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The Law of Nature and Nations (Excerpt)

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The Law of Nature and Nations, Excerpt

By Samuel von Pufendorf

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Chapter 3: Of the Law of Nature in General

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There is still one question behind which requires our determination. Whether or no there be any such thing as a particular and positive *Law of Nations*, contradistinct to the *Law of Nature*. Learned men are not come to any good Agreement in this Point. Many assert the *Law of Nature and of Nations* to be the very same thing, differing no otherwise than in external denomination. Thus *Hobbes* (*De Cive*, chapter 14, sections 4, 5.) divides *Natural law*, into the *Natural Law of Men*, and the *Natural Law of States commonly called the Law of Nations*. He observes, that "the precepts of both are the same": But that "for as much as states when they are once instituted assume the personal properties of men, hence it comes to pass, that what, speaking of the duty of particular men, we call the Law of Nature, the same we term the Law of Nations, when we apply to whole states, nations or people." This opinion we for our part readily subscribe to: Nor do we conceive, that there is any other voluntary or positive law of nations, properly invested with a true and legal force and obliging as the ordinance of a superior power (Add. John Henry Boecler, [Commentary] on Grotius, I, Book 1, chapter 1, section 14 and on I.2, chapter 4, section 9). And thus we do not really differ in judgment from those who are more inclined to call that the law of nature which consists in a conformity to rational nature, and that the law of nations, which flows from the consideration of human indigence, the relief of which seems to be the main end and design of society. For we as well as they, deny that there is any positive law of nations proceeding from a superior. And whatever is deducible from reflections on the indigence of human nature, we refer immediately to natural law: only we were unwilling to define and explain this natural

law by a conformity to rational nature; because this means we should establish reason for the rule and measure of itself; and so this way of demonstrating nature's laws would run round in a circle.

Most of those matters which by the *Civilians* and others are referred to the law of nations, as the ways of acquiring things, the business of contracts, etc. do indeed belong either to the law of nature or to the civil laws of those countries where they are observed: Many people and states agreeing in such points, which otherwise do not depend on the universal reason of mankind. Now it is not proper or fair to constitute these as a peculiar and distinct species of *Law*; in as much as the reason why such constitutions are common to many nations doth not arise from any mutual covenant or obligation, but it is wholly to be attributed to the particular pleasure of the several legislators, who by accident agreed in these ordinances, without the least regard to one another. And therefore this kind of customs and decrees, may be and frequently are, altered by one people, or kingdom, without advising with their neighbors.

Nor is *Feldenius's* distinction to be despised, who in his observations on *Grotius* (Book 2, chapter 2, section 20 and chapter 8, section 1), tells us, that the Roman lawyers by the *Law of Nations*, understood the power and liberty which strangers and foreigners were allowed to transact matters in the *Roman* state; and by the *Civil Law*, that which was proper to the citizens only, all foreigners being excluded from its benefit. That on account *Wills* and marriages were said to be of the *Civil Law*, and contracts or bargains, of the *Law of Nations*, because the former were restrained to the citizens, whereas strangers were admitted to a share and right in the latter.

Many authors do farther rank under the title of the *Law of Nations*, several customs mutually observed by tacit consent, amongst most people pretending to civility; especially in the affairs and transactions of war. For after that the most polite parts of the world came to esteem martial glory as the greatest of human honors, and to think that a man had no such fair way of showing his excellency beyond others, as by being able by his boldness and his sagacity to destroy many of his fellows; upon which account there perpetually arose either unnecessary or unjust contentions; for fear great captains, if they used the full liberty of a just war, should bring to much envy on their power, and expose themselves to general hatred; many nations found it convenient to temper the vigorous fierceness of hostile proceedings, by a show of clemency and of magnanimity. Hence arose customs of exempting certain things and person from martial violence; the particular manners of hurting enemies to such degrees, of treating captives, and the like. *Machiavelli* in his *Prince* (chapter 12) relates one practice of this nature, which I question whether it were worthy of the name and profession of soldiers. He says it was first introduced by *Aberigio da Como* of *Romagna*, and kept up in the *Italian Wars* of the last age, chiefly by the foreign and mercenary troops. The opposite generals endeavored with all possible industry to rid themselves and their soldiers of all trouble and fear. And their way was, by killing no one in fight; only taking one another prisoners, whom they afterwards dismissed without ransom. When they were in leaguer before a town, they shot not rudely amongst them in the night; nor did the besieged disturb their camp with the like incivilities. They made no entrenchments for their security whilst encamped; and when winter came on, never lay at all in the field. And to behave themselves in this manner was part of their discipline and institution. An agreement something like this *Strabo* (*Geography*, Book 10) tells us of, between the *Eretrians* and the *Chalcidians*, forbidding the use of missive weapons against each other. To which we may add the custom observed by the ancient *Indians*, of letting the husbandmen remain safe from all injury and molestation, even in civil wars (*Arrian, Indica*).

But although these customs seem to include some kind of obligation arising from tacit consent; yet if

one who is engaged in a lawful war, shall neglect them, and profess that he will not be bound by such restraints; provided what is contrary to them may be rightly done according to the law of nature; he is guilty of no other sin, but a sort of unskillfulness, in not adjusting his proceedings to the nice models of those who reckon war in the number of the liberal studies. As a gladiator who is accused of inexpertness, when he wounds his antagonist otherwise than by the rules of art. Whoever therefore wages war in a just cause, may slight these formalities at pleasure, and govern himself purely by the law of nature: Unless he thinks it more for his interest to observe them, as a means to render the enemies less severe towards himself and his men. On the other hand, he who prosecutes and unjust quarrel, if he punctually fulfills these niceties, is so far in the right, as to appear wicked with some kind of temper and moderation. However these reasons not being general, cannot constitute any law of an universal obligation. Especially since as to any restraints which depend on tacit agreement, it seems reasonable that either party should have the liberty of absolving themselves from them; by making express declaration that they will be holden by them no longer, and that they do not expect or require the observance of them from others. Hence we find many such practices to be worn out by time, or overcome by the prevalence of contrary custom. Neither have those men any good reason of complaint, who censure this doctrine as a notion by which the security, the interest, and the safety of nations are robbed of their surest guards and defense. For the insurance of these advantages and blessings doth not consist in the practice of such mutual favors, but in the due observance of the law of nature; a much more sacred support; and which whilst they enjoy, they have little need of inferior methods of protection. And sure it shows much more excellency and worth in any custom, to derive it from the law of nature, than to establish it only on the consent of different people.

Amongst the chief heads of that *Voluntary Law of Nations* which *Grotius* maintains, he reckons the law of embassies. Now as to this point it is our opinion, that the persons of ambassadors are sacred and inviolable, even amongst enemies by the mere law of nature; provided they do not come purely as spies, nor enter any hostile design against the person to whom they are sent; although in the ordinary course of business, and of treaties, they prefer their master's interest to all others. For in as much as such persons are necessary for the procuring the preserving, or the strengthening of peace by leagues and covenants; and since the law of nature enjoins us to embrace peace by all honest ways: it must at the same time be supposed to have provided for the security of those men, without whose intervention this good end cannot be obtained (Add. Frederick de Marselaer, *Legatus*, I, Book 2, chapter 13). To this right of personal safety is joined another of being exempted from the jurisdiction of the sovereign to whom they are sent; at least in all matters relating to their office. Since otherwise they would not have full power and liberty to promote their master's interest, with due application and vigor, were they obliged to give an account of their management to any authority besides that which they represent. Other privileges commonly attributed to ambassadors, especially to those who reside in courts, not for the settling or the securing of peace, but chiefly for the diving into the secrets and policies of a state, these depend absolutely on the indulgence of the prince who entertains them; and therefore, if he sees convenient, he may deprive them of these favors without the breach of any law, provided he will suffer his own ministers abroad to be treated in the same manner.

The right of burial, which according to *Grotius* seems likewise to make a particular head of the *Law of Nations*, may be well referred to the common duties of kindness and humanity (Add. Antonius Matthaeus, *De Criminibus*, Prolegomena, chapter 3, section 5). Nor are the other instances which he offers, of consequence enough to establish a new species of law, since they may with convenience enough be allowed a place in the system of the law of nature. As for those persons who rank under the *Law of Nations*, the particular compacts of two or more states, concluded by Leagues and Treaties of Peace, to us as their Notion appears very incongruous. For although the *Law of Nature* in that part of it concerning the *keeping of Faith*, doth oblige us to stand to such agreements; yet the agreements themselves cannot be called *Laws*, in any propriety of speech or of sense. Besides they are almost infinite in number, and commonly are settled only for a time. Nor do they any more constitute a part of

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Law in general, than the covenants and bargains of particular subjects with each other, do belong to the body of the civil law of the kingdom: but they are rather to be esteemed the subject and the concern of *History* (Add. Selden, *de Mari Clauso*, l.1, chapter 2, concerning *Unwritten Laws*, or *Custom*, besides others. See John Henry Boecler on Grotius, I, Book 2, chapter 4, section 5).

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