



WAR AND THE RULE OF LAW

MORTIMER J. ADLER

Part 2 of 2

When the men exercising governmental authority and power are above constitutional limitations, there is no positive limitation upon what can and cannot be made a law, and there is no positive limitation upon the way in which laws shall be administered or shall be changed. Hence, the laws of a nonconstitutional government, the so-called “laws” of a dictator, of an absolute monarch or a despot, are really not laws at all but only the decrees or edicts of men exercising personal power. They look like laws. They have certain qualities in common with laws. They have generality and coercive force. They are rules of public conduct, made by someone in power and with some portion of authority. But they lack that which is essential to the rule of law norm of legality which we ordinarily describe as due process of law.

In constitutional government the manner of making and applying and enforcing laws is itself determined by a law which is binding upon the governing officials, and is capable of being enforced against them by the community, through the operation of other governmental agencies. The fundamental law which establishes the lawmaking and the law-administering processes of the community is itself positive law. It is voluntarily instituted by the community; it is an expression of their will as well as of their reason; and, unlike natural law, it can be upheld against all offenders by the application of the community's coercive force. This fundamental positive law is the constitution. We see at once that the two major facts about constitutional or legal government are, first, that the coercive force of law applies to all men, in public office as well as in private life and, second, that a standard of legality determines the due process of making, changing, and administering laws.

It follows from the foregoing that government can be either imperfect or perfect imperfect if nonconstitutional; perfect, if constitutional. It would be contrary to the facts of political history to say that only constitutional government is government. Until fairly recently, constitutional government has been the exception rather than the rule. And it would be false to say that where men have lived under one or another type of nonconstitutional or absolute government, no community existed. It seems to be much more accurate to divide government into perfect and imperfect government, according as government realizes or does not realize the full nature of the principle of government which is the expression of the sovereignty of the community.

When government is imperfect because insufficiently legal, it is an imperfect instrument for maintaining the peace of the community. To the extent that the ruled, the governed, have no legal redress against injustice on the part of their governors, to the extent that their governors are above the coercive force of law and are not limited by due process in the making of laws, the violence of armed rebellion is the only method by which one part of a community can carry on its political disagreement with another part.

A peace which can so be broken is an imperfectly made peace. The institutions of imperfect government seem to be inadequate to the task of solving all social problems peacefully. In so far as imperfect government is government, it does keep a kind of peace and does maintain a kind of community. But, in so far as it is government by men and not by law, the peace it keeps is as imperfect as it itself is. Only the rule of law, only government by law or constitu-

tional government, is an adequate cause of perfect peace, because only such government is able to provide all the means needed for a peaceful settlement of every kind of dispute that can arise among men living together.

It should be noted in passing that rebellion is not the same as war. Rebellion, like crime, is a breach of the peace, however tenuous that may be. War between nations is not a breach of the peace, because so long as there are sovereign nations there can be no peace between them but only a temporary cessation of hostilities that should be called an armed truce, not a condition of peace. Rebellion, albeit violent, may be the inevitable expedient by which a community improves its political condition, perfects its government, and so achieves a more perfect peace. Not all rebellions are justified by grievances, but most of the many rebellions which history records have been justified. They were fought for the improvement of the community in which they arose. They broke the peace in order to establish a better peace. But international war breaches no peace, and establishes no peace in consequence. When war occurs between nations, no peace is broken, and so no peace is restored or perfected.

My third general point is that natural law, though indispensable to government by law, is by itself totally inadequate for the maintenance of a community or for the preservation of peace.

For the purposes of this discussion, we shall consider natural law in a very restricted sense. By “natural law” we shall understand only those principles of justice that have no authority except the voice of reason itself. Natural justice is not legal justice. The principles of natural justice do not have to be instituted by human government. They arise from the nature of man and of society. If man were not by nature a rational and a social animal, there would be no natural justice.

The principles of natural justice can be briefly stated in the following manner: that equals shall be treated equally; that the inequalities they suffer shall be rectified and equalized; and that to each man shall be given what is due him both according to his nature and according to his works.

It is in terms of the principles of natural justice that men have natural rights, the violation of which is injury or injustice. Without the principles of natural justice, there would be no meaning to the notion of natural right. And without the notion of natural right, there would be nothing but force to settle disputes, nothing but power,

nothing but pressure and prejudice. There would be no ground for trying peacefully to arbitrate disputes. Just as the constitution provides the norm for determining due process of law in all the acts of government, so the principles of natural justice provide the norm for determining whether the constitution is itself just or unjust. We speak of laws as constitutional or unconstitutional, but we cannot speak of a constitution as constitutional or unconstitutional but only as just or unjust. And, since a constitution is itself something made, since it is itself positive law, there must be exterior and antecedent to it a norm for determining its legality.

Let us consider, for example, the oligarchical constitution. Though it was not always recognized to be oligarchical, that was the character of the constitutions of all the city-states of Greece, of republican Rome, and of all the constitutional or quasi-constitutional regimes in the Middle Ages. The constitution of England today is oligarchical, and so, as a matter of practice, is the Constitution of the United States, though perhaps our Constitution is, on paper at least, almost free from the errors of oligarchy.

The oligarchical constitution is unjust because it does not distribute the fundamental status of citizenship to all men equally but gives the wealthy or the noble-born special privileges and powers to which they have no natural right. There is no rule of positive law which tells you that the oligarchical constitution is unjust. There is nothing in the constitution itself that will tell you this. You know this only by knowing what the natural rights of men are, by knowing, for instance, that the poll tax is a violation of such natural rights and an expression of oligarchical injustice.

Now, if the constitution is unjust, government and law will not protect natural rights; and, when natural rights are not protected by legal means, those who are injured by the injustice of government have no peaceful method of redress. Only violence remains to them as a way of gaining what is their just due.

In order to sustain the peace and order of a community, not only must laws be constitutionally made, but through the justice of the constitution itself they must be justly made. The point is not that one can hope to avoid all injustice in the relations of men, or in the relation of government to the governed. That is utopian folderol. The point is rather that the injuries and injustices, the violations of natural right that will inevitably occur in the intercourse of men, can be peacefully, as opposed to violently, rectified only under the agencies of constitutional government and only in proportion as the constitution itself embodies and gives force to the principles of

natural justice. When, for example, a substantial portion of the population are disfranchised, they lack, by that very fact, the constitutional status needed to exercise juridical powers in defense of their rights. They have nothing but force to employ against injustice and oppression.

But though the principles of natural justice are indispensable, they will not by themselves suffice. Positive law will not do its work for peace unless it somehow tends to become a more and more perfect embodiment of natural justice. The legal positivist is wrong if he supposes that law can perform its mission without any recourse to anterior principles of justice. But equally wrong is the naturalist, or the legal idealist, who supposes that the principles of natural justice by themselves, without law and government, suffice for the maintenance of the human community and for the preservation of its peace.

The principles of natural justice are absolutely general, and as such they are indeterminate. They do not specify particular acts to be done or to be avoided, nor do they specify and provide particular measures for rectifying injustices. The rules of positive law are precisely such determinations. They are concrete particularizations of the principles of natural justice, thus enabling these principles to direct the affairs of a particular community in a manner befitting the contingent circumstances of its historical character.

The principles of natural justice bind men only in conscience, and hence bind only good men. If all men in the human community were men of good will, the principles of natural justice might suffice. But we know that this is not the case. We know that some portion of the community is always in need of restraint or coercive force; some portion of the community is always either actually, or on the verge of, committing crimes. The governing rules of the community must, therefore, exert the coercive force of externally applied sanctions. But only rules of positive law, rules instituted by a government, can have such force. The rules of natural law, not instituted by any government, have no coercive force whatsoever.

If men were angels, the principles of justice might suffice to govern them and to maintain the peace of their social life. But men are not angels; moreover, few men are men of good will in the fullest sense; and so coercive force, the force of externally applied sanctions, is needed to make justice rule the affairs and actions of men.

One might also go on to say, with Hamilton, that if men were angels, no government would be necessary that is, no government

which combined the rule of positive law with the coercive force needed to sustain this rule. On the other hand, if men were brutes, no government would be possible, for, without reason, only force would be left. Government is not the exercise of brute force but rather the use of force to support the rational process of lawmaking and arbitration.

Because men are neither angels nor brutes, because they are rational animals, human government combines might and right, force and reason, and neither the one nor the other by itself is sufficient to maintain the existence of a community or to preserve its peace.

From all this, it will be seen to follow that, among angels, war is impossible, just as among brutes peace is impossible. What happens in the jungle at regular intervals is not peace but merely the truce that momentarily prevails among well-fed beasts. Because men are rational animals, both war and peace are possible in human affairs. This double possibility is perfectly evidenced by the facts. Peace does exist within particular communities, imperfect or perfect peace as the case may be; and between communities war exists, for between communities nothing but war can ever exist, war or temporary truces in which there is time for rearmament.

My fourth point is that international law is not positive law and therefore does not establish that rule of law which is necessary for the creation of peace among nations.

Positive law is an appendage of government. Where no government exists, no rules of positive law can be made or enforced, for without the establishment of government there is neither the authority nor the force required for making positive laws or for their application. No international community exists, because no single government exists whose rule of law establishes such a community.

The so-called “international community” and, I think, there is no more deceptive phrase in current jargon the so-called “international community” is nothing but a set of sovereign nations or peoples or communities, the set forming a “community” only in the sense that these political units live in the same world and “try” to have intercourse with one another. But if the existence of a community as a peaceful unit requires government, and if sovereigns cannot be under government and remain sovereigns, then it necessarily follows that so long as a number of political units retain their absolute and unqualified sovereignty, in no way limited or abridged by a superior sovereignty, the so-called “international community” is noth-

ing but the chaos of anarchy, in no way different from the anarchic condition of individual men who tried to live together without the institution of government and without its instrumentalities.

The fallacy of supposing that international law and international courts and all the other pretensions of international arbitration can effectively set up and preserve a condition of peace among sovereign nations is allied to the fallacy of supposing that natural law is sufficient for the government of men. The maxims of international law, from the day of Grotius to the present day, are nothing but moral precepts ultimately deriving their authority from the principles of natural justice but having no coercive force from positive institution by government. International law is no better than a treaty between nations, and a treaty between sovereigns is no better than a scrap of paper.

My fifth point is that war and conquest are the natural consequences of anarchy.

If individuals could not go to court to arbitrate their disagreements about what is or is not due them, and if, furthermore, they were not subject to the coercions of police power, when the court's decision was against them, they could only fight for their rights. And they would fight for what they claimed to be their rights whenever the issues were sufficiently serious to make the risk worth undertaking.

Nations or communities which are absolute sovereigns are in exactly the same position that individual men would be in, if they tried to live anarchically with one another. Nations or communities which are sovereigns do not live together under government or under the reign of positive law. They are, therefore, always potential belligerents, and, when they are not actually at war, they remain potentially at war with one another. International diplomacy of the sort in which we engage as well as the sort in which Japan or Germany engages is a continuation of the war between nations during a period of truce. This is just as true as von Clausewitz's maxim that overt war is merely the fulfilment of everything that is latent in international politics. War is the continuation of international diplomacy, because international diplomacy cannot help being preparation for war.

Power politics is merely a polite name for the kind of war that goes on between nations during the truces that interrupt armed conflicts. A treaty does not make a peace between nations. It makes a truce or an armistice. A treaty is, at its worst, a pact imposed by the conqueror on the conquered. At its best, it is a gentleman's agreement

between brutes who have beaten each other temporarily to their knees, and who will not remain gentle any longer than their temporary impotence compels them to. A pact imposed by the conqueror is no more a peace than the agreement forced by a stalemate is the institution of government.

Nevertheless, it is true to say that military conquest does reduce the extent of anarchy in the world. The larger the dominion of any one power, no matter how it is achieved, the wider is the area of government and the fewer the number of anarchic communities. Push this point to its limit, and you will seem to reach the conclusion that world peace could be established by world conquest, for by world conquest the anarchy of a plurality of autonomous sovereign nations would be overcome. There is a certain truth here which must not be overlooked. But neither should we overlook the error, which consists in failing to see that by conquest one gets government by force alone, necessarily nonconstitutional government and so unable to establish anything except a very imperfect peace that will before long be broken into a thousand fragments by violent rebellion on all sides.

Keep the truth of this point and correct the error, and you will reach the conclusion toward which this whole analysis inevitably tends. Let me now state that conclusion as inescapable.

The rule of law that is, just constitutional government is the indispensable condition of peace in any community, however small or large, from the smallest tribe to the as yet nonexistent community of all men on the face of this earth. The threat of civil war or violent rebellion is never removed so long as the constitution remains fundamentally unjust, so long as political or economic injustice is embodied in the laws; for, so long as that is the case, men will have to resort to violence in the defense of their natural rights. But even though the class war continue after world government is set up, a single world government, a constitutional regime enforcing one rule of law on all men everywhere, is, nevertheless, the indispensable condition of world peace.


Peace is positive and war is negative. Rebellion is a breach of the peace. International war signifies the nonexistence of any peace to break. All the causes usually assigned for the occurrence of war account merely for the origins or circumstances of a particular conflict. None of them by itself is, nor are all together, the cause of war, for the only cause of war is the lack of the one condition that is needed to maintain peace namely, constitutional government and the instrumentalities of positive law.

It is folly to suppose that men must become angels to live at peace with one another. It is folly to suppose that peace will occur only when all the causes of disagreement or conflict among men are removed. That would be tantamount to making peace depend upon the assumption of angelic perfection. That that is not so is plainly shown by the fact that within the smaller communities which are now established under government, all the causes of disagreement or conflict are operative, and yet there can be peace in these communities, because the rule of law provides a way of preventing these conflicts from demanding violent resolutions. The institutions of law do not remove the causes of conflict among men. They merely provide a way of resolving these conflicts peacefully.

There is no distinction between peace and perpetual peace, so far as the cause of peace goes. What is not established in such a way that it can be perpetual is not peace but merely a truce; and, just as peace must be, by its very nature and by the operation of its causes, capable of perpetuity or permanence, so it must be universal. A partial or limited peace is not peace on earth but only a peace within the borders of some particular community, and, when that is the case, the interior peace of that community is always threatened, always subject to disturbance and violation, by the fact that this community lives in a state of anarchy with other communities with which it is always potentially at war and most of the time is actually so. No community can have peace in the full sense until the world is one community, established under a single government, exercising the authority and force of government through due processes of law.

Finally, let me make two predictions. The first is that the motion of history is toward the community of the world and toward a perpetual and universal peace which will some day be established by the constitution of a single government in which all men will participate. But my second prediction is that peace will not be made at the end of this war. What will be made will be another truce, perhaps on a larger scale and with more deceptive talk than ever before about covenants and world courts, but a truce nevertheless, and not a peace. That means that the warfare of the diplomats will continue after the guns have ceased firing. That means another war at a not too distant future.

The reason why I am so insistent on a clear perception of these fundamental truths about war and peace is that I think they may save us from childish illusions and from tragic disillusionment. The ideal of peace is what we should aim at, but if the realities

prevent us from attaining it at the end of this war, we ought to face those realities squarely; we ought not to deceive ourselves into thinking that we have made a peace that will endure when in fact we have not even made the beginnings of a peace. However unhappy the thought, we should then prepare our children for the ordeal of another and worse war than the one we are now fighting for the sake of liberty, justice, and peace. 

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