained good of certain customs and practices. It is, viewed thus, a jurisprudence of effects rather than of causes,—a *Wirklichkeitsjurisprudenz*.

Let us first ascertain if there is any historical justification for the conception of an association of independent nations, which agree in vesting in it a certain measure of authority over their mutual dealings with each other.

The Hanseatic League, formed by the main port towns in Germany, in the thirteenth century, was an association of over forty of these political units. They proclaimed war against Denmark in the fourteenth century and again in the fifteenth. In the latter case they had a naval force of forty ships and an army of 12,000 regular troops. They had a central government in a Bundestag of instructed delegates, and provided for settling disputes among themselves. They made several treaties of large importance, and while gradually reduced in number to three, Lübeck, Hamburg, and Bremen, played a large part in the direction of international commerce down to 1630.

Here was an exercise in international concerns of powers belonging to sovereignty by an international association of German communities. Sovereignty to a certain extent was in Germany. To a certain extent it was also in the Hanseatic League.

The treaty of Vienna provided (Art. 105) for a standing tribunal, to be chosen by those of the signatory Powers which were on or included navigable rivers, to settle the mode of navigation upon them. It was to be composed of "commissaries," who could make regulations on lines indicated in the treaty. The navigation of the Danube and the Rhine has been conducted in this general manner for over a cen-

ture. An inter-state tribunal, in other words, exerts, in this respect, powers of sovereignty.

The Congress of Vienna has been fitly described as "a council of the Powers, the object of which was to anticipate and control any differences arising between State and State."⁶ Such control by that and many later Congresses of a character more or less similar amounts to a subjection to rules prescribed by them, or to be prescribed under authority derived from them, which are enforceable in the territory of any of the signatory Powers. Most European railroads have for many years been operated under such a scheme. Mails between nations are transmitted according to a system directed by a universal Postal Union, functioning through a central bureau. Under our Immigration Act of 1907, the President is empowered to call an international Conference to frame international agreements or treaties to regulate all matters pertaining to the immigration of aliens into the United States. The stipulations of such a treaty, by the accepted principles of modern international law, could not be revoked or varied against the protest of any of the Powers represented. Each virtually consents to part with its sovereign authority over matters that may be thus left in subjection to orders of administrative officers.

The German *Zollverein* of 1833 came to control the general commerce of Europe, and was a mere association of sovereigns. Such associations may be more common when not of a political nature. Calvo⁷ would put these in a class by themselves. "There may be formed," he says, "associations between two or more different nations which without having a determinate political end, without constituting a true State in every sense of that word, assume nevertheless an international character and modify, in a certain measure, the manner of existence and the mutual relations of the parties. It is in this respect that these kinds of associations deserve to be ranked in the domain of international law. The German Customs-union, known under the name of *Zollverein*, is the most striking example we can present."

Each member of such a body joins as a sovereign with other sovereigns in exercising or giving effect to the exercise of sovereign power belonging to each, and, when exercised, constituting a sovereign act on the part of each.

In the early history of France sovereignty was regarded as held in part by the king and in part by the grand seigneurs. As it was put by Beaumanoir in the thirteenth century, the barons were sovereign in their baronies and the king was sovereign over all.⁸

⁶ Andrews, *The Historical Development of Modern Europe, 1815-1850*, 102.

⁷ *Droit International*, sec. 78.

⁸ "Chacuns des barons si est souverain en sa baronie, voirs est que est li roi et souverain par dessus tous." Here *baron* is used as including Dukes and Counts. Merlin, *Répertoire de Jurisprudence, Bar*, 483, 503.

So the Holy Roman Empire consisted of a combination of separate States, under an imperial sovereign, but most of the powers of government remained in the several States. Controversies between them were to be decided by authority of the empire, acting through Diets, Imperial Chambers, Councils, or Circles. Refusal to submit to such a decision might subject the recalcitrant State to the "ban of the Empire." In the sixteenth century the Elector of Saxony and the Landgrave of Hesse were deposed for such a cause. In 1757 a forfeiture by the King of Prussia of all his rights under the empire was decreed by the Aulic Council.

A similar procedure obtained in the German Confederation of the Rhine, created in 1806. The Act of Confederation expressly bound the confederating States "not to make war on each other under any pretext, nor to decide their differences by force, but to bring them under the consideration and decision of the Diet." In the Germanic Confederation of 1815 there was a similar provision.⁹ It might enforce its orders by what was known as a "Federal Execution," backed up by the military power of the Confederation. The enforcement of this kind of process was to be committed to some particular State or States, but they were not bound to accept the mandate. Such an execution issued in 1863, against Denmark, a member of the Confederation, to close the Schleswig-Holstein controversy; and was effectual.¹⁰

Following the same traditionary policies, the Diet of the North German Confederation, which was organized in 1866, under its constitution possessed compulsory authority over the component States; and so did the recent empire, under the Constitution of 1871.¹¹

The settlement of the Congo question also bears directly upon the present discussion.

In the proceedings resulting in the formation of the independent State of the Congo, sovereignty followed trade. The Conference of Berlin in 1884-5 gave a recognized *status* to the International African Association as a political entity, with a flag of its own; and for a number of years it and its successor acted as a sovereign power, with the general acquiescence of the Family of Nations. Here a private trading company of Europeans, subject to the sovereignty of Belgium, and really a part of the Belgian government, was recognized as possessing sovereign authority in part of Africa. It derived it also, according to a Declaration approved by the United States on April 22, 1884, from treaties of cession which it had made "with the legitimate sovereigns in the basin of the Congo and of the Niade-Kialun, and in

⁹ Annual Register, 1815, p. 391.

¹⁰ Essays by the Marquess of Salisbury on *Foreign Politics*, 62, 138.

¹¹ It was classed as a Confederate Empire, in view of the extensive powers retained by the component States. Hall, *International Law* (7th Ed.) 23.

adjacent territories upon the Atlantic" . . . "for the use and benefit of free States established under the care and supervision of the said Association."¹²

In 1889, by a "General Act", adopted at Berlin, by Great Britain, Germany and the United States, and assented to by "his Majesty Malietoa, King of Samoa," it was stipulated that any future dispute as to "the rightful election or appointment of King or of any other Chief," or his powers, should "not lead to war, but should be decided by the Chief Justice of Samoa." That officer was to be an Englishman, American or German. His jurisdiction was to be much like that of the League of Nations now proposed, and extend to any differences that might arise "between either of the treaty powers and Samoa." As to these the provision was that "Such difference shall not be held cause for war, but shall be referred for adjustment on the principles of justice and equity to the Chief Justice of Samoa, who shall make his decision thereon in writing."¹³ Here four Powers united in creating a judicial forum in which to decide all disputes between them arising as to a certain territory, and it was maintained in working order for some ten years.

Arrangements of this nature between sovereigns set up what has been styled a *condominium*, or *consortium*. The territory over which their jurisdiction may extend is subject to two masters. Relations are created which the principles of public law may be invoked to protect. They were thus invoked and applied in a recent suit before the Supreme Hanseatic Court (*Oberlandesgericht*) of Hamburg. It concerned the effect of the "International Union for the protection of Literary and Artistic Works," having its seat at Berne. In this action for the infringement of an Italian copyright, brought in Germany by an Italian, the defendant (in 1917) claimed that, Germany and Italy being at war, the action could not be maintained. The Court, while regarding a particular copyright treaty which had existed between these two governments as abrogated by the war, said that the Union, composed of ten States, was a *Consortium* not capable of being dissolved by a state of war between only a part of its members; that such an international union was a legal entity; and that rights constituted under it in favor of individuals survived the war and could be enforced during the war in the court of one belligerent by the subjects of another.¹⁴

How far, now, can we expect the philosophical school of legal science to deal with this question of divided sovereignty?

Sovereignty is that from which law derives its sanction. According at least to American conceptions (and they are fast becoming those

¹² 23 U. S. Stat. at L. 781.

¹³ 26 U. S. Stat. at L. 1497.

¹⁴ (1918) 3 INTERNATIONAL LAW NOTES, 26, 48.

professed by the rest of the world also) the right of a sovereign to exist depends on the consent of his people. They choose or recognize him for their own benefit. As they grant, so they can limit his exercise of the sovereign power. They can retain part of it in their own hands, ungranted, but kept in reserve for future use, should they deem it necessary.

If they can thus divide sovereignty into parts, one vested in an active agent and one held back, why cannot a division be made on a basis of vesting part of the whole of sovereignty exclusively in one public agency and the rest of that whole in another agency? Everything is referable to the consent of the constituents. If private individuals can create a sovereign State, whether by successful revolution or peaceful agreement, why should not several sovereigns have a like power, although its exercise may cost each a part of his sovereignty?

The late Professor Gray, in considering the work of the Hague Peace Conference of 1907, and its project for setting up an International Court of Arbitration, concludes thus:

"When that is done, the nations which unite to establish it will become an organized body, which will have the court as an organ. The court will lay down and follow general rules. If the nations who have united to establish the court unite to declare that they will join in carrying out its decrees by force, if necessary, then the rules will become Law in the strictest sense, and each of the nations parties to the establishment of the court will have legal rights and legal duties."¹⁵

How, now, will the possession of sovereignty by a League of Nations be regarded by the pragmatic school of legal thought?

It will pay little attention to philosophical theories. Such light as history can give it will earnestly seek. It really has but one question to ask, namely, Will such a league, so far as it might be given sovereign power, be competent to hold and administer it to the advantage of all concerned?

Pragmatism naturally relies most on recently established facts. If they are the echo of those long since ascertained, so much the better. The test is proved practical utility, if there are means for determining that, and if there now are not such means, then a practical utility in the course of future events that can be fairly presumed from our present knowledge of what it is given men to know. The American pragmatist does not have to look far for division of sovereign power which has worked well for over a century, and is working well to-day. The judgment for over \$12,000,000 recovered in the Supreme Court of the United States by the State of Virginia against the State of West Virginia is a striking proof of it.¹⁶ The sovereign character of these

¹⁵ Gray, *Nature and Sources of Law*, 127.

¹⁶ *Virginia v. West Virginia* (1914) 238 U. S. 202, 35 Sup. Ct. 795.

States may be disputed by some legal scholars; but they cannot deny that in fact the American States undertook to vest a somewhat similar jurisdiction in the Congress of the United States by the Articles of Confederation, and that it soon afterwards was effectively exercised in a controversy between Connecticut and Pennsylvania; nor that under the present Constitution of the United States the Supreme Court has long administered, with perfect success, a similar grant of power from the American people.

It was a remark of Huxley that of all living things "man alone seeks a higher life in voluntary association." It is the great achievement of the human race. Bees do not associate nor cattle herd to advance their mode of life, but to preserve it. As the life of mankind grows larger and reaches farther, it is logical and fit that nations should frankly recognize the movement by adapting their governmental institutions to it. They have surrendered the theory of a divine right to sovereign power in State or Church. They take but a short step further in asserting their right to associate on terms of dividing sovereignty. No philosophical subtleties as to what sovereignty is should be allowed to fetter their upward course. It naturally leads to creating, by their common consent, a tribunal of public opinion and public justice, whose decrees in support of public order shall bind the world.