

THE NEW ITALIAN SCHOOL OF PRIVATE
INTERNATIONAL LAW.

II.

IT will have been seen from the resolutions of the Institut de Droit International,^(a) and may be observed from a comparison of the theories of the latest writers, that the practical conclusions of the Franco-Italian writers command in substance the almost uniform support of the leading authorities in international law. Criticism of their theories will be found to be not so much against the conclusions as against the reasonings. Now two facts are to be noted. The first is, that it was chiefly the works of these writers, their eloquent propaganda, which produced the present approach to unanimity. The second is that but for their radical and far-reaching principles their zeal and eloquence would have been things impossible.

As I have said, it is not so much the originating of conceptions, as the combining of pre-existing materials that forms the chief structural work of the school. This is inevitable, as truth in jural science unfortunately precludes that originality, the striving after which is noted by Savigny as a particularly unprofitable form of juristic research. The most distinct feature of the system is the doctrine of nationality, a doctrine the force of which in public international law is of considerable importance. In private international law, however, its force is to be seen in the transformation it has effected in the theory of foreigners' rights.

(a) *Supra*, *Juridical Review*, v. 121.

NATIONALITY AND JUSTICE—COMITY.

That application of the doctrine of nationality which proclaims the international duty of justice to the foreigner as a man and as a member of his nationality has permanently changed the character of discussions in private international law. It is due to the Italian theory that the State's duty under the law of nations to extra-territorially recognise foreigner's rights, and extra-territorially apply foreign law has received such wide recognition. Now as Mancini shows (Rev. D. I. vii. 354) the current theory of comity—the false idea that the civil condition of individuals out of their own country, and the force accorded to foreign law spring only from a generous concession—was the principal obstacle to the formation of a scientific doctrine of private international law. Two conclusions were derived from the idea of comity—one, that the State could arbitrarily set limits to the concession; the other, that in an entirely arbitrary matter there was no occasion to seek rational principles. The Italian theory has made possible a science of private international law; and it has vivified foreigners' rights by placing them definitely under the protection of the law of nations.

It does not in the least detract from the importance of that achievement to find that "comity" had become with certain authorities merely a form intended to express the historical origin of the State's duty, not by any means to imply a denial of duty. Savigny, as Mancini points out, regarded the action of the State as a legal duty under the community of law of civilised peoples; although formally admitting comity as a possible origin of the duty's recognition. Lord Brougham (quoted by Story, 226) maintains that view as a judicial legislator—holding that a duty lay on the State, originating in comity. Other English judges denied that comity or courtesy was the origin of the Court's action—but rather the recognition of a legal obligation.

But the inevitable precariousness of foreigners' rights

under any theory in which mere courtesy played a part has been abundantly illustrated. Story attenuated to an extreme degree the force of Huber's and Voet's doctrine, making the mere temporary interests of the State the sole criterion. Laurent quotes (*Droit Civil Int.* i. 581) an American decision in which the temporary interest of an individual citizen is considered a sufficient ground for ignoring foreigners' rights. Even to the present day, Story is surpassed by recent English writers, some of whom expressly deny the foreigner's right to the extra-territorial application of his law; while others implicitly do so, by ignoring altogether the foreigner's international status in questions of this character, and treating the matter as merely one of municipal concern.

NATIONALITY AS THE DETERMINANT OF THE PERSONAL STATUTE OF THE FOREIGNER.

As a practical measure, this proposal now commands universal assent. There can be no doubt of the jural propriety in the great majority of cases of applying the foreigners' law as his personal statute in questions of status, capacity, and family relations. Domicil, of course, in most cases coincides with nationality; that is when there has been no change, or no permanent change of residence. But when the residence has been changed, legal presumptions as to change of domicil often work serious inconvenience.

No doubt it is true, as Laurent and Esperson admit, that in countries with an active legislature (instead of customary law), and especially in view of facilities of naturalisation, the identification of the national law of the individual with his natural associations may be pressed too far. But notwithstanding that fact, the national law is more likely than any other to be suitable to the individual. The principle, like so many others of the school, originated in France. The French civil code applies it to the case of the Frenchman residing abroad. The French tribunals have extended the rule, by analogy, to the case of a foreigner residing in France.

Mailher de Chassat, in 1845, advocated the adoption of nationality, instead of domicil, as the criterion of the personal statute, anticipating the Italian School by demanding that the foreigner should be recognised as a representative of his nationality.

NATIONALITY AND FRATERNITY—EQUALITY BEFORE THE
LAW OF FOREIGNER AND CITIZEN.

The principle of fraternity, based on the right of the foreigner to the recognition of his personality, is of modern growth. It springs more immediately from the liberty of the individual than from his membership of a State. Nationality has effect only to give his State the right to interfere for his protection.

The doctrine of the equality of the citizen and foreigner in civil rights is logically necessary for the construction of any rules recognising foreigners' rights. In this point the Italian school are to some degree still pioneers. It will be noted that the Institut de Droit International do not think opinion as yet completely advanced to that point.

There can be no doubt, however, as to its ultimate recognition in the practice of all States of the Family of Nations. (a)

NATIONALITY AS THE DETERMINANT OF THE REAL STATUTE
PUBLIC LAW AND PUBLIC ORDER.

The doctrine that the only limit to the extra-territorial recognition of foreigners' rights and the extra-territorial application of foreign law is to be found in the public law and public order of the State is one which now has met with almost universal acceptance. It is in complete harmony with the actual practice of States.

(a) Esperson recalls the foundation of the doctrine: "Fu la rivoluzione francese del 1789 che sostitii ai vecchi assiomi legislativi nuovi assiomi splendente di giovinezza immortale. A nome della fratellanza che stringe tutti gli uomini, qualunque sia il loro paese, furono tolte in Francia le disposizione rigorose ed ostile che vigevano contro gli stranieri." *Nazionalità*, 14.

The only criticisms directed against it are such as those of Bar (sec. 30), which when analysed, simply amount to the statement of a fact which is undisputed—that is to say, that it is difficult to draw the line between public law and private law.

It is also difficult to draw the line between day and night. If a difficult task be necessary, as it undoubtedly is here, to secure a firm basis for foreigners' rights, its difficulty is merely a subject for regret. Arndts, speaking on the Oxford resolutions of 1880, rightly observed that the delimitation of the topics of public law and order was the work of juristic science. Brocher's suggestion is, that the line of division should be between *Droit public internal*, to be assimilated to the personal statute, following the citizen everywhere, and *Droit public international* to be the real statute which stops at the frontier. This suggestion gives reason to hope that the task may not be too heavy for accomplishment. Fusinato's definition—that public law consists of provisions chiefly and obviously affecting the public welfare of the States—can hardly in practice leave any room for doubt as to its application.

Weiss adheres in principle to Brocher's suggestion; and meanwhile thinks that Fiore's view, that the judicature of each State should be entrusted with the function, sufficient for practical purposes. After all, as Mancini points out in his report, in practice there can be very little difficulty in deciding what matters belong to public, and what to private law: the only difficulty is in shaping a precise formula.

The problem in practice is solved every day, whenever a civil wrong is distinguished from a crime.

GENERAL OBJECTION TO THE THEORY OF NATIONALITY IN PUBLIC AND PRIVATE INTERNATIONAL LAW.

As regards public international law more particularly, but also as regards private international law, objection has been raised to the theory of nationality on the ground that it is

inconsistent with the present law of nations, which does not recognise nationalities but States. It is also contended that its purport is revolutionary. It is lastly suggested that its tendency is particularising and narrowing.

It is not plain that the present law of nations affords no recognition to the rights of nationalities; although its formal expression, in so far as is to be gathered from international conventions, is through the organs of States. On the contrary, the right of a nationality to constitute itself a State was not only recognised but actively assisted by the great powers, in the cases of Greece and Belgium, and later, in the cases of Servia, Bulgaria, and Roumania. It was recognised in the case of Italy. No one questions for a moment that if Poland were able to reconstitute itself, it has a right to do so. If the doctrine makes oppressors uneasy, that is hardly a consequence to be regretted.

The deduction of Mancini that the recognition of nationalities is the real foundation of the law of nations is profoundly true as a political precept against oppression, and also in the sense that the community of custom among the peoples runs by the frontiers of nationalities rather than of States. But, as Mancini admits, it would not be true in any sense which denied the jural existence of States not based on nationality. The essential truth of this theory of nationality is rather deducible from the individual freedom on which he founds it; and which gives to a State existing by the free will of its citizens of different nationalities an unshakeable basis of right.

Mancini undoubtedly shows the startling consequences of holding that membership of a State is the sole ground of foreigners' rights. He asks if that be so, what is the position of one civilly dead in his own State? or of the peaceful subject of an enemy State? It is inconceivable that these have no rights under international law.

As regards the objection that the principle of nationality is likely to foster narrowness and territorial and social particularism in public and private international law, the

answer is complete. The relation of nationality is in modern days subject to the free will of the individual. Furthermore, the idea of citizenship, as a personal relation between the community and the individual on a basis of reciprocal duties, has taken the place of the idea of subjection to a sovereign by reason of the accident of birth in his territory. It is in fact an emanation from the liberty of the individuals who compose it. (a) Not particularism, but the equal recognition of all nationalities, is the true deduction to be drawn. (b)

THE LIBERTY OF THE INDIVIDUAL—THE BASIS OF NATIONALITY—OF FOREIGNERS' RIGHTS—OF INTERNATIONAL LAW—THE COMMUNITY OF LAW.

The liberty of the individual is the sun of the Italian system. Nationality and the law of nations, are but the outcome of his right of association; the rights of the foreigner and of the citizen are but reciprocally limiting modifications.

The liberty of the individual is the right to the free development of his faculties, physical and mental, in so far as that development does not interfere with that of others. In the words of the American constitution, it is the right to life and the pursuit of happiness.

It furnishes the basis at home of the rights of the citizen, exacting constitutional liberty. It is the foundation abroad of the individual's rights, when the citizen has become the foreigner; and supports his international claim to the recognition of his nationality on the common ground of universal fraternity.

The basis of State right, it justifies the existence of the State, and the supremacy in its territory of its public law. The basis of international law, it safeguards the liberty and

(a) "La Nazionalità non è che la esplicazione collettiva della libertà e però è santa e divina cosa quanto la stessa libertà" ("Della Nazionalità," 41).

(b) "Il principio di Nazionalità non può significare che la eguale inviolabilità e protezione di tutte (le Nazioni)." "Laonde può applicarsi al principio di Nazionalità quello che Kant affermò della Libertà" (64).

independence of every State of the family of nations. Its postulates, its limits, supply the principles of the necessary law of nations.

The assertion of the right of the individual to liberty of development—the irreducible minimum of right—constitutes one of the chief services to juristic science and political progress of the Italian school. As a statement, not of historical explanation, but of present fact; as a rational basis of right, and as the necessary postulate of the science which deals with the jural relations of citizens of the family of nations, its position is impregnable.

No statement, however, which deals with social phenomena can be complete which takes no account of time. The passionate repudiation of a hateful past, which surges through 1789 in revolution, and 1848 in revolt, leaves here its indelible mark. It was the obvious refuge of Rousseau and the pre-revolutionary writers to ignore or to defy the past, when no records existed of that past but the archives of slavery; when history was the *peculium* of the Capet, who first freed and then enslaved the communes of France. The burning of the muniment rooms of the château was the first impulse of the peasant, to whom historical records meant the security of successful innovation on his ancient rights. Nevertheless, a more patient survey than perhaps then was possible serves to show that the right of the individual in France, and in all States of European civilisation, was indeed a *universitas juris* of historic privileges, the inheritance of two thousand years of progressive civilisation.

That reputation of the past is to be seen in the deduction of the right of the individual from his *status* as a human being, irrespective of his citizenship of any State, or of the existence of any State.

Ignoring the past is simply, in whatever field of inquiry it takes place, the disregard of one of the essential elements for ascertaining the truth. The evil result in internal politics has been manifest in many ways. It is to

be seen chiefly in ignoring the differences which exist between men and communities in stage of mental development. A peculiar result is that Liberals strangely forget that they are in essence, and by fatality, a minority, and that their existence is bound up with the rights of the minority.

In international law the result up to the present has been slight, and no doubt the future will take care of itself. But even here inconvenience may arise from neglect of the historic basis of individual right, when to that neglect is added forgetfulness of the outer ring of barbarism beyond the scope of the law of nations.

It cannot, of course, be denied that men as such have rights, although they are not citizens of a State, or of any State of the Family of Nations; and that granted the postulates of *à priori* equality and voluntarily harmonious co-existence, these rights may have to be taken into account under the law of nations. But, in the first place, it is to be remembered that these postulates cannot be granted by any means as universally a matter of course; and, secondly, that they are only part of the assumptions underlying the system of the law of nations.

The true foundation of that law, as Savigny reminds us, is the community of law of civilised States; the common possession of beliefs, customs, and opinions, the outcome of identity of race, and of identity of historical association for over two thousand years. In other words, it is true to say that the necessary law of nations rests on the nature of man as a reasonable and social being. But it rests on that nature, modified by the special history of a section of the human race.

Let us take, in illustration, an exceptional instance of the working in private international law of the Italian *à priori* statement of the results of the liberty of the individual. These writers deduce from that liberty a right of emigration, which now may be taken as universally conceded, and a right of immigration, which is generally conceded—

among States of the Family of Nations to citizens of each other. But California and Australia do not admit the latter right to Chinese. They have felt the existence of the outer ring, where the community of law is a thing non-existent.^(a)

It is to be remembered, however, that the theory of the Italian school does not require any wider scope to be assigned to the law of nations than that which is consistent with historic truth. The only possible objection which can be made is to the breadth of their statement, true only within less wide limits. Relative to the *respublica maxima gentium*, their theory is the proclamation of a present truth based on historic fact, the realisation of which is the requisite of all progress. Within the Family of Nations, the liberty of the individual is indeed the basis of the right of the State, of the right of the citizen, of the right of the foreigner, and of the law of nations.

TREATIES IN PRIVATE INTERNATIONAL LAW.

The suggestion that uniformity may best be secured by the negotiation of treaties dealing with the topics of private international law, is one which commends itself to nearly all the writers of the Franco-Italian school, and has been sanctioned by the Institut de Droit International. Laurent draws a forcible picture of the powerlessness of juristic science to prevent the possibility of anomalies (*Droit Civil International*, i. 16. *De Bauffremont Case*).

As this is rather a question of ways and means than of legal science, one may express a doubt as to the wisdom of the policy advocated. Unless some provision could be made to render inevitable periodical revision, the narrowness, and above all, the rigidity of treaties, seem to indicate that pro-

^(a) Savigny, *System*, i. Lorimer postulates more specifically, and perhaps less historically, the existence of a reciprocating will as the basis of the law of nations. On the other hand, Mancini, *Rev. D. I.* vii., p. 333, speaks of "Une grande communauté de droit fondée sur la communauté et la sociabilité de la nature humaine." Esperson, "Nazionalità," founds on the "Solidarietà dell' umana famiglia."

gress is to be sought in the direction in which hitherto it has been achieved. The enlightening of opinion by the writings of jurists seems a surer if not so rapid a method.(a)

SAVIGNY AND THE THEORY OF THE SCHOOL.

The relation between Savigny's theory and that of the writers of the school is so close as to approximate to identity in nearly all the cardinal features of the system.

The international duty of the State to extra-territorially apply foreign law is maintained by Savigny. While argumentatively admitting the current theory of "Comity," he practically shows its invalidity—as Mancini points out (Rev. D. I. vii.).(b) The application of foreign law may be regarded as a friendly concession among States. "But this must not be regarded as mere generosity or the revocable act of an arbitrary will," but "a regular and progressive development of law following in its growth the same course as State rules on conflict between provincial laws." The true basis is a "community of law among different States" (System, viii. § 348).

The community of law among States, which is the source of international law, is based by Savigny on a community of race and of social beliefs and mode of thinking, rather than on the single fact of human nature (System, i. 12).

The recognition and protection of the moral equality and of the liberty of the individual is defined by Savigny to be the special end of the law. Its general end is the moral destination of man. It is one of the purposes of the legislature to reconcile the two ends (System, i. 15). The similarity of the position of the Italian school, due to its connection with Kant and the principles of '89, is obvious.

(a) "New rules," says Story, "resting on a basis of general convenience, and an enlarged sense of national duty, have from time to time been promulgated by jurists and supported by Courts of Justice, by a course of juridical reasoning, which has commanded almost universal confidence, respect and obedience, without the aid either of municipal statutes, or of royal ordinance, or of international treaties."

(b) See also Laurent, D. C. I. 622.

The limit of the State's duty to extra-territorially apply foreign law is thus defined by Savigny. No State is obliged to admit the application of foreign laws, as to which there is no international community of law. These are laws which have as their object not private rights, but public interest or morality, or legal institutions unknown to the State, such as civil death or slavery. The supremacy of the public law of the State appears in Savigny's theory in the form of a rule that prohibitive laws are supreme in the territory of the legislator.

The identity of these conceptions, with those of the Italian school, is plain.^(a)

Treaties are recommended by Savigny for the purpose of securing uniformity in the extra-territorial application of laws—again anticipating the Italian theory.

The only difference between Savigny's system and that of the Italian school consists in two points. As to one of these the divergence is explained by historical causes—as to both the divergence has no practical effect.

Savigny preferred following the "law of the seat of the jural relation" as the criterion for deciding the spheres of native and foreign law. He also was opposed to accepting nationality as of force in this matter. As regards the first point, it can easily be shown that the Italian principles of the personal and real statute are based essentially on the theory of determining the seat of the jural relation, and are in fact a more precise statement of the same theory.^(b) As regards Savigny's objection to nationality (System, viii., Preface) it might be enough to say that, although stated, it

^(a) Bar (sec. 29) endeavours to lessen its effect by ascribing it to some inaccuracy in Savigny's other definitions, and to his too great pre-occupation with Roman law conceptions. But these are arguments against the worth of Savigny's ideas, not disproofs of their identity with those of the Italian school. The term "prohibitive" is adopted in the Italian Civil Code.

^(b) See particularly Fiore, *Dir. Int. Priv.*, § 37, who expressly adopts Savigny's view of the community of law, and the delimitation of the spheres of law by establishing the law to which each jural relation belongs. Fiore also states that Savigny's book inspired his writings.

does not seem to have much practical effect, or to be any real portion of his system. But the explanation is really due to the fact that, writing in 1849, Savigny was as a German, and as a citizen of Europe, bound to recognise that jural and national unity was to be obtained for Germany, as well as other nations, by ignoring nominally national frontiers—the mere creation of dynastic particularism, without any basis in the popular mind. His probable attitude towards that modern conception of nationality—the real, not the false—based on the liberty of the individual, may be judged from the importance he ascribes to the recognition of that liberty, making it the special end of all law.

Mancini, Laurent, and Fiore are therefore right in claiming the authority of the greatest of German jurists as cast on their side.

SERVICES TO INTERNATIONAL LAW AND POLITICS.

It will be evident from the foregoing considerations that the Franco-Italian school have rendered signal services to juristic science. For public international law they have placed as an ideal a rational basis of national right and duty, rather than a merely empirical generalisation from formal conventions of the treaty—making organs of States.

For private international law they have vindicated the title of a science; a title which previously to their writings it could hardly be said to possess. Dominating all their theory of this branch of law is the lucid conception: That States have duties towards States as regards their citizens in the territories of each other. This truth was but feebly appreciated, and but faintly expressed in the current theory of the "Courtesy of Nations," which these writers have finally disposed of. No true science was possible of private international law when all rights of foreigners, all extra-territorial application of law, was supposed to be granted as a revocable concession, without any basis of strict right or duty. "*La comitas*," truly observes Laurent, "n'a rien de commun avec le droit; elle en est, au contraire, la négation" (D. C. I. i. 503).

Apart from the science of international law, in the wider sphere of international politics, and that portion of the polity of all States which touches the freedom of the individual citizen, it is not too much to say that the writings of the Franco-Italian jurists entitle them to the respect and gratitude of the civilised world. Their zeal and eloquence have been devoted to the cause of civilisation—to the highest interests of the commonwealth of States, with the fate of which are bound up the present hopes of humanity. Their proclamation of Justice as the true standard of national conduct, comes none too soon in a time of shallow maxims of national statesmanship; maxims based on unreasoning guesses at national and individual interest. It comes most appropriately in these later years, when the nineteenth century is closing in the gloom of revived international rancour which mocks the hope of its middle age.

It is indeed of the highest expediency that the foreigners' right to justice should be proclaimed with no faltering voice, when the Alps and the Jura look down on fourteen millions of armed men, who but await the signal fire of a conflict which may drown in blood the ancient civilisation of Europe. The Fraternity of the mighty republic of all nations could not be asserted at a more fitting time—that "*Vinculum per quod Respublica cohaeret; ille spiritus vitalis quem tot millia trahunt.*"

The assertion of the rights of Nationality is indeed vindicated by the object lesson before our eyes, the result of the trampling on that claim in the interests of dynastic and military autocracy.

And not least does the hour demand the proclaiming anew of the truth announced a century since by that republic, which then was undivided—that the Liberty of the Individual is the basis of all law and order, of all wise State policy and of all true progress. When the individual's rights are challenged by pseudo scientists, who irrelevantly demand if he has a right to live; and derided by the worshippers of the deified State, who as autocrats, democrats, or

socialists, demand the extinction of his liberty and his prostration before their idol, it is well that the unalterable truth of the irreducible minimum of right in the individual should be heard again—as the triumph of the past two thousand years of European civilisation, and the chief security for its permanence.

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