THE LAW OF NATIONS

AN INTRODUCTION
TO THE
INTERNATIONAL LAW
OF PEACE

FIFTH EDITION

J. L. BRIERLY

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PREFACE TO FIFTH EDITION

THE purpose of this book remains what it was when it was first published in 1928. It is not intended as a substitute for the standard textbooks on the subject, but as an introduction for students who are beginning their law courses, or, I hope, for laymen who wish to form some idea of the part that law plays, or that we may reasonably hope that it will play, in the relations of states. That question cannot be answered by *a priori* methods which lead too often either to an under-estimation of the services that international law is already rendering, or to an equally mistaken assumption that it offers us the key to all our international troubles. The truth is that it is neither a myth on the one hand, nor a panacea on the other, but just one institution among others which we can use for the building of a better international order.

J. L. B.

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I

THE ORIGINS OF INTERNATIONAL LAW

§ 1. *The Rise of Modern States*

THE Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another. Rules which may be described as rules of international law are to be found in the history both of the ancient and medieval worlds; for ever since men began to organize their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations. But as a definite branch of jurisprudence the system which we now know as international law is modern, dating only from the sixteenth and seventeenth centuries, for its special character has been determined by that of the modern European state system, which was itself shaped in the ferment of the Renaissance and the Reformation. Some understanding of the main features of this modern state system is therefore necessary to an understanding of the nature of international law.

For the present purpose what most distinguishes the modern post-Reformation from the medieval state is the enormously greater strength and concentration of the powers of government in the former.

The national and territorial state with which we are familiar today in western Europe, and in countries which are founded on, or have adopted, western European civilization, is provided with institutions of government which normally enable it to enforce its control at all times and in all parts of its dominions. This type of state, however, is the product of a long and chequered history; and throughout the Middle Ages the growth of strong centralized governments was impeded by many obstacles, of which difficulties of communication, sparsity of population, and primitive economic conditions, are obvious illustrations. But two of these retarding influences deserve special notice because of the imprint which they have left even to this day on the modern state.

The first of these was feudalism. Modern historical research has taught us that, while it is a mistake to speak of a feudal *system*, the word 'feudalism' is a convenient way of referring to certain fundamental similarities which, in spite of large local variations, can be discerned in the social development of all the peoples of western Europe from about the ninth to the thirteenth centuries. Bishop Stubbs, speaking of feudalism in the form it had reached at the Norman Conquest, says:

'It may be described as a complete organization of society through the medium of land tenure, in which from the king down to the lowest landowner all are bound together by obligation of service and defence: the lord to protect his vassal, the vassal to do service to his lord; the defence and service being based on and regulated by

the nature and extent of the land held by the one of the other. In those states which have reached the territorial stage of development, the rights of defence and service are supplemented by the right of jurisdiction. The lord judges as well as defends his vassal; the vassal does suit as well as service to his lord. In states in which feudal government has reached its utmost growth, the political, financial, judicial, every branch of public administration is regulated by the same conditions. The central authority is a mere shadow of a name.'[1]

Thus to speak of a feudal 'state' is almost a misuse of terms; in a sense the feudal organization of society was a substitute for its organization in a state, and a perfectly feudal condition of society would be not merely a weak state, but the negation of the state altogether. Such a condition was never completely realized at any time or anywhere; but it is obvious that the tendency of feudalism to disperse among different classes those powers which in modern times we regard as normally concentrated in the state, or at any rate as under the state's ultimate control, had to pass away before states in our sense could come into existence.

On the other hand, there were elements in the feudal conception of society capable of being pressed into the service of the unified national states which were steadily being consolidated in western Europe from about the twelfth to the sixteenth centuries, and influential in determining the form that those states would take. Thus when its disintegrating effects on

[1] *Constitutional History of England*, vol. i, p. 274.

government had been eliminated, the duty of personal loyalty of vassal to lord which feudalism had made so prominent was capable of being transmuted into the duty of allegiance of subject to monarch in the national state; the intimate association of this personal relation with the tenure of land made the transition to *territorial* monarchy easy and natural; and the identification with rights of property of rights which we regard as properly political led to notions of the absolute character of government, of the realm as the 'dominion' or property of the monarch, and of the people as his 'subjects' rather than as citizens. Feudalism itself had been an obstacle to the growth of the national state, but it left to its victorious rival a legacy of ideas which emphasized the absolute character of government.

The other influence which retarded the growth of states in the Middle Ages was the Church. It is not necessary here to speak of the long struggle between Pope and Emperor, although one incidental effect of this was to assist the growth of national states by breaking up the unity of Christendom. More significant in the present context is the fact that never until after the Reformation was the civil authority in any country regarded as supreme. Always governmental authority was divided; the Church claimed and received the obedience of the subjects of the state, and its claims were not always limited to the purely spiritual sphere. Even in England, always somewhat restive under papal interference, the idea of the omnicompetence of the civil power would have been

unthinkable. Men might dispute exactly how far the powers of each of the rival authorities extended; but that there were limits to the powers of the state, that the Church had *some* powers over the members of the state which it neither derived from, nor held by the sufferance of, the state, was certain. States might often act as arbitrarily as any absolute state of the post-Reformation world; they might struggle against this or that claim of the Church; but neither in theory nor in fact were they absolute. But just as the state was gradually consolidating its power against the fissiparous tendencies of feudalism within, so it was more and more resisting the division of authority imposed upon it by the Church from without; and this latter process culminated in the Reformation, which in one of its most important aspects was a rebellion of the states against the Church. It declared the determination of the civil authority to be supreme in its own territory; and it resulted in the decisive defeat of the last rival to the emerging unified national state. Over about half of western Europe the rebellion was completely and evidently successful; and even in those countries which rejected Protestantism as a religion, the Church was so shaken that as a political force it could no longer compete with the state. The Peace of Westphalia, which brought to an end in 1648 the great Thirty Years War of religion, marked the acceptance of the new political order in Europe.

This new order of things gave the death-blow to the lingering notion that Christendom, in spite of all its quarrels, was in some sense still a unity, and there was

a danger that the relations between states would be not only uncontrolled in fact, as they had often been before, but henceforth uninspired even by any unifying ideal. The modern state, in contrast with the medieval, seemed likely to become the final goal of unity, and Machiavelli's *Prince*, written in 1513, though it formulated no theory of politics, had already given to the world a relentless analysis of the art of government based on the conception of the state as an entity entirely self-sufficing and non-moral. Fortunately, however, at the very time when political development seemed to be leading to the complete separateness and irresponsibility of every state, other causes were at work which were to make it impossible for the world to accept the absence of bonds between state and state, and to bring them into more intimate and constant relations with one another than in the days when their theoretical unity was accepted everywhere.[1] Among these causes may be mentioned (1) the impetus to commerce and adventure caused by the discovery of America and the new route to the Indies; (2) the common intellectual background fostered by the Renaissance; (3) the sympathy felt by co-religionists in different states for one another, from which arose a loyalty transcending the boundaries of states; and (4) the common feeling of revulsion against war, caused by the savagery with which the wars of religion were waged. All these causes co-operated to make it certain that the separate state could never be accepted as the final and perfect form of human associa-

[1] Cf. Westlake, *Collected Papers*, p. 55.

tion, and that in the modern as in the medieval world it would be necessary to recognize the existence of a wider unity. The rise of international law was the recognition of this truth. It accepted the abandonment of the medieval ideal of a world-state and took instead as its fundamental postulate the existence of a number of states, secular, national, and territorial; but it denied their absolute separateness and irresponsibility, and proclaimed that they were bound to one another by the supremacy of law. Thus it reasserted the mediæval conception of unity, but in a form which took account of the new political structure of Europe.

§ 2. *The Doctrine of Sovereignty*

Out of the new kind of state which developed from the Reformation there arose a new theory of the nature of states, the doctrine of sovereignty. This was first explicitly formulated in 1576 in the *De Republica* of Jean Bodin, and since sovereignty has become the central problem in the study both of the nature of the modern state and of the theory of international law, it is necessary to examine its origins and its later development with some care.

Like all works of political theory, even when they profess to be purely objective, Bodin's *Republic* was deeply influenced by the circumstances of its time and by its author's sentiments towards them; indeed one of Bodin's merits is that he drew his conclusions from observation of political facts, and not, as writers both before and since his day have too often done, from

supposedly eternal principles concerning the nature of states as such. France in Bodin's time had been rent by faction and civil war, and he was convinced that the cause of her miseries was the lack of a government strong enough to curb the subversive influences of feudal rivalries and religious intolerance, and that the best way to combat these evils was to strengthen the French monarchy. He saw, too, that a process of this kind was actually taking place in his own day throughout western Europe; unified states were emerging out of the loosely compacted states of medieval times, and the central authority was everywhere taking the form of a strong personal monarchy supreme over all rival claimants to power, secular or ecclesiastical. Bodin concluded therefore that the essence of statehood, the quality that makes an association of human beings a state, is the unity of its government; a state without a *summa potestas*, he says, would be like a ship without a keel. He defined a state as 'a multitude of families and the possessions that they have in common ruled by a supreme power and by reason' (*respublica est familiarum rerumque inter ipsas communium summa potestate ac ratione moderata multitudo*), and he dealt at length with the nature of this *summa potestas* or *majestas*, or, as we call it, sovereignty. But the idea underlying it is simple. Bodin was convinced that a confusion of uncoordinated independent authorities must be fatal to a state, and that there must be one final source and not more than one from which its laws proceed. The essential manifestation of sovereignty (*primum ac praecipuum caput*

majestatis), he thought, is the power to make the laws (*legem universis ac singulis civibus dare posse*), and since the sovereign makes the laws, he clearly cannot be bound by the laws that he makes (*majestas est summa in cives ac subditos legibusque soluta potestas*).

We might suppose from this phrase that Bodin intended his sovereign to be an irresponsible supra-legal power, and some of the language in the *Republic* does seem to support that interpretation. But that was not his real intention.[1] For he went on to say that the sovereign is not a *potestas legibus omnibus soluta*; there are some laws that do bind him, the divine law, the law of nature or reason, the law that is common to all nations, and also certain laws which he calls the *leges imperii*, the laws of the government. These *leges imperii*, which the sovereign does not make and cannot abrogate, are the fundamental laws of the state, and in particular they include the laws which determine in whom the sovereign power itself is to be vested and the limits within which it is to be exercised; we should call them today the laws of the constitution. The real meaning of Bodin's doctrine can only be understood if we remember always that the state he is describing is one in which the government is, as he calls it, a *recta* or a *legitima gubernatio*, that is to say, one in which the highest power, however strong and unified, is still neither arbitrary nor irresponsible, but derived from, and defined by, a law which is superior to itself. In that he was following the medieval tradition of the nature of law, for in the Middle Ages men looked on

[1] See on this point M'Ilwain, *Constitutionalism and the Changing World*.

law not as something wholly man-made; they believed that behind the merely positive laws of any human society there stood a fundamental law of higher binding force embodying the wisdom of the past, and that positive laws must conform to this higher law if they were to have validity. The notion that legitimate power could ever be purely arbitrary is alien to all the legal thought of the Middle Ages, and in this respect Bodin's work made no break with the past. Medieval rulers might, and no doubt often did, behave arbitrarily; but that could not alter the fact that it was still by the law that the rightfulness or otherwise of their conduct must be judged; it was law that made the ruler, not, as later theories of sovereignty have taught us to believe, the will of rulers that made the law. Where Bodin broke away from the medieval tradition of law was in making his sovereign a legislator, for legislation was a function which that tradition did not readily admit; when a medieval ruler made new law men preferred to regard it as an act of interpreting, or of restoring the true construction of, the law as it had been handed down from the past.

In the form in which Bodin propounded the doctrine of sovereignty it raised no special problem for the international lawyer. Sovereignty for him was an essential principle of internal political order, and he would certainly have been surprised if he could have foreseen that later writers would distort it into a principle of international disorder, and use it to prove that by their very nature states are above the law. Bodin evidently did not think so, for he included in the