

THE FUNCTION OF LAW IN INTERNATIONAL SOCIETY

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Supernational legal norm as idee of law.

The law is a universal principle of mankind and not to be confined only to a narrow region of a special state. It is intended to realize justice in the actual life of human beings. So, in this meaning, the object of law should be the whole world. The common legal idee of mankind in the world requires to make a common norm of an international community (jus gentium). According to the doctrine of Aristotle, the law derived from nature (phusis) is a common norm (nomos koinos) throughout the world and not a special law only appropriated to a certain state (nomos idios).

Roman Emperor Justinian wrote in his famous *Institutiones Romanae* «omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur.» So even in every positive law, there is the same principle of humanity, for the law is a universal truth postulated by human reason of mankind (vernünftiges Wesen) in the community, that is, «jus est in interiore homine habitat veritas et exigente humanis necessitatibus» as St. Augustine said. This shows that the community of all mankind necessitates a common legal norm, as Cicero said «insignis humani generis similitudo.»

Thus the law should necessarily be established on the basis of the whole mankind in the world. It should be based on justice and include the whole mankind. The idee of law is justice and the *raison d'être* of law lies in realizing justice in the human community.

Such a supernational and humanistic tendency we can find in the constitution of several states in the world after the first world great war. Mirkin-Guetzévitch emphatically designates this very point in his *Droit Constitutionnel International*. In it he discussed the phenomenon of inter-

nationalization of national law. This tendency can be found in the new constitution with many provisions to meet the international legal norm. The phenomenon to unify the national law and the international law (principe de l'unité de droit publique) can considerably be found in the concurrence of their contents.

This is due to the fact that the law is the product of legal consciousness of mankind and human consciousness cannot be different at home and abroad. Both international law and national law are produced by the same legal consciousness of human being. According to Mirkine-Guetzévich's doctrine, this tendency can be traced back up to the French revolution. (*L'influence de la révolution française sur la développement du droit international*) As a result of the French revolution an international treaty caused to restrict the states and consequently the nations (citoyens). So the international treaty (jus gentium) restrains the people in general in the world. That is to say, the principle of *le traité a force de loi* has come to be found in the constitution of every state in the world.

Concurrence of state and international laws.

In the modern constitutional democratic states where fundamental human rights and public welfare are, to the most, respected, and justice as idee of law is expected to be realized, the violation of an international treaty should be denied. For in the constitutions of theirs the duty of the people to observe the international treaties is provided and so the violation of them means that of the constitution. So it is impossible to infringe the international treaties. It was the constitution of the United States that clearly provided international treaties as the supreme law of the land.

In the constitution of the United States, article 6, section 2, declares that this constitution and the laws of the United States which shall be made in pursuance thereof, all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. The same provision can be found in the constitution of the United States of Mexico. That is, article 133 lays dawn that this constitution and the laws of the United States of Mexico which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the president of the republic, with the approval of the congress, shall be the supreme law of the land. According to these provisions international treaties are the supreme law of the land with the equal authority to the constitution. Likewise, chapter 10, article 98, section 2, of the Cons-

stitution of Japan, tells us that the treaties concluded by Japan and established laws of nations shall be faithfully observed. The constitution of the Estonian Republic (now one of the Soviet Union Republics), article 4, provides that universally recognized general rules of international law are parts of the Estonian laws (1920). And also article 4 of the constitution of German Reich proclaims that the generally recognized rules of international law are valid as binding constituent parts of the law of the German Reich (1919). The same provision can be found in article 9 of the federal constitutional law of the Republic of Austria saying that the universally recognized rules of international law are accepted as integral part of the Austrian Republic (1920). In the Italian constitution, article 1, section 1, we find the same clause providing that the legal order of state of Italy shall submit to the principles of generally recognized international law. The principle of respecting treaties and international law as the supreme law of the state with equal authority to the constitution conspicuously appeared after the first world war. In the Spanish constitution, article 7 prescribed that the state of Spain shall respect the universal rules of the international law and acknowledge them as parts of her positive law (1931), and also article 65, section 1 lays down that every international treaties with the character of the international law ratified by Spain and registered by the League of Nations shall be considered as component of Spanish legislation. Spanish legislation shall be appropriate to these rules. Article 7, in Dutch constitution, provides that the universal rules of the international law shall be recognized as parts of the national law and be observed by the people. The same international tendency of provisions in the constitution can be found in the states of Germany (Deutsche Länder). In the constitution of Bayern, article 88 ordinances that generally acknowledged international rules shall be considered as parts of national law (1946). Article 67 of the constitutional rules of Hessen prescribes that the international rules shall be parts of national law (1946). And also Baden constitution provides in article 46 that the international laws generally acknowledged shall be parts of national law they restrict state (Land) and the people. (Dr. Miyazawa introduced «les tendances internationales des nouvelles constitutions» in details in the review of state science in December, 1950).

Supremacy of international law.

Moreover, making a step forward, the latest tendency shows the superiority of international law to national law. International law represents

world sovereignty. In this fact we can find the superiority of world sovereignty. This can be seen in the 4th constitution of French Republic, providing, in article 28, that the international treaty duly ratified and published shall keep legal effect even if it is against the national law. This meant that international law, that is, world sovereignty restricts the sovereignty of the state. We can find superiority of world sovereignty as above mentioned in the following provisions. Article 11 of Italian Constitution provides that the State of Italy shall agree with the restriction of her sovereignty necessary for the order to ensure the peace and justice among international relations under the mutual condition, and also the preamble, section 15, of the 4th constitution of the Republic of France declares that France consents the abridgment of her sovereignty necessary for the organization of peace and defence under the preservation of mutualism. This supremacy of world sovereignty (international law) can most expressly be seen in the fundamental law of German Federal Republic. Article 24, section 1, prescribes that Federal Republic can transfer sovereignty to the international organ (for instance, the United Nations) in accordance with law, and section 2 shows that Federal Republic agrees with the restriction of its sovereignty in order to bring about and ensure peaceful and eternal order among the nations in the world. Moreover article 25 provides that the general rules of international laws are valid as binding constituent parts of the federation. The general rules of international law are superior to the federal laws and directly give rise to right and duty of the inhabitants in the territory of the federation, and article 26, section 1, provides that activities tending to disturb or undertake with the intention of disturbing the peaceful relations between nations, and especially preparing for aggressive war shall be unconstitutional (1948). In the Spanish constitution, article 65 declares that in order to realize the rules of international treaty ratified by Spain, the government shall submit the bills necessary for them to the house of representatives as quick as possible and the diet cannot make any law contradictory to the treaties, as long as they are not denounced according to the procedures recognized by the treaty, and article 28 of the 4th French Republic constitution provides that the foreign treaty duly ratified and promulgated shall have superior authority to that of national law and so it cannot be abolished, changed, or suspended without the formal decree issued by foreign procedure. Especially in the constitution of the Free City of Danzig, it is provided that the Free City of Danzig from the time of its establishment by the principal allied powers in accordance with article 102 of the treaty of Versailles, will be placed under the pro-

tection of the League of Nations and the constitution of the Free City of Danzig will at the same time be placed under the guaranty of the League of Nations. This shows that the constitution can be altered duly in case when the League of Nations does not oppose it. That is, international restriction is imposed upon the constitution-making power (national sovereignty.)

The world sovereignty is the postulate by these international provisions of the constitutions of democratic states in the world. The purpose of establishing world sovereignty is to realize humanity or the public welfare (*bonum commune*), fundamental human rights, such as life, liberty and pursuit of happiness, or the eternal peace of the world. As for the rights to life and liberty, the provision guaranteeing them in an international legal point of view can be found in the form of the right of refuge (*droit d'asile* of foreigners in the constitution of several countries in Europe. In section 4 in the preamble of the French constitution (1946), every person who is persecuted on account of the activity for the liberty of mankind shall have right to take refuge in the territory of the Republic of France. Article, section 3, of Italian constitution provides that every foreigner who is prohibited from available enjoyment of domestic freedoms guaranteed by the Italian constitution shall have right to get protection in the territory of the Republic of Italy according to the condition provided by law. Article 129 of the constitution of the USSR declares that the USSR shall confer the right of internal refuge on foreigners who are accused on account of the interests of workers and academic activity of the struggle for racial emancipation. The constitution of Yugoslavia (1946) provides the same clause in article 31. And also the constitution of the People's Republic of China, chapter III, article 99, declares that the People's Republic of China grant asylum to any foreign national persecuted for supporting a just cause, for taking part in the peace movement or for scientific activities.

World Sovereignty

Next, the eternal peace of the world is nothing but the greatest public welfare (*bien commun*) and so it is the greatest crime against humanity, that is, all mankind to break it. So the modern democratic constitutions prescribes this supreme idea of humanity in them in the form of the declaration of renunciation of war. As all of us Japanese know, article 9 in the constitution of Japan laying down that aspiring sincerely to an international peace based on justice and order, the Japanese people renounce war as a sovereign right of nation and the threat or use of force

as means of setting international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized. Here is expressed a sublime ideal of humanity as superstate legal idee (world sovereignty) This superstate provision of peace (*jus gentium pacis*) as the manifestation of the highest idee of humanity can also be found in the constitutions of France in 1791, 1793, 1848. Also, the constitution of the 4th French Republic (1946), in its preamble, declares that the French Republic, faithful to its traditions, abides by the rules of international law. It will not undertake wars of conquest and will never use its arms against the freedom of any people. In article 6 in the constitution of Spain (1931) and in article 3 in the constitution of Philippine (1935) it is provided that Spain (or Philippine) shall renounce war as means of national policy. Article 4 in the constitution of Brazil (1934) ordinances that Brazil shall not declare war except in case she cannot submit a dispute to arbitration or it cannot be settled by arbitration. Brazill shall not take part in war, directly or indirectly, by herself or in combination with other countries. The constitution of the Germand Democratic Republic, in its article 5, provides that no citizen may participate in belligerent actions designed to oppress any people. In its article 26, activities tending to disturb or undertaken with the intention of disturbing the peacefut relations between nations, and especially preparaing for aggressive war, shall be unconstitutional. They shall be made subject to punishment. In its article 4, section 3, no one may be compelled against his conscience to perform war as a combatant. Details shall be regulated by a federal law. Article 11 of the constitution of Italian Republic ordains that Italy renounces war as an instrument of offense to the liberty of other peoples or as a means of settlement of international disputes, and on conditions of equality with the other states, agrees to the limitation of her sovereignty to an organization which will assure peace and justice among nations, and promotes and encourages international organizations constituted for this purpose.

The constitution of the Union of Burma, in article 211, expresses that the Union of Burma renounces war as an instrument of national policy, and accepts the generally recognized principles of international law as its rule of conduct in its relation with foreign states. In its article 212, the Union of Burma affirms its devotion to the ideal of peace and friendly cooperation amongst nations founded on international justice and morality. Article 6 of the constitution of the Republic of Korea (1948) shows that the Republic of Korea shall renounce all aggressive wars. The mis-

sion of the national military forces shall be to perform the sacred duty of protecting the national territory. In article 7, the duly ratified and published treaties and the generally recognized rules of international law shall be valid as a binding constituent part of the law of Korea.

As above mentioned, supernational legal norm as the manifestation of the idee of humanity has, in concrete form, come to be realized in the modern democratic constitutions.

World Government (Federation)

After the second world war, the United Nations has been organized as a concrete international organ to realize the supreme idee of humanity and Charter of the United Nations was established in 1945 at San Francisco.

The Charter of the United Nations (june 26, 1946) declares in its preamble that we the peoples of the Untied Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,.....and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,.....and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed forces shall not be used, save in the common interest, and to employ internal machinery for the promotion of the economic and social advancement of all peoples Moreover Chapter 1, Article 1 provides that the purposes of the United Nations are; (1) to maintain international peace and security, and to that end: to take efective measures for the prevention and removal of theats to the peace, and for the suppression of acts of agression or other breaches of the peace, and to bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; (2) to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; (3) to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging and respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion;

and (4) to be a center for harmonizing the actions of nations in the attainment of these common ends.

The United Nations will be developed to the world government, that is, the subject of world sovereignty and the charter will be to the world constitution. So-called world law will be provided one after another. At present, as world government organization (World Republic), United World Federalists Committee to frame a world constitution has been established in America. The British Parliamentary Committee for the Crusade for World Government was established in England in 1947 and expects to found World Government. Liga für Weltregierung und Weltstaat has been organized in Germany, and the world movement for World Federal Government was founded in Paris in 1946. The purpose of these international organization is to establish World Federation with world sovereignty superior to state sovereignty to superintend every state not to disturb world peace and give disasters to mankind. The unification of every state sovereignty left out by world federation, that is, the supreme world sovereignty is intended to realize a peaceful and humanistic world as the highest and final ideal of human community.

According to Chicago Draft of a World Constitution, world government has power to superintend every state to observe world constitution, to secure and promote fundamental human rights and duties, to maintain world peace, to arbitrate and solve international disputes and prohibit the use of violence among states, to supervise the alteration of order among states, to interfere in the offence of laws concerning the peace and justice of the world, to organize and limit arms and military force of every state, to lay and collect federation taxes and to provide federation budget, to establish and manage world bank and suitable world banking organs, to supervise and acknowledge laws concerning emigration, to make use of private and public properties for the federation by requisition for public service, to establish organs to exploit natural resources on the earth, to be in charge of legislation and administration in the territory chosen for federation district where world government situates. And such powers as not be delegated to the world government are reserved to every state and every union, that is, every state sovereignty.

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