

of individuals is not yet fully established. An analogy from administrative law lends support to the theory and practice suggested. In the eighteenth century the natural law school of jurists advocated the right of resistance to unlawful acts of state prejudicing the individual. As that spelled disorder, the state met the popular demand for defense against illegal acts by instituting administrative and sometimes judicial courts in which the validity of its acts could be tested and determined. That is what is needed in international law, and it does not seem an unusual demand to make upon the nations. To promote the reign of law by permitting the government to be sued for injuries it inflicts by its agents should not invite opposition. To extend the practice from the local to the international forum is but a slight advance. The institution of the practice would remove from the political to the legal field an important department of international relations.

EDWIN M. BORCHARD.

PROJECTS FOR THE CODIFICATION OF AMERICAN INTERNATIONAL LAW

The International Commission of Jurists for the Codification of International Law, composed of two delegates from each of the Latin American republics and the United States, will meet at Rio de Janeiro on April 16, 1927, in accordance with the resolution¹ adopted by the Fifth International Conference of American States at its session held at Santiago, Chile, on April 26, 1923. The basis of the Commission's discussions will be the thirty projects for the codification of international law prepared by the American Institute of International Law pursuant to the resolution adopted by the Governing Board of the Pan American Union on January 2, 1924, by which the Governing Board submitted to the Executive Committee of the American Institute of International Law "the desirability of holding a session of the Institute in 1924 in order that the results of the deliberations of the Institute may be submitted to the International Commission of Jurists at its meeting at Rio de Janeiro."² These projects, in the form of proposed conventions, are as follows: (1) Preamble; (2) General Declarations; (3) Declaration of Pan American Unity and Coöperation; (4) Fundamental Bases of International Law; (5) Nations; (6) Recognition of New Nations and Governments; (7) Declaration of Rights and Duties of Nations; (8) Fundamental Rights of American Republics; (9) Pan American Union; (10) National Domain; (11) Rights and Duties of Nations in Territories in Dispute on the Question of Boundaries; (12) Jurisdiction; (13) International Rights and Duties of Natural and Juridical Persons; (14) Immigration; (15) Responsibility of Governments; (16) Diplomatic Protection; (17) Extradition; (18) Freedom of Transit; (19) Navigation of International Rivers; (20) Aerial Navigation; (21) Treaties; (22) Diplomatic Agents; (23) Consuls; (24) Exchange of Publications; (25)

¹ Special Supplement to this JOURNAL, Vol. XX, 1926, p. 295.

² This JOURNAL, Vol. XVIII, 1924, pp. 269-270.

Interchange of Professors and Students; (26) Maritime Neutrality; (27) Pacific Settlement; (28) Pan American Court of Justice; (29) Measures of Repression; (30) Conquest.

The genesis of these projects is described in an editorial in this *JOURNAL* (Volume XIX, 1925, p. 333) by Dr. James Brown Scott, one of the representatives of the Government of the United States on the Commission of Jurists, and they are printed in full in the Special Supplement to this *JOURNAL*, Volume XX, 1926, pp. 300-384.

The Board of Editors of the *JOURNAL* has deemed it appropriate to comment upon these projects. A discussion of Projects Nos. 14, 15, 16, 17, 18, 19, 20, 26, 27, 28, 29 and 30 is contained in the January, 1927 number of this *JOURNAL* (Vol. XXI, pp. 118-146), and it is the purpose of this editorial to discuss briefly projects Nos. 1-9.

The main objective of all of these projects is the codification of American International Law, and through them all runs the unmistakable implication that a distinction must be drawn between American International Law and European, or General, International Law. This distinction apparently is not limited to the law governing the relations of the American nations between themselves, but applies also to the development of international law in the relations between the American nations and non-American nations.

In order to emphasize the distinctive Americanism of the international law which is to be codified by means of these projects, each of them is framed in the form of a treaty between the American nations exclusively. Many of them in terms call especial attention to the solidarity and common interests of the American nations and the consequent advisability that they should determine for themselves the principles and rules governing their international intercourse.

The first four of these projects, together with Project No. 9, all emphasize the desirability of developing solidarity among the American republics, and the necessity for differentiating, to a certain extent, American international interests and relations from those of non-American nations.

For instance, the Preamble for all of these projects, which in itself is Project No. 1, recites that it is one of the great duties of the American republics "to strengthen the bonds of solidarity between them which nature and history have happily established" and that "it is incumbent upon the American Republics to determine among themselves alone the rules which shall regulate simply their reciprocal relations."

The Preamble also points out that although "international law originated and developed on the European continent and has thence been extended to all the nations of the world," nevertheless, "outside of Europe certain rules or principles have been modified in conformity with the special conditions prevailing in certain regions." So also, the General Declarations, which constitute Project No. 2, recognize that although the international law in force in Europe is applicable to the American republics, nevertheless "they have

maintained the power to proclaim other principles or rules more in harmony with the new conditions of their existence and more favorable to their free development. They have claimed especially the right to establish fundamental bases for American international society in conformity with their necessities and aspirations.”

These General Declarations define the body of law to be known as American International Law, as follows:

By American International Law is understood all of the institutions, principles, rules, doctrines, conventions, customs, and practices which, in the domain of international relations, are proper to the republics of the New World.

The existence of this law is due to the geographical, economic, and political conditions of the American Continent, to the manner in which the new republics were formed and have entered the international community, and to the solidarity existing between them.

Lest these Declarations should be taken to have a more far-reaching effect than was intended, they conclude with a final limitation, as follows:

American International Law thus understood in no way tends to create an international system resulting in the separation of the republics of this hemisphere from the world concert.

Project No. 3 adopts as a Declaration of Pan American Unity and Coöperation the principles stated by Mr. Elihu Root, as Secretary of State, at the Third Pan American Conference, held at Rio de Janeiro in 1906,³ which have already, by virtue of their universal appeal to every American nation, become embodied in American International Law. This Project also adopts the declaration made by Mr. Root, as Secretary of State, in his address on laying the corner stone of the Pan American building in Washington in 1908,⁴ stating as a working basis for an American peace policy that:

There are no international controversies so serious that they can not be settled peaceably if both parties really desire peaceable settlement, while there are few causes of dispute so trifling that they can not be made the occasion of war if either party really desires war.

Project No. 4, which undertakes to define the Fundamental Bases of International Law, consists of six sections, (1) “Nature and extent of international law”; (2) “Elements of general international law”; (3) “Source; obligatory force in America of international rules, customs, or practices; abrogation”; (4) “Development and interpretation of the rules of international law in America”; (5) “Value of national laws, diplomatic precedents, arbitral awards, and opinions of publicists”; (6) “Sanctions of international rules in America.”

³ Secretary Root's Speeches in South America, 1906, p. 12, quoted in this JOURNAL, Vol. III, pp. 424-5.

⁴ This JOURNAL, Vol. II, pp. 522-4.

The provisions of Sections 1 and 2 consist of definitions, based for the most part upon accepted authorities and classifications. Article 4 of Section 1 is of particular interest in relation to the present controversy about the so called confiscation policy of foreign owned property in Mexico. It provides: "National laws should not contain provisions contrary to international law."

The remaining sections deal with international rules to be developed on the American continent. Apparently the general principles of international law are subordinated to the international rules adopted on the American Continent, because it is provided that rules established by conventions, signed by the republics, even if they have not yet been ratified, "should be considered as a manifestation of the legal consciousness of the New World," and only in the absence of rules derived from this source, among the others enumerated, "shall recourse be had, in the international relations of American republics, to the rules of universal international law in so far as they are not contrary to the American principles indicated above."

The idea of American solidarity is again introduced by the provision that "international rules should always be developed and interpreted in a spirit of international solidarity and general utility."

This and the preceding projects all lay the foundation for the enlargement of the authority and importance of the Pan American Union as proposed in Project No. 9.

The Pan American Union, as at present organized, owes its origin and continued existence to resolutions adopted by the Pan American Conferences held from time to time since 1889 by the twenty-one American republics, and it is maintained by funds contributed through voluntary appropriations by those republics. It is now functioning under authority of a resolution adopted by the Fifth International Conference of American States held at Santiago, Chile, in 1923.

The direction of the Pan American Union is controlled by a Governing Board composed of the diplomatic representatives of the American republics accredited to the Government of the United States, and the Secretary of State of the latter country. Its President and Vice President are elected by the Board. Its administration is in the charge of a Director General appointed by the Board, who has power to promote its development in accordance with the regulations and resolutions of the Governing Board, to which he is responsible. The Board also appoints an Assistant Director who acts as its Secretary.

While the Pan American Union has been in existence continuously for many years, its permanence is dependent upon the voluntary assent of the governments maintaining it. One of the purposes of Project No. 9 is to establish the Pan American Union on a more permanent basis by substituting a treaty as its charter in place of a conference resolution.

The Pan American Union as organized under the proposed treaty retains

substantially all of its old functions under the resolution, but, instead of acting merely as an administrative agency for the twenty-one American republics, certain political activities on the part of the Union now seem to be contemplated. As recited in the preamble of this Project, "The Pan American Union, perfected in the course of the various conferences held by the American republics, should be the framework for the said organization." The "said organization" is the reorganized Pan American Union, which is projected in the preamble as follows:

It is necessary to organize American international life on the basis of coöperation and in such a way that this organization may reflect the legal consciousness and opinion of the Republics of the New Continent.

It is accordingly proposed that the American republics agree in this treaty that:

The Pan American Union is a permanent organ of conciliation and coöperation between the Republics of the New World.

All the American Republics have the right to be represented in the Union on the basis of equality.

In recognition of this right, representation by a government not recognized by the United States is ensured by the provision that:

The American Republics which for any reason whatever may not have a diplomatic representative accredited to the Government of the United States of America may appoint a special representative to the Board of the Union.

In connection with the proposed new activities of the Union it is of interest to note the following provision from Project No. 4 (Article 22):

American Republics directly injured by a violation of international law may address themselves to the Pan American Union in order that it may bring about an exchange of views on the matter.

One of the most important of the new functions conferred upon the Union by this treaty is:

The Pan American Union may appoint a special commission, which shall have the following duties:

1. To see that a maritime map of the American Continent is drawn, on which shall be indicated the different zones to be distinguished for navigation, especially the territorial sea and the part contiguous thereto. This map should also indicate the regions to which the present convention is not applicable, particularly the antarctic and polar regions.

2. To see to the observance of the most absolute freedom of navigation in accordance with this treaty, and to see that no nation interferes with it even indirectly. Every violation which appears to be established by the special commission shall be communicated to the Pan American Union.

3. To recommend to the Pan American Union any other measure relating to maritime navigation which it may deem useful.

4. To register and publish the laws and regulations on the subject of navigation enacted by the American Republics.

5. To study the best method of making the provisions of the laws and regulations referred to in the preceding paragraph uniform.

Project No. 5, Nations, states the elements entering into the international conception of a nation. Its chief purpose apparently is to declare that all the American republics possess the necessary elements of sovereignty and, therefore, are nations, and that inasmuch as nations are legally equal "the rights of each do not depend upon the power at its command to insure their exercise." The declaration that the American republics are nations seems to be superfluous because, if the American republics were not nations in the international sense, a treaty entered into by them declaring that they are nations would not make them so. The declaration as to the rights of nations is duplicated in Projects No. 7 and No. 8, which would seem to be a more appropriate place for such declaration.

Project No. 7, Declaration of Rights and Duties of Nations, is a reproduction, with certain formal changes to put it into treaty form, of the Declaration adopted by the American Institute of International Law at its First Session in the City of Washington, January 6, 1916, with the addition of the following article:

The American Republics recognize it as a fundamental duty to furnish instruction to their nationals in their international obligations and duties as well as in their rights and prerogatives, thus creating the "international mind" and the public opinion which shall in the future obtain by persuasion what force has failed to gain in the past.

This Declaration, as originally adopted, was the subject of an editorial comment by one of its joint authors, Dr. James Brown Scott, in this JOURNAL (Volume X, 1916, p. 124), which makes further comment here unnecessary.

Project No. 8, Fundamental Rights of American Republics, proclaims for the American republics a doctrine of non-interference with each other except only by "friendly and conciliatory action without any character of coercion," and forbids the cession by any American republic of any part of its territory to a non-American nation, or the occupation "even temporarily of any portion of the territory of an American Republic in order to exercise sovereignty therein, even with the consent of the said Republic." This Project is also of interest in relation to the proposed extension of the functions of the Pan American Union in that it provides that in case of the violation of the provisions above mentioned, or in case of "menace, offense, or acts of violence, individual or collective, committed by those nations [apparently either American or non-American nations] with respect to an American Republic, the continental solidarity will be affected thereby, and any American Republic may address the Pan American Union with the object of bringing about an exchange of views on the subject."

Project No. 6 deals with the Recognition of New Nations and of New Governments, and is merely declaratory of settled rules of international law on the subject.

This Project is of special interest, however, in that, in effect, it repudiates the non-recognition policy adopted by the Central American republics among themselves in their treaty of February 7, 1923, prohibiting the recognition of a new government, in any of those republics, coming into power through a *coup d'état*, or a revolution, which alters its constitutional organization.

This Project provides that:

Every abnormally constituted government may be recognized if it is capable of maintaining order and tranquillity and is disposed to fulfill the international obligations of the nation.

In other words, a *de facto* government may be recognized regardless of its constitutional, or *de jure*, status.

This provision conforms to the traditional policy of the United States. Since the time of Thomas Jefferson the United States, except for a very brief period and under exceptional circumstances, has consistently followed the policy, introduced by him in our foreign relations, of granting recognition to new governments on the purely *de facto* principle, in distinction from the theory of legitimacy, which then controlled European governments in their international relations.

The *de facto* principle is based upon the jural equality of nations, and the sovereign right of the people of each nation to determine for themselves their own form of government. The *de facto* principle is accordingly basically antagonistic to the *de jure* principle, which rests on the assumption that the government of one nation is entitled to pass on the legitimacy of the government of another nation, thereby subordinating the internal affairs of one nation to the approval of another nation, and introducing considerations of domestic policy into international relations.

The question of the constitutionality of an act of congress or of a government is a domestic political question, which certainly the United States in its own case would refuse to submit to the decision of any other government.

A practical demonstration of the impracticability of the *de jure* policy, which was adopted by the Central American republics, has been furnished by the recognition by the United States of one government in Nicaragua and the recognition by Mexico of another, each as the *de jure* constitutional government.

The unfortunate results of our intermeddling in Nicaraguan domestic politics during the Chamorro régime, and especially in attempting to decide upon the constitutionality of the political acts of the National Congress of Nicaragua, demonstrate the wisdom of our traditional policy of recognizing, as proposed by this project, a *de facto* government without attempting to pass upon the domestic question of its constitutionality.

CHANDLER P. ANDERSON.