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Book Reviews

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BOOK REVIEWS

THE EQUALITY OF STATES IN INTERNATIONAL LAW. By Edwin De Witt Dickinson. (Cambridge: Harvard University Press, 1920. Harvard Studies in Jurisprudence, Vol. III.) Pp. ix, 424.

The doctrine of equality has proved as alluring and deceptive in the field of international as of municipal law. Until recently it has enjoyed almost universal acceptance. By the early political philosophers it was regarded as one of the immutable principles of the law of nature. To many of our modern publicists it has likewise presented itself as the sole rational basis upon which the legal relations of states can be properly adjusted. The very indefiniteness of the conception has served to commend it to popular favor. It seemed to voice the spirit of democracy in its vindication of the rights of the weak as against the strong. In the smaller states, in particular, the doctrine has been raised to the dignity of a religious creed; it has come to be looked upon as the veritable ark of the covenant, upon which the grasping hands of the more powerful states cannot be placed without endangering the peace of the world and even civilization itself.

On the other hand, it must be admitted that the publicists have often been troubled by the strange elusiveness of this so-called fundamental principle. The doctrine seemed to evade, if not to defy, strict legal definition. In certain quarters this characteristic has raised a suspicion as to the scientific value of the principle itself. Nevertheless, the majority of jurists continued to accept it as an article of faith, even though they were sometimes prone to express grave doubts as to its strict applicability in this wicked and perverse world.

To statesmen of the more powerful nations the doctrine has proved to be a veritable thorn in the flesh. They were generally prepared to recognize it in legal theory, but they were more frequently found to repudiate it in practice. The doctrine was, and is, manifestly incompatible with the facts of international life. Inequality, and not equality, is the essential characteristic of the relations of states both inside and without the circle of nations. The great powers have established an hegemony against which the smaller states have protested in vain. The age-long struggle between law and politics has been here transferred to the international sphere.

It has required no little courage on the part of the author to tackle this most perplexing question. Fortunately, Professor Dickinson is singularly well equipped both in scholarship and judgment to undertake the task. His study reveals a remarkable familiarity with the literature of international law, both ancient and modern, together with a thorough understanding of recent developments in diplomatic history and comparative government. The result is one of the most scholarly monographs of recent years in the field of international law.

This volume covers a wide range of subject-matter, including many phases of legal history, *rechts philosophie,* comparative government and practical politics. On the historical side the author has traced the origin of the principle of state equality back to the "applications to nations of theories of natural law, the state of nature and natural equality." This conception, it is interesting to learn, was not a part of the system of Grotius, but was the product of the naturalistic philosophy of the seventeenth and eighteenth centuries. The doctrine was "subsequently reinforceable by theories of sovereignty," and thus became "one of the primary postulates of *le droit des gens thorique.*"

The theoretical phases of the subject involve an analysis of the divergent interpretations of the phrase "equality of nations." A clear-cut distinction is drawn between equality in the sense of equality before the law, or, as it is often expressed, the equal protection of the laws, and equality in the sense of an absolute equality of rights and possibly of obligations. The former of these conceptions, as the author points out, is essential to the existence of any legal system, whether municipal or international. Moreover, it is compatible "with the grouping of states into classes and the attributing to the members of each class of a status which is a measure of capacity for rights."

It is quite otherwise with the second conception of equality which ascribes to all nations the possession and enjoyment of exactly the same rights and privileges. This conception is a pure, juristic abstraction of naturalistic origin and quite irreconcilable with the facts of present day international relations. The theory is usually presented, however, in the modified form of an equality not of rights but of capacity for rights. In this form, the doctrine represents a democratic ideal which the nations ought ever to keep before them in the development of the principles of international law.

Turning, then, to the more practical aspects of his subject, the author proceeds to examine in detail some of the most important legal limitations upon the equality of states. These limitations he classifies as either internal or external, or as constitutional or international, in character; that is to say, they may be imposed by the fundamental law of the state, or they may arise out of a state's peculiar relations with other members of the international community.

The chapter on the nature of the internal limitations on state equality is perhaps the least satisfactory in the whole work. The reciprocal relations of constitutional and international law, it must be admitted, have never been satisfactorily worked out. These relations vary not only from state to state but also raise many knotty legal questions within the states themselves. For example, the nature and range of the treaty-making power of the crown is still a disputed question in the English constitution. It is little wonder, in the circumstances, that Professor Dickinson has not succeeded in avoiding all of the treacherous pitfalls which waylay the investigator. Two or three of these difficulties may be briefly mentioned. Throughout this discussion the author often seems to identify the legal capacity of the executive with the power of the state itself. No clear distinction is drawn between the state

and the government of the state. The body politic, it is true, can act only through its duly constituted organs, so that for all practical purposes a constitutional limitation upon the capacity of the executive in respect to foreign affairs does operate as a restriction upon the international competency of the state. The distinction, nevertheless, should not be overlooked, since many of these limitations are concerned with the constitutional principle of the division of powers rather than with the international contractual capacity of the state itself.

Much more serious, however, is the author's tendency to read American legal principles into the interpretation of foreign constitutions. The political philosophy of John Marshall has taken hold upon him and has permeated all his thinking. But the constitutions of many foreign states have not the sacrosanct character of that of the United States. They are not the supreme law of the land in the strict American sense; on the contrary, they partake much more of the character of political than of legal instruments of government. This must needs be the case wherever the political organs of the state, and not the judicial, are made the guardians and final interpreters of the constitution. Many of the provisions, therefore, which seemingly impose important limitations upon the capacity of the state ought properly to be regarded in the light of political maxims rather than as true legal inhibitions. In other words, they are intended for the guidance of the executive or legislative departments of the government and not for the judiciary. For example, a member of the Swiss national assembly, it is safe to assert, would be greatly astonished to learn that Article 29 of the constitution, providing for the levying of low import duties upon certain articles, restricted the legal power of the state to enter into commercial agreements with outside nations. That the provision has not so worked out in practice is amply demonstrated by the adoption of a higher and higher scale of protective duties.

It is somewhat surprising at first to find that certain conventional limitations upon the war- and treaty-making powers of the British Empire are incorporated into the discussion of the general question of the legal competency of states. That there is ample warrant for treating the conventions of the British constitution as of equal value to the law of the constitution may well be admitted, but the author ought certainly to have explained the fundamental difference in character between the two, both from the international and constitutional standpoint. In the same connection, it may likewise be proper to add that Canada was not the first, nor is it the only self-governing colony to establish a department of external affairs whose authority encroaches, in fact if not in theory, upon the legal unity and supremacy of the English executive.

Even more surprising, however, is the author's failure to apply his realistic methods of investigation to the consideration of the practical value of many of these constitutional limitations in respect to foreign affairs. The principle of historical criticism ought to be equally applicable to constitutional provisions as to political theories. For example, the constitutional prohibition of the alienation of national territory is of singularly little value

to a defeated nation, as Turkey can testify. In all such cases it is evident that the right of conquest as recognized by international law overrules the express inhibition of the constitution. In other words, a constitutional provision regarding territorial integrity cannot be applied in the face of superior force. For all practical purposes, all such constitutional provisions have no international validity and do not operate as limitations upon the inherent power of the state to cede territory in case of necessity.

The chapter on the limitation of the political equality of states contains much new and interesting material. The author brings out clearly the essential distinction between the legal equality of states and their political equality in respect to international organization, and finds little difficulty in demonstrating the inapplicability of the principle of political equality to the great deliberative conferences of our day. No legal fiction can possibly place Hayti and Panama on an actual political equality with the United States or the great European powers. To disregard the existing disproportions in size, population and resources of the various states would violate the fundamental principle of democracy itself by placing the direction of the world's affairs in the hands of an insignificant minority of its inhabitants. As the author well states, "insistence upon the complete political equality in the constituting and functioning of an international union, tribunal or concert is simply another way of denying the possibility of effective international organization."

The supplementary chapter on the equality of nations at the Paris Conference is disappointing. It has manifestly been added as an after-thought in an attempt to bring the study up to date. It is, perhaps, too much to expect the author to add to his erudition as a scholar the still greater gift of prophesy, but the public had every reason to believe from the high quality of the preceding chapters that the discussion would involve something more than a repetitious résumé of some of the chief provisions of the treaty.

Notwithstanding this anti-climax, the book stands forth as a distinct landmark in the development of the principles of international law. There have been more than enough general text-books on international law. The need has long been manifest for a critical analysis of some of the so-called fundamental principles of the subject. The war, fortunately, has swept away many of the shams and fictions which have detracted from the true legal character of international law. The time has now come to rebuild its principles upon the sure foundation of international facts. To this great undertaking Professor Dickinson has made a most important contribution. He has attacked one of the most sacred of these international fictions and has made out an irrefutable case for a reconstruction of both the theory and practice of representation. The volume, in short, is a worthy addition to the Harvard Studies in Jurisprudence. It is sincerely to be hoped that this is only the first of a series of studies by the author in this general field.

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