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Sumner Allen

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SOME LEGAL ASPECTS OF THE INVASION OF BELGIUM

In the fifth century before the Christian era the two powerful states of Greece, Athens and Sparta, were at war. Greek culture was then at its highest level, and Athens was the centre—in the phrase of Pericles, “the school of Hellas.” Its attainments in art, letters, and government were a source of pride and the basis of the Athenian claim of superiority. During the progress of that long and terrible war, the Athenians conceived that the neutrality of a small colony on the little island of Melos was a military disadvantage, and an army was sent to reduce it to subjection. An embassy was dispatched to acquaint the settlers with the purpose of the invading army. A delegation representing the Melians met the embassy and a conference was held in which the views of the strong and the weak were exchanged. Recent events in Europe give the story of this interview, as related by Thucydides, a new interest. The following extract from the history of the Peloponnesian war contains the main points:

“Athenians: ‘Well, then, we Athenians will use no fine words; we will not go out of our way to prove at length that we have a right to rule because we overthrew the Persians, or that we attack you because we are suffering any injury at your hands. . . . Nor must you expect to convince us by arguing that although a colony of the Lacedæmonians, you have taken no part in their expeditions or that you have done us no wrong. But you and we should say what we really think and aim only at what is possible, for we both alike know that into the discussion of human affairs the *question of justice enters only when the pressure of necessity is equal, and that the powerful exact what they can and the weak grant what they must.*’

“Melians: ‘Well, then, since you set aside justice and invite us to speak of expediency, in our judgment *it is certainly expedient that you should respect a principle that is for the common good:* and that to every man when in peril a *reasonable claim should be accounted a claim of right.* . . . Your interest in this principle is quite as great as ours, inasmuch as you, if you fall, will incur the heaviest vengeance and will be the most terrible example to mankind.’

“Athenians: ‘This is a danger you may leave to us. . . . We want to make you ours with the least trouble to ourselves.’

“Melians: ‘*It may be to your interest to be our masters, but how can it be to ours to be your slaves?*’

“Athenians: ‘To you the gain will be that by submission you will avert the worst.’

"Melians: 'But must we be your enemies? Will you not receive us as friends if we are neutral and remain at peace with you?'

"Athenians: 'No, your enmity is not half so mischievous to us as your friendship, for the one is in the eye of our subjects an argument of our power, the other of our weakness.'

"Melians: 'But do you not recognize another danger? . . . Will you not be making enemies of all who are now neutrals? When they see how you are treating us, they will expect you some day to turn against them.'

"Athenians: 'We do not consider our really dangerous enemies to be one of the peoples inhabiting the mainland, who, secure in their freedom, may defer indefinitely any measure of precaution they may take against us, but islanders, who, like you, happen to be under no control.'

"Melians: 'We know only too well how hard the struggle will be against your power. Nevertheless we do not despair of fortune for we hope to stand as high as you in the favour of heaven because we are righteous and you, against whom we contend, are unrighteous.'

"Athenians: 'As for the Gods, we expect to have quite as much of their favour as you; for we are not doing or claiming anything which goes beyond common opinion about divine, or men's desires about human, things. For of the Gods we believe, and of men we know, *that by a law of their nature, whenever they can rule, they will.* The law was not made by us and we are not the first who have acted upon it. But do you not see that the path of expediency is safe, whereas justice and honour involve danger in practice?'

"Melians: 'Men of Athens, our resolution is unchanged, and we will not in a moment surrender that liberty which our city, founded seven hundred years ago, still enjoys; we will trust to that good fortune which by the favour of the Gods, has hitherto preserved us, and for human help, to the Lacedæmonians, and endeavour to save ourselves. We are ready, however, to be your friends, and the enemies, neither of you, nor the Lacedæmonians.'"

The strong prevailed and Thucydides closes the narrative with the brief statement that "the Athenians thereupon put to death all who were of military age and made slaves of the women and children. They then colonized the island, sending thither five hundred settlers of their own."

Coming on the eve of the disastrous expedition to Sicily, the first of a series of defeats, after which the greatness of Athens lay in the past, the fate of Melos made a profound impression on reflecting minds. While Thucydides confines himself to a bare narrative of events, the space given to the incident is suggestive. To it is attributed one of the most tragic of Greek dramas, Euripides' *Trojan Women*, in which the glorious feat of arms related by Homer is seen from another angle—the angle of cities in ashes, of dead bodies polluting the air, of children slain before the eyes

of mothers, of the flower of Trojan womanhood condemned to lives of degradation and dishonour.

Twenty-three centuries have elapsed since Melos was punished for asserting the doctrine of the rights of man. Again war is raging between great powers. One of them is the school of western civilization, to whose universities students flock from all quarters of the globe. Her contribution to art, letters, science, industry, government, is so distinctive that the phrase "German culture" has passed into current use. The neutrality of a small state was an obstacle in the execution of her military plans, and an army was assembled on its borders. The plea of the neutral state that it desired to be at peace, that it owed the duty to be neutral under treaty obligations, was rejected. When it was suggested that she could not without dishonour permit the use of her territory for the benefit of another, the answer was returned, as on a former occasion, that "the path of expediency is safe, whereas justice and honour involve danger in practice." The little state chose the course of the Melians. Not all of her male citizens of military age have been put to death; but thousands have been slain, cities are in ashes, homes burned, women and children in exile, and finally, under the guise of war exaction, fines amounting to millions of dollars have been imposed on a people whose sole offence is that it attempted to perform a plain duty.

Belgium was invaded because she had the best military road to France. When it was suggested that the Belgian treaty might involve other nations in the war, the German Chancellor, if correctly reported in the press, expressed surprise that "a piece of paper" should be taken so seriously. No explanation of the language used has been given to the public and the meaning must be inferred. The phrase suggests that the breach was technical, that it involved form rather than substance. As a direct result of the breach, a country once prosperous is now desolate, and thousands are without food or shelter. The purpose of the agreement was to prevent the ravages of war, and the defeat of the purpose is not in a legal sense a technical breach.

Perhaps the German Chancellor meant that the duty to observe the treaty rested on the rules of conventional law—the lawyers' code—and that a higher law justified the invasion. If this is the defence, the method is sanctioned by legal procedure, for every rule of conventional law may be attacked on the ground that it

is in conflict with fundamental and controlling principles. The act of Germany involves relations between states, collective standards of conduct, and she is entitled to the benefit of established principles governing them. She has a right to invoke the philosophy of law in the determination of the question presented. This is a field in which German scholars have recently won distinction. One of the most eminent of the group, Josef Kohler, expresses his conception of the basis of international relations as follows:

"The division of mankind into states was indispensable; it had this great advantage, that the members of the different states could develop their qualities and talents without being hindered by the contradictory views and endeavours of others who were dominated by an entirely different view of life. Such a national formation is of special value because it is the only way in which a uniformly gifted national group can develop its own life, its own talents, and abilities to the utmost. . . . In this way state confronts state, each for itself, but each dependent on the other for certain cultural purposes. This constellation led originally to a kind of anarchy, for among the states, in conformity with the principle of sovereignty, no law is known. . . . *This condition is unendurable and cannot exist alongside of the great cultural mission of humanity. . . . When once the idea has arisen in this way that there is some law above the state, a so-called super-national law, we have gained a new plane of culture. . . .* Of course such international legal customs always mean an interference with the power of the individual state; hence we have to struggle against very strong counter-currents of individualistic national nature. . . . Nevertheless the idea must gradually penetrate, and when it has become fully developed, the chief step towards the peace of nations has been taken. . . . Agreements between states have a double significance: (a) they create rights, either of the parties, or of individual persons, so that the latter can refer directly to the treaty in demanding their rights; (b) in addition they *have this significance, that they establish international legal principles*; thus they contribute to the growth of the law as an international customary law."

The view that the cultural mission of law halts at national boundaries finds little support in this statement. Nor is the treaty that paves the way for the advance of social justice into international relations, defined as a "piece of paper," whose violation is of trifling consequence. That the preservation of the independence of Belgium, as one of a group of cultural states which in living its own life, serves all, is imperative is implied in his analysis of the function of states.

The history of the origin and growth of legal conceptions confirms Kohler's view. In the final analysis the social progress of the modern state, in contrast with the progress of the ancient

state, is not due to superior conceptions of social justice, but to the application of the conception to wider circles. In one sense the doctrine of "inherent and inalienable rights" is the product of the French and American Revolutions,—in the sense that through these movements the collective expression of these rights was achieved. There were Greeks in Aristotle's day who held that a human being could not become property because the status was contrary to natural law. The socialists of Israel—the prophets—saw clearly that any practice that destroys self-respect and the sense of dignity, violates the principle of social justice.

"No man shall take the nether or the upper millstone to pledge, for he taketh a man's life to pledge."

"When thou dost lend thy brother anything, thou shalt not go into his house to fetch his pledge. Thou shalt stand abroad, and the man to whom thou dost lend shall bring out the pledge."

In these provisions, and in the provisions for the redemption of a house within a year, for the seventh year of release, the modern exemption, redemption and bankruptcy laws are clearly outlined. In that famous passage in the thirteenth chapter of I. Corinthians, Paul declares that in human relations the spirit of good will is the foundation of the moral order, and that all other things are as "sounding brass." No higher level has been attained in modern days. The difference is that what was once a social ideal, an individual's standard of conduct, has been accepted in part as a collective standard, and passed into the group of rules behind which the collective will is operative.

Why does the collective standard lag so far behind the individual standard? No historical explanation is complete that does not take into account the whole past. Some of the fundamental causes are revealed in social psychology.

"It has become almost a commonplace," says President Lowell, "that the elder breed of political and economic philosophers erred in regarding man as a purely rational being, guided by selfish aims; whereas he is really, in the main, a creature of suggestion, whose strongest impulses are often generous. Later experience and modern psychology have started a new train of thought, have given us a different standpoint from which to study mankind."

Our ancestors began the ascent with the simple instincts shared by the higher animals. The conservation of life depended upon

action and those instincts were the springs of action. Before invention and co-operation had multiplied human power, survival depended upon the resources of the individual. The instinct in this contest was of high value because warning and appropriate action were in effect simultaneous. When the instinct of flight, for example, was excited, the corresponding emotion of fear drove the human machine instantly at its maximum speed. When the combative instinct was stirred, the corresponding emotion of anger made the machine strike its hardest blow. Before the primary emotions were compounded, partly through the formation of sentiments, to arouse any one instinct was to arouse only its accompanying emotion. The savage whose combative instinct is excited by the presence of an enemy, experiences a thrill of delight in killing an infant before its mother's eye. That the tendency of the instinct to arouse emotion in the original form is not wholly suppressed is shown in the action of civilized white men who, under sudden and severe provocation, watch with pleasure the dying agony of the negro, burning alive. War is a powerful stimulus, and the twentieth-century soldier hurls bombs, not alone at armies, but into cities where defenceless women and children dwell.

How, in the evolutionary process, the emotions of the combative and self-assertive instincts were commandeered by the parental instinct as the family group broadened into the clan and tribe, is a long story. It is enough to say that when the wrong done to another came to excite anger in the higher phase of righteous indignation, when the sense of fellowship led to the conception of a universal fraternity held together by rules based upon social justice, the attainment of these ideals has been obstructed at every turn by the reversion to original forms of the emotions of the combative and self-assertive instincts. In the range of intellect, the ancient Greek is not inferior to the modern European. Nor was he lacking in moral standards. Yet the effect of war upon a race highly civilized was so striking that the Greek historian Thucydides was profoundly impressed with its lesson. A brief quotation may be pardoned:

“Revenge was dearer than self-preservation. Any agreements sworn to by either party, when they could do nothing else, were binding as long as both were powerless. But he who on a favourable opportunity first took courage and struck at his enemy when he saw him off his guard, had greater pleasure in a perfidious, than he would have had in an open, act of revenge; he congratu-

lated himself that he had taken the safer course, and also that he had overreached his enemy, and gained the prize of superior ability. . . . Thus revolution gave birth to every form of wickedness in Hellas. The simplicity which is so large an element in a noble nature was laughed to scorn and disappeared. An attitude of perfidious antagonism everywhere prevailed; for there was no word binding enough, nor oath terrible enough, to reconcile enemies. Each man was strong only in the conviction that nothing was secure; he must look to his own safety, and could not afford to trust others. . . . At such a time the life of the city was all in disorder, and human nature, which is always ready to transgress the laws, having now trampled them under foot, delighted to show that her passions were ungovernable,—that she was stronger than justice, and the enemy of everything above her."

In that war which Thucydides observed, the parties marched to battle under the banner of a principle, Athens, "upholding the constitutional equality of the many," Sparta, the "wisdom of an aristocracy." Change the names of the cities and of the banners, and the passage quoted applies to the Italian cities of the Middle Ages, whose brilliant achievements in art, letters, and industry gave promise of world leadership. The primal combative instinct was excited by endless controversy, and the joy of revenge exceeded all other satisfactions. In the orgy of brutal passion the light of culture went out.

In the seventeenth century two religious parties in Germany, each asserting cultural superiority, appealed to the decision of war. When, at the end of thirty years, exhaustion terminated the struggle, it is estimated there were six million inhabitants left out of a population of twenty millions. Cities and villages were in ashes, churches and schools closed, large farming districts abandoned. The fundamental teaching of the professed religion, that faith of the power "to remove mountains," and fidelity that "gives the body to burn," are as "sounding brass" without the spirit of good will, fell on deaf ears when the environment aroused the primal combative instinct with its fierce, absorbing passion.

One excuse put forward for the invasion of Belgium is that France intended to violate the treaty. According to legal standards this is beside the point. The court of justice does not permit the accused to plead as a defence that another would have committed the robbery had he refrained. In this paper it is assumed that Germany in good faith believes her cause to be just. The siren song of superior culture in religion and politics rarely fails to elicit this belief, and it is not strange that France, Germany, Austria, England, and Russia, each in-

vokes the same God to vindicate justice by the defeat of its enemy.

Professor Münsterberg misses the point when he complains that Americans, in judging the act of Germany, do not think, but feel. The American environment is such that the conception of justice expressed in the Declaration of Independence is not the subject of debate. International lines stretch across the western continent, guarded by no forts, no sentries. Energy is not directed to the invention of huge siege guns that will destroy the cities and homes of another nation. The sense of security in Canada and the United States rests not in armies and guns, but in the belief that the standard of social justice is not suspended at the border line. It is the presence of the German army in Belgium, the destruction it has worked, that arouses feeling in America. An innocent people is suffering. The guilty intent of France and England is another question. The wrong was done by Germany, and proof that the pot is as black as the kettle is not to the point.

Legal philosophy finds no middle ground in the analysis of the Belgian situation. At bottom the invasion admits of no justification save under the rule that "the powerful exact what they can, and the weak grant what they must." This rule is the highway to anarchy. In every instance the application of it has excited an instinct whose passions culture is powerless to control. That the passion is directed to the service of religious, political, or cultural ideals does not modify its fierceness as the history of religious inquisitions and political revolutions proves. The anathemas of hate that the philosophers, divines, scientists, and artists of Europe are hurling at opposing nations are an example. And yet Germany wonders that infuriated Belgians mutilate wounded soldiers. If the stimulation of mere patriotism causes the explosion of wrath in Hauptmann and Eucken, what must the pitch of frenzied emotion be in the Belgian peasant whose home is in ashes?

The exhibition of elemental passion in Belgium, the atrocities committed by the invaded and the invaders, are deeply significant. The meaning is that if the condition were universal, if every weaker state on the globe were simultaneously subjected to the same treatment accorded Belgium by a stronger neighbour, the volcanoes of passion would bury modern civilization deeper than plummet ever sounded. Legal philosophy cannot give its

sanction to an act which, if it became a rule of action, would destroy the social order.

While the spoliation of Belgium is converting civilized men to savagery there are counter influences elsewhere. The effect of low collective standards of conduct is shown in startling colours. The world sees that oppression is equally hateful whether committed by individuals or nations. If America continues to feel deeply, in spite of Professor Münsterberg's criticism, a public opinion may form of such power that no nation will hereafter dare to override the law of social justice.

CHAS. SUMNER ALLEN.

San José, California.