

**THE PAPACY CONSIDERED
IN RELATION TO
INTERNATIONAL LAW**

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The Papacy Considered in Relation to International Law by Ernest Nys & Ponsonby A. Lyons

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BY
ERNEST NYS,
DOCTEUR EN DROIT.

Translated from the French
BY THE REV. PONSONBY A. LYONS,
Editor of "Whitaker's History of Whalley."

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TO

THE RIGHT HONORABLE

SIR ROBERT PHILLIMORE, D.C.L.,

MEMBER OF HER MAJESTY'S MOST HONORABLE PRIVY COUNCIL
AND JUDGE OF THE HIGH COURT OF ADMIRALTY,

THIS ESSAY

IS

RESPECTFULLY INSCRIBED

By the AUTHOR.

189068

The Papacy

AND

INTERNATIONAL LAW.

ONE of the most interesting problems of international law is that of the international position of the Papacy in our time. Eight years ago, the sovereign pontiffs found themselves deprived of the temporal power which they had exercised for centuries; and of the double character with which they had been invested, there now remains to them merely that of supreme chiefs of the Roman Catholic Church. As long as Rome was subject to them, they had, like all sovereigns, a juridical international personality; they enjoyed the rights conferred by this personality, and were subject to the obligations it implies. The events of 1870, the entry of the Italian troops into the Eternal City, the suppression of the Roman States, would appear necessarily to induce great changes, and to have modified the status of the Holy See.

It might at first have been supposed that Europe would regulate the new condition of the Holy See. Projects of this kind were attributed to the empire of Germany. But no resolution was taken. Some states profited by the march of events to withdraw their representatives from Rome. Others maintained the *status quo*. After 1870, Pius IX. had his nuncios as he had before; after, as before, he saw powers accredit their ambassadors to his person. Even his death has not as yet modified this state of things, and Leo XIII. has, like his predecessors, been able to notify to the different governments his accession to the pontifical throne; like them, he maintains diplomatic rela-

tions, and, at this moment, negotiations are going on, with a view of renewing with several countries the relations which the policy of Pius IX. had broken off (a).

From a theoretical point of view, there is here a flagrant anomaly. The only persons known to international law are States (b). Outside of them, nothing is capable of rights or subject to duties. Primitive or absolute rights, conditional or hypothetical rights, rights arising from pacific or hostile relations, are, like the duties corresponding to these rights, the exclusive attribute of sovereignty. Now, there is no sovereignty except in the State. As soon, then, as the temporal power of the popes fell, their international status would vanish. They would not, and could not, have international rights or duties.

The facts, however, are far from being in conformity with principles. In the past, the sovereign pontiffs have already been seen to send out, as popes, not as kings, their legates and nuncios, and to negotiate Concordats not relating either to the Patrimony of St. Peter, or to the interests of their subjects (c). Eight years have elapsed since the fall of the temporal power. We have stated what was done for Pius IX.; we have told what is now done for Leo XIII. One of the principal rights of sovereignty—the right of legation and treaty—has been exercised, and is still exercised.

Where is the error? Is it in the theory or in the practice? Has or has not the Papacy an international status? Constituted as it is, a supposed spiritual power,

(a) The States still actually represented at the Vatican are:—Austria and Hungary, Spain, France, and Portugal, who have each an ambassador at Rome; Bavaria, Belgium, Bolivia, Brazil, Ecuador, Chili, Guatemala, Monaco, the Republic of Nicaragua, Peru, and the Republic of San Salvador, who maintain a minister plenipotentiary. Germany has retained a chancellor. Holland has no minister accredited to the Holy See, but an internuncio continues to reside at the Hague.

(b) Bluntschli, *Das Völkerrecht der civilisirten Staaten*, Book II. art. 16 et seq.

(c) Bluntschli, *De la responsabilité et de l'irresponsabilité du Pape dans le droit international*. Translated from the German by A. Rivier.

deprived of all real and effective sovereignty, can it enjoy a primordial prerogative of sovereign States? This is the problem which we find placed before us.

The question assuredly deserves to be examined. Few institutions have played a part in the world comparable to that of the Papacy. For centuries the annals of the Holy See have been confounded with those of Catholicism itself. It was the bishops of Rome who created, so to say, the Catholic Church; it was they who gave it its formidable organization; and it was they who impressed upon it that impulse which long made it the arbiter of the destinies of humanity. On this account alone the study of their international rights and duties presents great interest. But the Papacy has not a merely historical character. Now, as in the Middle Ages, the sovereign pontiffs find themselves at the head of Catholicism. Theoretically, the popes of the nineteenth century are even more supreme than their predecessors; and what in Gregory VII., Innocent III., and Boniface VIII. was simply an affirmation of haughty pretensions, has become for Roman Catholics a dogma of faith with respect to Pius IX. and his successors. The Constitution *Pastor Æternus* of 18th July, 1870, has this bearing, that henceforth, literally, the Pope is the Church. And whatever may be the feeling entertained on the subject of Catholicism,—whatever may be the opinion held as to its mission, and the manner in which that mission has been fulfilled,—it is impossible to ignore the influence which it yet in our days exercises on the march of civilization. It cannot, then, be superfluous to study the status of him who personifies it.

History, the *living word of law*, as one of the great minds of contemporary Germany so well calls it, will serve us as a guide in our labour. We will examine by its light the Roman theories on the subject which occupies us; we will study the attempts which have preceded, and the facts which have accompanied, the putting into practice of these theories, and we will try to educe what we believe to be

sound ideas. The problem, however, is confined within sufficiently narrow limits. It cannot be required to examine if the Papacy possesses a complete and perfect sovereignty. A multitude of international rights cannot in any case be acknowledged to belong to it; and it will be finally sufficient to examine whether it is allowable to admit that the Papacy possesses a sovereignty *sui generis* which gives it the right of legation and treaty.

I.

The science of international law is modern. If, however, it had existed in antiquity, the situation of a pretended spiritual power could not have found a place among its objects. In reality the very idea of such a power did not exist. Religion was, above all, national; the political community included the spiritual, and the *jus sacrum* was merely a division of the *jus publicum*.^x To the pagan idea Jesus opposed the idea of the separation of the two domains,—spiritual and temporal; and by the side of the earthly kingdom, He proclaimed the heavenly kingdom into which all those might enter who acknowledged Him to be the Messiah, who followed His precepts, and laboured like Him to the glory of his Father (*d*). The new religion was born.

Was it intended by its Founder to assume a tangible form, and is the conception of an outward Church a conception truly Christian? Neander (*e*) has completely proved that the Church is a deviation from the Gospel spirit; that it constitutes a return to Judaism. Moses had organized a priesthood called on to offer sacrifices, to serve as intermediary between God and man. Jesus restored direct communion between the believer and his

(*d*) Geffcken, *Staat und Kirche in ihrem Verhältnis geschichtlich entwickelt*.

(*e*) Neander, *Geschichte der christlichen Religion*, Vol. I. pp. 306 et seq.

Creator. He alone is mediator; He alone is a sacrificer. Doubtless all Christians are not endowed with the same gifts; but he who is called on to teach the faith is not the superior of those to whom he preaches the divine word. External unity is an idea of the ancient law. Under the new law there exists a more true and a higher unity,—the unity of minds.

Christianity in its pure form may then exist without raising any question of international law. Jesus and the apostles did not cease to preach submission to temporal authority. The first Christians were satisfied with progressing and recruiting their numbers under the guardianship of the existing laws; and, on the other hand, the government of the Church was long in the hands of the faithful.

To this democratic organization the episcopal aristocracy succeeded (f). The bishops claimed a divine origin. But even in this larger sphere equality continued to exist. The idea of spiritual power had assumed a bodily form. In turn episcopal aristocracy disappeared. Too weak to resist the social dissolution to which the world was a prey, it was replaced by the Papacy; and in this the power of the Church concentrated itself. On the ground of reason, the pretension set up by the Papacy of constituting a spiritual power was unfounded. Nevertheless it gained ground.

The bishops of Rome did not long consent to remain the equals of the bishops of other Christian communities. It is curious to see that even in the primitive Church Pope Victor declared the Christians of Asia Minor separated from his communion; and in the third century Pope Stephen claimed to impose on the Churches of Africa and Asia the Roman tradition as to the validity of baptism. The movement which took place towards the

(f) Laurent, *Etudes sur l'histoire de l'humanité*, Tome V., *Les Barbares et le Catholicisme*, pp. 274 et seq.