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THE CONCEPT OF PUBLIC SERVICE*

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Everyone is acquainted with the celebrated theory of the Three States, formulated by the great thinker, Auguste Comte. He taught that human thought passes successively through three stages: the theological, during which it is dominated by a belief in the supernatural and its influence upon terrestrial affairs; the metaphysical, during which man connects all the phenomena which he beholds with his senses to entities which are foreign to his experience; and, finally, the positive, during which man has learned to free himself from theological or metaphysical beliefs, which he relegates to the domain of the unknowable, and admits as reality only directly observable facts.

At the period in which we live the above emancipation is complete in the field of the natural sciences. The physician or chemist no longer explains the phenomena which he observes by the existence of superior powers as their productive and conscious cause. They place no longer behind visible phenomena invisible metaphysical entities, which might serve as their support and at the same time as their explanation. Philosophers may discourse endlessly upon so-called metaphysical principles. The scholar, as scholar, takes no notice of them. After a long effort he has succeeded in freeing himself from religious and metaphysical ideas and to consider phenomena only by themselves, without regard to unknown or unknowable causes from which they may originate. In the realm of psychological sciences the emancipation of beliefs from the supernatural and the metaphysical is perhaps less complete. Nevertheless, in modern times a science of positive psychology has sprung up, which has eliminated from its domain all notion of a metaphysical entity as a support for psychological phenomena.

But the above is not true in the social and juridical domain which has remained encumbered with metaphysical entities, to which, owing to the ever persisting influence of religious need, we still tend to attribute a

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supernatural power and a direct and sovereign effect. Notwithstanding the influence of Auguste Comte and the entire positive school, our social and juridical learning is still encumbered with actual mysticism; and one could rightly speak of a social religion or mysticism.

The most persistent source of this metaphysical need and of this social mysticism is doubtless the concept of subjective right, a concept inadmissible in positive science, and concerning which Auguste Comte has justly said:¹

"The word *right* [referring to subjective right] must be discarded from any true political language, as the word *cause* from any true philosophical language. Of these two theologico-metaphysical concepts the one (that of right) is henceforth immoral and anarchical, just as the other (that of cause) is irrational and sophistical. . . . A true right can exist only in so far as definite authority can proceed from supernatural wills. The metaphysics of the last five centuries introduced so-called human rights, which admitted only of a negative function, for the purpose of fighting these theocratic authorities. Whenever the attempt was made to give to them a truly organic place, they soon manifested their anti-social nature, by always tending to hallow individuality. In the Positive State which does not recognize any celestial title, the idea of right disappears irrevocably: . . . In other words, no one possesses other rights than that of always doing his duty."

People cling nevertheless to this idea of subjective right, a purely metaphysical concept, inexplicable and unexplained, which brings in its train a mass of other ideas as inexplicable and unexplained, for example, the ideas of juristic person, subject of rights, transfer of rights. And so we find the juridical and political sciences encumbered with metaphysical rubbish, from which certain individuals and myself have struggled for almost forty years to free them.

I

Nowhere has this metaphysical idea of a subjective right maintained itself so strongly as in the field of general public law and in the idea of the state. Indeed it has been attempted to make of the latter a real being, invested with a superior will, a will of power, *imperium*, sovereignty (all these terms are synonymous), commanding personality, the possessor of a subjective right distinctive in character, which enables it never to be limited, except by itself, and to impose as such its will upon all other wills which may be within a particular territory. All that is pure imagination, mysticism, or metaphysics. The state is a fact, nothing but a fact—the fact of political differentiation.

It is said that a state exists when in a given society, within a particular territory, there is a person or a group of persons stronger in fact than the rest and able to impose upon the others, by material constraint, obedience to his or its will. This power of constraint was established as the result of a slow and complex evolution, which has varied with

¹ *Système de politique positive* (3. éd. 1890) 361.

different countries. It was brought about sometimes by moral forces, sometimes by economic forces, sometimes by purely material force. It makes little difference which. This greater force became organized and thereafter it was said that a society was a state. Ihering and Treitschke were therefore right when they said that the state is power. But we must add that the state is power limited by law, as I shall prove a little later.

This power actually established has often been a cause of misery, of suffering and of death for the people. But if it has often done wrong, it has also often been the source of good; and Ihering could justly say that the absence of a state would constitute for society a much greater misfortune than the existence of a tyrannical and cruel state. On the whole a state renders more service than it causes harm. Early in the history of mankind people became accustomed to regard it as legitimate and its power as entitled to obedience. They naturally attempted to explain and justify this power, and in doing so had recourse first to theological process, and thereafter to metaphysical imagination.

It was said at first that the power of the state was a creation of the divine power, but when religious belief waned, appeal was made to metaphysical belief, the foundation of which is not more substantial. It was said that the state was a juridical person in whom was vested the public power conceived of as a right. Or it was affirmed that the sovereignty was vested in the nation as such because its personality was wider than the individual personalities and consequently could enforce its orders with respect to them, the state being thus nothing but the organized nation. Or it was said, after the German school, that the state is, that the state as such possesses sovereign power, that it exercises it through its organs, which express only its will, the nation being at times one of these organs.

I call brief attention to these doctrines to show to what inextricable complications the persistence of religious and metaphysical conceptions in the political and social science leads. For many centuries the nature of the state has been disputed, and yet no step forward has been made, could be made, in its solution.

II

And even this is nothing when compared with the impotence and confusion resulting from the attempt to determine the principle of a juridical limitation placed upon the power of the state.

That the state is power is not doubtful, whatever the conception which we may entertain concerning it (the state). But man feels an irresistible need of finding the principle of a legal rule limiting this power. This is an aspiration which, one might say, has filled the human heart and mind ever since there were men conscious of their individual and social life. Today, more than ever, a solution of the problem is demanded. The modern man is imbued with the idea that those wield-

ing public power possess with respect to their subjects duties rather than rights. Saint Augustine as early as the fifth century wrote: "Those who command serve those whom they appear to command."² And President Wilson in his Labor Day Message in September, 1918, said of the great war: "It is war of emancipation. Not until it is won can men live anywhere free from constant fear or breathe freely while they go about their daily tasks and know that Governments are their servants, not their masters."³

And yet, if one maintains that the state possesses sovereignty, that is, that it possesses the subjective right to impose its will as such, if one maintains that the will of the state is sovereign, that is, that it has the characteristic of being never limited except by itself, and of being able to limit the extent and object of its action, it is quite impossible to fix a juridical limit for the state. Theories have not been lacking, but they have all remained ineffectual. This is particularly true of the individualistic theory, notwithstanding its celebrity and the great influence which it has doubtless had. It leads necessarily to Stirner's theory of anarchism and to J. J. Rousseau's and Robespierre's theories of absolutism. In addition it is powerless to determine the positive obligations resting upon the state and to limit its action in the domain of international relations or to lay the foundation of international law. To reconcile the limitation of the state with the principle that it is sovereign, the German authors have invented the doctrine of the self-limitation of the state. They teach that the state has the power of self-determination, but it may limit itself, either by the laws which it enacts, or by the conventions into which it enters, and that within the sphere of its laws and its contracts it is therefore limited by law, though remaining sovereign, because, in prescribing limits for itself, it limits itself only by its own will.

Ihering, the promoter of this doctrine, writes:⁴

"The authority of the State itself should respect the norms issued by it Only in this way is chance banished in the application of the norms; and in place of arbitrariness comes uniformity, security, reliability of the law. This is what we understand by *legal-order*, present to our mind when we speak of the *sovereignty* of right and law; and such is the demand that we make of the law if it is to correspond to that idea of it which we carry within us. It is the problem of the *legal State*.

"Law, therefore, in this full sense of the word means the *bilaterally* binding force of the statute; self-subordination on the part of the State authority to the laws issued by it."

Jellinek has taken up again this doctrine of self-limitation, and, notwithstanding his great skill, has not been able to prevent it being

² *De Civitate Dei* XIX, 14.

³ N. Y. TIMES, Sept. 2, 1918, p. 1, col. 3.

⁴ Rudolf von Ihering, *Der Zweck im Recht* (4 te. Aufl. 1904) 278, translation by Husik, under title *Law as a Means to an End* (1913) 267.

noticed that it is a veritable sleight-of-hand performance. A voluntary subordination is no subordination. A state is not really limited by law if this law is laid down and formulated solely by itself and can be changed by it at every moment as it pleases. Moreover, the German jurists do not in the least conceal the fact that this must be so, in the domain of international as well as in that of internal law, and they also do not fail to assert the same idea as Treitschke. They surround it with a juridical apparatus, but it is not on that account less baneful for the peace of the world. Jellinek, certainly the most eminent German jurist during the last forty years, has not hesitated to write: "Where the observance of international law comes into conflict with the existence of the State the rule of law must yield, as the State stands higher than any particular rule of law, as the study of the relations of internal public law have already shown us. International law exists for the States and not the States for international law."⁵

III

Does it not follow clearly that the juridical limitation of the state cannot be placed upon a solid basis except by denying both the personality and the sovereignty of the state? These are metaphysical conceptions which are without reality, an artificial creation of the human mind, which lead to absolutist policies within and to policies of conquest and plunder without. The individuals invested with public power are men like the rest. They are neither the representatives nor the organs of a supposed sovereign collectivity. Like all the other members of the social body, they are subordinated to the rule of law. Both those in authority and those governed are subject to the law and it is this subordination which constitutes the subordination of the state to the law.

That a rule of law imposes itself upon all people belonging to a given society is not subject to serious dispute. The social fact itself is above all a fact of solidarity by the division of labor. People have united in society and live together because they have a certain number of identical needs which they can realize only through a common life. But they remain united in society mainly because they have different needs and also different aptitudes and because they can secure the satisfaction of these wants by an exchange of reciprocal services owing to the different aptitudes of each. Nearly a century ago Hegel showed that we could find in this the constitutive element of all human society; he called it the system of needs. The demonstration was taken up again and made in a final manner by Durkheim about twenty years ago in his excellent work, *De la division du travail social*.⁶

As man can live only in society and as a society cannot live except

⁵ *Allgemeine Staatslehre* (1900) 339.

⁶ (1893).

by an exchange of reciprocal services, owing to the different aptitudes of each, every man from the very fact that he lives in society has the imperative duty to develop as far as he can his individual activity, his personal aptitudes, and to do everything corresponding to his situation in the society and to his individual capacity. This social duty imposes itself upon all members of the collectivity without exception. Upon it every juridical system is based.

But, it will be objected, this concept of social duty is itself a metaphysical concept just like the concept of right, and if one rejects every metaphysical concept one can speak no more of duty than of right. The objection is not to the point because I have not in view the correlative of a right when speaking of duty. I do not have in view a certain subordination of one will to another. In saying that all men living in a society have the duty to develop their personal activity so far as possible, I mean to say only that the wills are naturally, and as a consequence of the social fact itself, subjected to the social discipline, and that if they do not conform to it, a certain social reaction, a social disorder, will necessarily follow which reacts upon the individuals themselves.

Individuals are subordinated to the social discipline, to the social law, just as all beings of this world are subject to a certain law, just as the cells that make up a living being are subject to the biological law of their being. Man, however, may become conscious of his subordination to such law; and it is probable, on the other hand, that the cells of which a living being is made up are not conscious of it. And in this way I answer at the same time the objection which has been made often to all positive doctrines and which, under different forms, has been constantly made to my theory of rights and of the state, the objection, namely, that the concept of duty cannot be based upon a fact, but only upon some higher principle. That is true if one regards duty as the correlative of a right, the subordination of an inferior will to a superior will. It is not true if, like myself, one regards duty as the condition of a more or less conscious being governed in his action by a natural law. This law shows itself to us in the character of a normative law because it is applicable to conscious beings; but, in final analysis, it is not different from the laws governing the physical world or the animal world.

We do not think of speaking of economic rules or of rules of custom as being connected with a superior principle or as having a metaphysical basis. Rules of law are never anything but economic rules or rules of custom which at a given moment acquire juridical character because the collective consciousness thinks that they are of such an importance for the social life that they should receive social sanction. If rules of custom and economic rules have an exclusively social and positive basis, I do not see why it should be otherwise with juridical rules. But however that may be, this question is of little importance. The existence of a rule of law which imposes itself upon all men living in society must be affirmed as an indestructible postulate, whatever basis may be given to

it, and it is this rule of law which limits positively and negatively, not the sovereign person of the state, which does not exist, but those in authority, that is, the individuals, in whom the power of coercion is in fact vested in a particular territory.

IV

Persons in authority are individuals, like the rest. Whatever the name given to them or assumed by them—kings, emperors, consuls, presidents of a republic, senators, deputies—their will is human and has no special character to give it any superiority whatever over other wills. Only they wield in fact a power greater than the other individuals. Just like these, they are subject to the rule of law which imposes upon them the duty to act according to their peculiar aptitudes and to employ the greatest force at their command for the realization of the social needs. Among these needs there are some of such a nature that if the activity which assures their realization were interrupted for a single moment, such a disturbance would result therefrom for society that its very life might be imperilled. The persons in authority are therefore under a juridical duty to employ the greatest force at their command to assure the accomplishment without interruption of these activities of collective interest which, at a given moment, are indispensable in a particular society in order that it may live and develop.

And this is the fundamental concept of *public service*, which I define: Every activity of general interest which is of such an importance to the entire collectivity that those in authority are under a duty to insure its accomplishment in an absolutely continuous manner, even by the use of force. Those in authority are thus under a duty to insure without interruption the operation of the public services, because they are, as members of the society like all the rest, subject to the social discipline which obliges them to act in conformity to their condition and means of action.

It will be perceived that if those in authority have the duty imposed upon them to insure the operation of public services without interruption, they may legitimately do all acts, formulate all orders, and accomplish all material operations whose aim it is to secure the operation of public services. If they meet with resistance they can legitimately overcome it by force, but in so acting they do not exercise a claim of power, a sovereignty. They fulfill only the duty which the rule of law has imposed upon them, and if the people governed are obliged to act upon the orders of those in authority, they in turn submit only to the rule of law.

The state thus ceases to be a sovereign power which commands. It is a coöperation of public services, constituted, regulated, directed, and controlled by those in authority, who in doing so fulfill the obligation imposed upon them by the rule of law based upon the social solidarity.

Logically it follows that obedience is owed to those in authority only so long as they command with reference to a public service, and to the extent that they act toward the same end. It follows also that in all well organized countries there should exist a right of recourse against all acts whatever of those in authority which exceed the aim of public service, be it through an act of legislation, or through an individual act. French public law is very advanced in this respect owing to the remarkable procedure known as *recours pour excès de pouvoir*.

V

This concept of public service, which in my opinion occupies the first rank in the public law of all modern nations, has met nevertheless with some objections. It is said in the first place that it is a vague and changing concept. I deny that it is vague. It is doubtless changing; and I see in that a proof that it is true.

The concept of an activity which is of such an importance for the social life that it cannot be interrupted for a single moment is something very plain and precise. But it is certain that the nature and number of the activities of collective interest which present this character are greatly varying. The rôle of the state, the extent of its action, must necessarily vary according to times and countries; and there is no doubt that at the present time it is increasing every day. For a long time people asked from the state only protection against an enemy without, order and security within. Only three public services were discerned: that of war, to protect the territory and the collectivity against foreign attacks—that of police, and that of justice, in order that security, tranquility, and order might reign in the country.

Today it is recognized, on the other hand, that the state has obligations much more extensive and much more numerous. Because of the constantly increasing substitution of a national for a domestic economy we expect the state to insure the accomplishment of activities of a greatly differing kind, which become so many public services, for example, common carriage, the postal and telegraph service, the transmission of electric power, and a whole series of different activities, the number of which is increasing every day. On the other hand, the modern conscience ascribes to those in authority new duties in the social relations, and also for the alleviation of suffering and misery, and to assure the intellectual and moral development of individuals, from which a whole series of different public services have arisen, particularly in matters of charity and education.

The number and extent of the services is after all of little importance. What is essential to understand is that the concept of state sovereignty is disappearing to give place to the concept of public service. We see no longer in the state, we should no longer see in it, a power that commands, but only persons in authority who organize public services and

insure their operation because the social rule makes it their juridical obligation. Hence, public law is no longer the totality of rules governing the relations between the state power and its subjects. It is the totality of rules that have been established for the organization and management of the public services. Law is not the command of a sovereign state; it is a by-law governing a service or a group.

An administrative act is a juridical act of the same kind and character as private juridical acts if both are considered with reference to their internal nature. Certain legislations, such as the French, may, of course, establish different tribunals for the adjudication of the disputes which may arise from either group of acts; this difference in jurisdiction does not arise from the juridical nature of the acts considered, but solely because of a difference of aim to which each group responds. At all events, the administrative act has always the same character because it pursues always the same end—the realization of a public service. The administrative act is not sometimes the act of an authority which commands, sometimes the act of an official who manages a service; it is always an act of management. The elaborate theories which have been formulated in certain countries, and especially in France, in order to establish two categories of administrative acts, one having reference to acts of administration, and the other to acts of authority, do not correspond to any reality and rest upon no basis.

Those in authority are obliged both to organize the public services and to insure their operation according to the law of such service. It follows that those governed ought to have means of recourse of a jurisdictional character which will guarantee the performance of this double obligation. The second is strongly sanctioned in France by the recourse, the name of which I have already mentioned, the *recours pour excès de pouvoir*. Anyone interested is competent to demand from the high jurisdiction, which with us is the *Conseil d'Etat*, the annulment of any act whatever emanating from any administrative authority whatever, which is alleged to have been done in violation of law. The petitioner does not have to prove the existence of a right. He alleges only that those in authority or their agents have violated the law of the service, and if he proves it the high court annuls the act complained of. A legal proceeding, flexible and energetic, which protects the subject better than any other against administrative despotism, and which has been established under the constantly growing influence of the concept of public service.

VI

Nowhere does the disappearance of the concept of sovereignty and its replacement by that of public service appear more clearly than in the development, increasing from day to day in most of the states and notably in France, of the recognition of the pecuniary responsibility of the state with reference to individuals who have been injured in the

operation of a public service. As long as the concept of the sovereignty of the state was dominant, the irresponsibility of the state was logically deduced therefrom. Sovereignty and responsibility are indeed two notions which are inconsistent. Sovereignty may be limited of course, and, according to the individualistic conception, it is limited by the right of the individual, just as it limits the latter's rights. These reciprocal limitations are regulated and can be regulated only by the legislative function of the sovereignty itself, constituting the law of the land. In the end it is the sovereign state that creates the right, and one cannot admit, therefore, that it can be responsible. According to the traditional conception, responsibility implies the violation of a right; and he who creates a right by his sovereign will cannot violate it. As in monarchical countries "*le roi ne peut pas mal faire,*" and hence cannot be responsible, so the democratic state, which is only the organized sovereign nation, cannot commit a wrong, cannot be responsible.

It cannot be responsible by means of the law, which is the mere expression of its sovereignty. Nor can it be responsible on account of any executive, jurisdictional, or administrative acts. If these acts are in conformity with law, the question of responsibility does not arise either with respect to the state, or with respect to the public official. If they are opposed to law, it does not arise with respect to the state, since it has made the law, has created the right, and has willed that this law be enforced. If it is not executed, or if it is violated, the official has substituted his own will for that of the sovereign state. There is therefore only one will that can be responsible—that of the public official.

All that was very logical, so logical that the system appears to have remained almost intact in many countries and notably in England and in America. In France, on the other hand, the notion of the responsibility of the state penetrates every day more into the domain of public law, and that is both a consequence and a proof of the idea here developed—the constant substitution of the concept of public service for the concept of sovereignty. If the state is obliged to organize public services and to insure their operation, by that very fact it is obliged to repair the harm which may result to one or more individuals from the absence of a public service or from its bad operation. We may say that the principle is today definitely recognized. Each time that an injury is done to an individual, in connection with a public service, the courts condemn the state to repair such injury. The decisions of our *Conseil d'Etat* to this effect are very numerous. They no longer distinguish, as they formerly tried to do, between the different public services. They no longer speak of public services of authority and public services of management. For example, they no longer distinguish between the public services of police as services of authority, in connection with which the state could not be responsible, and the public services such as the postal service, that of public instruction, of

public works, in connection with which the responsibility of the state might be invoked. The principle of the responsibility of the state is affirmed and applied in the one case, as in the other.

It even seems that a state of law is being formed according to which the responsibility of the state may be invoked though there has been no faulty operation of the public service, though no agent of the state can be charged with any fault or negligence. In other words, the state is looked upon as an insurer of the social risk incurred by the subjects on account of the administration of the public services. These are instituted and operated in the interest of all. Concomitantly it seems just that the collective treasury should repair the prejudice which has been caused to some in the interest of all. Several decisions of the *Conseil d'Etat* have already sanctioned this idea. It should be added that the converse should also be true, that is, if the operation of the public service has been the occasion of exceptional benefit for one or more individuals, they should be obliged to account therefor to the common treasury and be compelled to pay into it a sum equivalent to the benefit received. Indeed it is nothing but the application of the great law of social solidarity that I am endeavoring to set forth in this study.

The idea of the responsibility of the state penetrates the modern public law so profoundly that the time is not far off when it will be applied even to the state in its legislative activity. Of course, if a law prohibits a harmful activity, which is in itself contrary to law, it should not award an indemnity to those who, taking advantage of the previous silence of the law, engaged in this activity and now find themselves deprived of the illegitimate profit which they derived therefrom. When laws were enacted in Switzerland and in France prohibiting the manufacture, traffic, sale or consumption of poisonous beverages, such as absinthe, the state owed no indemnity to the manufacturers or dealers who would suffer, as a result of the prohibition, a certain and very considerable loss. But if, on the contrary, the state should forbid to individuals the exercise of a certain activity, perfectly lawful in itself, in order to confer upon the state a monopoly thereof, as the legislators of Uruguay and Italy have created a monopoly of insurance, there is no doubt regarding its duty to reserve the principle of indemnity for the benefit of those who have been injured by such legislation, and if it has not done so, the courts are competent to award to such parties a just indemnity.

This idea, I repeat, penetrates more and more the modern juridical consciousness. Numerous applications are made of it by the French courts. And if I have dwelt upon it somewhat at length, it has been because to me there is no better proof, on the one hand, of the progressive disappearance of the idea of sovereignty, and, on the other, of the raising of the fundamental concept of public service to the first rank in modern public law.