Neglected Modes of International Arbitration

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NEGLIGENCE MODES OF INTERNATIONAL ARBITRATION

Supposing that two countries, having a dispute to settle, agree to refer it to the decision of a third party, but without binding themselves necessarily to adopt that decision, what is the proper name of the transaction?

What name, that is, is least misleading to the ordinary person who may find it used? Surely arbitration most fittingly covers these cases of recurrence to the benefit of a third opinion, which in all but their consequences so closely resemble reference to the obligatory determination of a third party. In both cases the procedure is exactly the same—the parties desire a definite pronouncement as to which of them is in the right, and they set about obtaining it in exactly the same way, only in one case they bind themselves to abide by the decision—in the other case they leave it to have its moral weight.

This is not slight—for if your own chosen referee has pronounced against you, you can without loss of dignity pay up and look pleasant. The invocation of the opinion of a third party has a powerful influence—and it may very well happen that a nation will consent to take such an opinion and in the end will very probably abide by it, where it would think twice and thrice before committing itself to abide by it in advance.

Mr. Merignhac would call such a proceeding "mediation" and although we should not quarrel about names, yet we think that such nomenclature has the unfortunate effect of slurring over the existence and uselessness of this kind of open arbitration. It is not in the least like mediation as the term is generally
understood: and if it is shut up in the same box with it, the result will be that it will be neglected and forgotten. Merignhac shuts it up in the mediation box because he has made up his mind that arbitration must be decisive on the parties, but it differs from mediation toto coelo. In mediation the third party endeavors to compose the differences between the parties. He takes the initiative, suggests compromises, presses concessions, listens to considerations outside the subject-matter in dispute, introduces considerations of morality and good-neighborliness, and acts, in short, as a friend and advisor rather than as a jurist. In arbitration, the third party says (or should say) simply who is right and who is wrong. There is nothing in common between it and mediation.

This is not to confuse mediation with good offices. The power (or powers) which tenders its good offices to disputants does not concern itself with the points which are in dispute, but only with the means of settling them. It interposes at the request of one or other, or spontaneously, to dissuade from war or mobilization—to suggest reasons of conciliatory settlement—to propose disarmament, mediation, arbitration or some step which will place a check on war.

Few, if any, instances of such arbitration as has been mentioned exist in history, and yet one must recognize that, especially in the more vital and important classes of dispute a reference of this kind might prove of the greatest value. It is seldom that a nation can contemplate calmly the irrevocable submission of its case in an important matter to three or four gentlemen, however eminent, or to any municipal court, however august. But if it referred the case to the candid opinion of expert friends, it would be easy as regards the result; whilst at the same time, if their opinion should be against it, it might well proceed to accept it. Turbulent elements in the state would be checked by the citation of the arbitrators' decision. The natural reluctance of the government to yield to external force or threats would be replaced by a comparative willingness to yield to enlightened outside opinions.

Two individuals quarrel. Neither can induce the other to give way. Without washing their dirty linen in public, and subjecting each other to the compulsion of sheriff and constable, they, like sensible people, invoke the opinion of a common and
trusted friend—perhaps (and indeed very often) an honest lawyer. "Well, if he says you are right, I suppose you must be right, though I can't see it myself," says the one party, and gives way, where nothing could have induced him to alter his own opinion. This is surely a procedure which international laws might well encourage, rather than smother under a misleading nomenclature.

Much must always turn, in international as in other arbitration, on the personality of the arbitrators. In a reference for opinion, this is particularly important—since it is in the value which the parties have for the opinion of the arbitrator that its importance consists. In the case of decisive arbitration, where the parties bind themselves to accept the judgment, the case may be wrongly decided, but at any rate it is decided. But in consultative arbitration (as it may be styled), the whole force, or nearly the whole force, of the proceeding depends on the disputants' confidence in the competence of the arbitrator. Some weight comes also from the natural unwillingness to stultify oneself in the eyes of the world by refusing to accept the determination of one's own appointed referee—but this again rests in the long run on his accepted fitness.

A great deal more stress should be laid than has hitherto been the custom, on the personal qualifications of those who are selected as arbitrators. This has a vicious historical reason. As states are disputants, it was at first natural and common that states should be the arbitrators; nothing less seemed calculated to satisfy their dignity. But as states could not literally act as arbitrators the choice, equally naturally, fell on sovereigns, and sovereigns, not being personally conversant with or much caring to be troubled with the details in dispute, chose any decently competent person to prepare their decision for them. It is obvious that in such a state of things the disputants have no special confidence in the real arbitration;—they only have confidence that it will be the choice of a personage whom they trust. This system was succeeded by one in which the sovereign was expected to do openly what he no doubt did privately and the dispute was referred to an un-named person to be named by him. Here also the parties may have a fair guarantee of impartiality and competence—but they clearly have no special trust and confidence in the personal qualities of the referee, for they do not know who he is.
A far better system would be frankly to recognize that it is
really individuals who decide these cases, and that their indi-
vidual characters and capacities are transcendently important.
That an arbitrator is a Portuguese or a Norwegian is nothing
beside the fact that he has a judicial, an instructed, and a patient
temperament. An eminently judicial, instructed and patient
temperament is what the disputants want,—and the fact that the
arbitrator is a supreme court judge will not of itself secure it,
nor will the fact that his government has a high opinion of his
ability, based on his usefulness to them in some quite different
sphere of activity.

We have spoken of "the arbitration" in the singular; for it
is a remarkable and regrettable fact that arbitrators chosen by
single parties or by sovereigns nominated by single parties, almost
invariably reduce themselves to the position of advocates at the
table. Such arbitrators with a mission—to secure the advocacy
of their own cause—should never be admitted. If once the
rational system were well established of selecting arbitrators for
their own personal competence, there would be little or no reason
for the exclusion of persons of the nationality of one or both
disputants. Such a person as the late Lord Courtney in Eng-
land, or Carl Schurz in America, might well have commanded
confidence in any mind. At the same time one would not
necessarily have taken Lord Courtney's opinion on a point of
navigation, or Mr. Schurz's on a military proposition. Technical
competence must be a matter to be considered. A dispute on a
question of conveyancing needs quite different qualities for its
solution from those which are useful in establishing the truth
in conflicts of evidence.

With those qualifications, the neglected process of referring
disputes for a friendly but not necessarily binding decision may
be seriously recommended for adoption.

A further word may be added on defects which seem to exist
in the usual type of arbitral body.

In the first place, it imitates too closely the procedure and the
de haut en bas attitude of a municipal court. This is not the
place to attack or to examine the propriety of that attitude
assumed by municipal judges. Everybody is conscious of it:—
the judge, carrying out the traditions of a day when the sov-
eriegn sat on the bench, regards the parties and their advocates
with an Olympic air. Even where the bar is highly capable and
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highly organized this attitude of the judicial person subsists. It subsists in Britain, and anyone who needs the rebuke to which David Dudley Field and his colleagues submitted to listen to a not very distinguished judge, will agree that it has its place in America. Where a court sits to exercise jurisdiction over a vast mass of populace, such an attitude may have its merits, but where arbitrators sit to determine by consent a dispute between two or three of a circle of fifty friends it is entirely out of place. An international tribunal has to determine disputes between states. If it arrogates to itself the lofty attitude of municipal judges it goes far to reduce them to the level of subjects. An international arbitration ought to be conducted on terms of the fullest equality: the advocate of the sovereign litigant ought to argue on equal terms with the arbitrators. He ought not to stand before them. He ought not to be told to be silent by them. This is partly why nations cling to the bad practice of appointing arbitrators who are practically national advocates: they secure their dignity thereby. But those who appear before an arbitral body to represent the interests of a sovereign state ought to yield in no substantial or formal respect to those who appear to give their arbitral decision. It may be objected that, on such a footing, the proceedings will fall into hopeless confusion. If the advocates appointed by a litigant nation throw the conduct of the case into confusion, then they stultify the reference and expose their country to the charge of failing to fulfill its engagements. If the arbitrators do the like, they fail in their duty. This ought to be sufficient to secure a proper conduct of business, without enthroning the arbitrator as a dictatorial judge. An international arbitration ought to be a friendly discussion; not a tournament of wits under judicial dictation.

It ought to be possible for advocates to converse freely and familiarly with the persons who will decide the matter. They should be hampered by no considerations of an unreal and conventional respect for the superior position of the board. The ideal would be for all to sit together at a round table in armchairs.

In the second place, the imitation of law courts has probably been carried too far in the adoption of a small fixed number of arbitrators for all classes of disputes. There are some disputes so far-reaching and delicate that it is not safe or fair to entrust
them to the decision of a majority of three lawyers. One wants, to decide such matters, something which will fairly represent the sense of justice of the whole world. I am not alluding to the distinction sometimes drawn between "justiciable" and "non-justiciable" disputes: I am old fashioned enough to believe that in any dispute a nation is either right or wrong, and that if it can be judicially declared to be wrong it is its business to make the best of it. But, even so, a great national question is not to be settled by the opinion of two or three majority jurists, however eminent. Jurists are apt to have eccentric views on particular topics. F. F. de Martens, who is not inferior to any of his contemporaries, gave a decision in *The Costa Rica Packet* which would hardly have been concurred in by many of the rest, and international jurists are particularly apt to be carried away by academic and impractical dogmatism. Statesmen are the real authorities on the law of nations—and they, again, are liable to be warped by political considerations and prepossessions. Accordingly it would seem that far greater elasticity in the composition of boards of international arbitration might well be introduced. For some disputes a single well-equipped technical authority would be sufficient, for others the conventional majority of two or three, for others a unanimous four or five.

But, for the most important class of differences a far more representative opinion is required. It might be secured by forming a sort of international jury. Each side might arrange the countries of the world in order of preference, and from the twelve highest in both lists might make a mutual selection of twelve or twenty-four thoroughly impartial and able persons to give their considered opinion after hearing the advocates of both sides. Such an Areopagus might command an influence which would ultimately crystallize into the formation of a regular tribunal whose seat, as Lorimer, the Edinburgh professor, suggested might well be fixed, with sovereign rights at Constantinople. For the same personages would probably be chosen again and again. But whether it did so or not—and perhaps it is to be deprecated that it should—the decision of such a specially selected body would carry far greater weight than the ipsi dixerunt of two or three individuals.

Elasticity is what is wanted. Elasticity in the reference—making it possible to refer for an opinion as well as for a decree. Elasticity in the procedure—dethroning the dictatorial procedure
of municipal courts and introducing the frank familiarity of a cabinet. Elasticity in the staff—fitting the composition of the tribunal to the relative importance and delicacy of the work in hand.

It is confidently suggested that these neglected elements in a satisfactory system of arbitration are well worth the attention of statesmen and jurists, and that their introduction with practice would enormously set forward the popularity of arbitral settlement.

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