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COMMENTS

OUTLAWRY OF WAR—*An Editorial*

It would be, indeed, a lasting monument to the law, if it should come about that through its agency, the greatest of all human evils, war, were abolished. And there is reason to hope that such may be the case. The international correspondence on the subject, so far as the public is privileged to know it, indicates the interested seriousness with which the nations regard America's proposal for a multi-lateral treaty eliminating a resort to war. This kindly attitude, in a measure, compensates for the coldness with which Russia's total disarmament proposal was received, for the outlawry of war certainly implies eventual disarmament. No good could come from solemn agreements never to resort to war, but continued competition in preparing for what is never to be.

The juridical implications of the theory of outlawry in connection with war are far reaching. It is proposed to get rid of a vast social octopus by means of law. The question is, can it be done? If we look into the history of juristic science, as Dean Pound has pointed out, we find two dominant ideas of law which have developed side by side, now the one, now the other exercising the greatest influence. These two notions are law as it is and law as it ought to be. The one idea contains within it a negation

of the theory of growth by conscious direction; the other assumes and encourages such growth and direction. The one makes for a retention of old ways of thinking and doing; the other looks to new ways, and better.

The proposal to outlaw war should enlist the interest of lawyers for it is consistent with modern tendencies in juristic thought. It insists upon regarding law as a human agency for controlling conduct rather than a colossal Mumbo-Jumbo before which to fall down and worship. It posits for society certain desired ends and assumes that law can be fashioned and molded so that ends may be realized.

And is there any sound reason why there can never be an ordering of international society upon a basis of peace as well as upon the supposition that since there have been wars in the past; there must necessarily continue to be wars in the future? Law has been consciously employed to change the ordering of human society in just this way. The great gain of modern civilization lies in its having taken private disputes out of the hands of the disputants and having submitted them to scientifically trained jurists for determination according to accepted juridical theories. In the story of the development of legal ideas and legal experience there is nothing to indicate that the same progress may not be made in our international civilization, and made by the same means and in the same way.

Subtle distinctions cannot be made between "aggressive" wars and "defensive" wars, however, if outlawry is to be effective. Outlawry of war must indeed be outlawry and there is no need for the law prohibiting certain kinds of war and legitimatizing other kinds. No reservations of "defensive" rights are necessary. No war has ever been waged in modern times which each combatent did not proclaim a "defensive" war. No nation admits that it deliberately undertakes "aggressive" wars. The matter of actual defense against an invading enemy is not proper subject matter for treaty negotiations. It could not properly be regarded as "war." Such defense could not be outlawed by treaty since no treaty renouncing such rights would be binding. The insertion of such a clause could have no more legal effect than were A to agree with B that if the latter attacks him with a deadly weapon, he will not try to save his life.

So it is that all war must be placed beyond recourse. The moral effect of this upon the world is certain to be that international thinking will, perhaps gradually, but surely, eliminate the possibility of war between nations. With the combined forces of law, religion and education arrayed against it, war will be so deprived of the world old glamor of respectability that it, like private war, will become but a crude relic of days when ideas, reason and human welfare prevailed only when combined with force and might. And all too frequently this coincidence has failed to exist for it has often happened that brute force has been upon the side of ignorance, stupidity and greed. There would seem to be little necessity for argument that it is the plain duty of an enlightened legal profession to throw its influence and place its technical skill at the disposal of a cause with such great potentialities for good.