MACHIAVELLI'S VIEW OF INTERNATIONAL LAW
By Professor Anthony A. D'Amato

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The year 1969 is the quincentennial anniversary of the birth of Niccolo Machiavelli. Many books and articles have recently been published or are in the process of publication that are devoted to the analysis of Machiavelli’s life, thought, or influence upon the history of ideas. However, none of them, nor any previous published work for five hundred years, has dealt with Machiavelli’s concept of international law. This is not in itself surprising inasmuch as Machiavelli rarely mentioned the term itself in his voluminous writings, and although he does use the terms “law” and “justice” he hardly addresses himself to them as specific ideas. Nevertheless, a patient study of his works shows a theory of international law that is more valuable today, at least as a firm foundation for analysis, than vast amounts of scholarly verbiage over the centuries that has purported to define “international law” but has only succeeded in creating confusion.

Before dealing with Machiavelli’s notion of law, let us consider briefly what that term has meant to most writers since Machiavelli’s time. The emergent nation-state in the writings of Thomas Hobbes and the theory of the legislative sovereign in Jean Bodin combined to lay the groundwork for a positivist concept of law that achieved its apotheosis in the lectures of John Austin. Austin claimed that law was the command by the sovereign within a state, a command that carried with it a threat of punishment if the addressee did not obey. In a basic sense this is a makes-right (or at least “legal right”) theory; the sovereign lawmaker within a state fashions, at his pleasure, laws that carry with them the threat of punishment at the hands of the state. The positivist theory has had great appeal in England and in the United States, as well as in the Soviet Union, and its current most articulate proponent, Professor Hart, claims that we need to trace laws to a sovereign or quasi-sovereign within a state (he uses a process called “rules of recognition”) in order to identify them as laws. He also, incidentally, draws a sharp line between law and morality as if to underline the fact that if makes legal right it does not make moral right.

With positivism in the ascendency, the outlook for “international law” was bleak. Austin quite consistently refused to regard “international law” as law; he called it “positive morality.” In the absence of a supreme international sovereign which could punish nations for disobeying its commands, there could be no international law “properly so-called.” Positivists since Austin have made some feeble attempts to restore the title of international law, the most important one probably that of Professor Hart. But since positivism is so firmly grounded in a command-backed-by-sanction theory, it is unlikely that international law would have much respect among positivists (save, perhaps, for the concession made by Soviet jurists and others to treaties -- laws binding upon nations because of their actual consent -- though this concession does not explain why a nation cannot subsequently change its mind.)

The verbal theory of positivism, downgrading international law, coincided nicely with the era of force in international politics where law, particularly in the twentieth century, has appeared to many observers to be a delusion insofar as restraining nations is concerned. However, as the utility of force drops off sharply, it will more and more appear that nations, most of the time at any rate, are obeying international law. This custom of obeying law will in turn reinforce further obedience and make it difficult, or at least costly, for a nation to depart from the law. But what kind of “law” is it that they will obey? It is certainly not “law” as defined by the positivists, but after all if the positivist definition does not accord with reality then that hardly matters. Let us see what Machiavelli would have called it.

Machiavelli’s concept of “law” is realistically stripped of all medieval notions of something apart from, and higher than, man. Under the medieval view, “law” somehow “exists,” and magistrates or princes “find” or “discover” it when they “apply” it to cases they are called upon to judge. To Machiavelli, laws are man-made, sometimes out of whole cloth when a state is founded. Although it is prudent for a founding prince to continue many of the old laws that the people were accustomed to, he clearly has the power to change all of them. Moreover, a prince has the power to violate the laws; Machiavelli furnished many examples of this. But here we come upon a crucial point. While the prince may depart from, or violate, laws that even he has made in the first place, there is no suggestion in Machiavelli that the prince’s action thereby changes the law. There is no sense that whatever the prince does is law; quite the contrary, the prince may depart from the law and may get away with it in terms of being too powerful for anyone to enforce the law against him, but nevertheless the prince has still disobeyed the law. Machiavelli gives the example of Savonarola who got a law passed and then did not observe it; his conduct “took influence away from him and brought him much censure.”

What we have in Machiavelli, in short, is a theory of constitutional law. A constitution is a list of laws some of which restrain the people and some the government and some both. When a citizen disobey a constitutional law, he is of course liable to punishment by the state. But what if
the government disobeys a constitutional law? What if it does something it has no constitutional right to do? If the government does this, it is never punished in the same sense that a citizen may be punished. For instance, if the American Congress passes a law abridging freedom of speech, no one would ever suggest that the individual Congressmen who passed the law would be liable to imprisonment, nor even that the individual policemen who enforced the law would be subject to punishment. What would result is either that another branch of the government (such as the Supreme Court in the American system) would declare the law to be of no force or effect, or all parts of the government would get together and declare a "state of national emergency" justifying the departure from the constitution. If the latter alternative is resorted to too often, or if resorted to at a time when there is no factual basis for it, the republic would weaken, people might rise up against the government, and the effective power of the government might be compromised. Thus it would appear that if a government wanted to retain its full power over the people, it would be well advised not to depart from the constitutional law except in the rare case of a true national crisis where no other alternative will keep the state together. This is precisely the advice given by Machiavelli: "I do not think there is a thing that sets a worse example in a republic than to make a law and not keep it, and so much the more when it is not kept by him who has made it." Yet in a "serious emergency," Machiavelli advises a republic to take refuge "under a dictator or some such authority" to avoid ruin. Except for such serious emergencies, it is better for a republic never to break her own laws to gain short-run advantages. For the example of extralegal action "has a bad effect, because it establishes a custom of breaking laws for good purposes; later, with this example, they are broken for bad purposes." Thus Machiavelli's concept of constitutional law is eminently realistic and indeed preferable to the various "positivist" theories of law that came after Machiavelli's time. Under the positivist theory which holds that laws are sovereign commands backed by the power of the state to enforce them, constitutional law is not really "law." For the latter is never enforced against the government which promulgated it in the first place. But this surely is a restricted view of "law"; it suggests that people draw a distinction between the laws they are supposed to obey and the laws that governments are supposed to obey. Yet such a distinction, Machiavelli tells us, is not drawn; to the contrary, princes set a direct example to their subjects by keeping laws.

But once we depart from the strict positivist view, a curious thing happens. Laws begin to take on a life of their own. Of course, this is simply a metaphorical statement, and yet, given the limitations of our language, it may be the most precise way of putting it. To the positivists, laws are simply commands issued by men; they derive their force from the fact that they communicate a contingent threat to the citizen (a threat that if he does not obey the command he will be punished). Governments are made up of men; they make laws; the laws do not restrain them. On the contrary, Machiavelli would imply subscribe to the possibility of a government of laws not of men. To him, laws may be man-made but they begin to take on a permanency that limits the action of everyone including their creator. In his History of Florence, Machiavelli writes a major oration for the Signor "of most standing" which obviously embodies Machiavelli's own views. The cure for the factions which were dividing and ruining Florence in 1372, the Signor says, is a thorough change of laws: "annul the laws that breed factions, and adopt those suitable for a truly free and law-abiding government." Laws clearly can be a restraint upon the government: note the emphasis upon a "law-abiding government." In the Discourses, Machiavelli says that "governments by princes have lasted long, republican governments have lasted long, and both of them no less are likely to be regulated by the laws." But why should a prince obey the laws? Machiavelli's profound answer is that by doing so the prince increases his own power: the mass of the people, "for whom it is enough to live secure, are easily satisfied by the making of ordinances and laws which provide for the general security and at the same time for the prince's own power." In the security and contentment of his subjects lies the greatest power of the prince, for when a prince does this and when the people see that under no circumstances will he break those laws, in a short time they feel secure and contented. An example is the kingdom of France, which lives safely for no other reason than that those kings are restrained by countless laws in which is included the security of all her people. In brief, a prince in obeying the laws is not obeying someone's "command" or even his own prior command, but rather is setting an example that increases respect for laws and thus for his own legal position of authority. This is why governments obey their own constituptions, and why the concept of "laws" is generally applicable to situations involving deeply felt needs of stability and security and not simply the positivist situation of a citizen threatened by the force of the state to do what the state has commanded. Constitutional laws take on a life of their own because they coincide with a prince's desire for power as well as the citizens' desire for security. A prince would be "crazy" (the choice of word indicating Machiavelli's deep conviction on this point) to do what he wants irrespective of the laws.

International law is very much like constitutional law. Again, with the law directed at a government, it is pointless to talk in terms of the punishment of individuals or the commands of sovereigns. Rather, international law is the expression of mutually felt needs of international security, and its observance by states increases their own power internally. Machiavelli cites the example of the violation by Rome of the law of nations respecting the conduct of ambassadors. The French, against whom the violation of international law was perpetrated, were "fired with scorn and rage" and "marched against Rome and took it, except the Capitol." This defeat (disruption of internal power and security) came upon the Romans, Machiavelli writes, "merely as a result of their failure" to observe the "law of nations." International law, like constitutional law, draws lines between permissible and impermissible conduct; it makes less difference what these lines in fact are (Machiavelli talks a lot about "good laws" but does not spell them out) than that there be lines. For the existence of lines communicates to the governments involved the kinds of conduct that will be tolerated by others. Wars are rendered less likely if there are many international laws and they are communicated to all states. Of course wars can be started deliberately (by transgressing important international lines), but there is less room for wars starting inadvertently as a result of failure to understand what types of conduct would be considered warlike by other governments.

If law is something more than a command backed by a threat of punishment, what precisely is it? Machiavelli consciously uses the term "justice" as synonymous with
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“good and holy laws,” as well as synonymous with the idea of constitutional law in A Provision for Infantry. The chief basis of a republic, he writes, consists of “justice and arms.” In The Prince, he writes that “the principal foundation of all states, the new as well as the old and the mixed, are good laws and good armies.” In a sense, force and law seemed to be paired opposites. But cutting into this antonymy is a notion of goodness; good laws (justice) and force work hand in hand in preserving a republic. The relation between laws and goodness finds expression in the Discourses: “Just as good morals, if they are to be maintained, have need of the laws, so the laws, if they are to be observed, have need of good morals.” Further, in speaking of the religion introduced into Rome by Numa among the chief reasons for Roman prosperity, Machiavelli explains that “religion caused good laws; good laws make good fortune; and from good fortune came the happy results of the city’s endeavors.” By deliberately linking the concept of law with the idea of goodness - in sharp contrast to the positivist insistence on the separation of law and morals - Machiavelli suggests a normative element in law. Law is something that ought to be obeyed, because it is right, just, and good to do so. In this sense, law transcends its maker; it acquires an independent existence; it can serve as the foundation of something as tangible as a state. The force of arms used internationally or internally in securing obedience to good laws becomes an element that strengthens the idea of the rule of law. Machiavelli has no illusions that princes will understand this logic and will obey laws themselves and use their armies to enforce obedience by others: “a wicked prince nobody can speak to, and the only remedy is steel.” But his theory is no less compelling even if in his time it was not widely adopted. For it may be becoming most relevant to an area which Machiavelli could not have contemplated: world politics in the last half of the twentieth century. Today we are witnessing a profusion of laws on the international scene - multilateral conventions on numerous topics, vastly proliferating bilateral treaties, codification conventions under the auspices of the United Nations, and close attention to the development of customary law by the smaller states in the world. At the same time, as has been argued, the utility of force has decreased sharply. We are thus in great need of a theory of law that will explain the sense of obligation that accompanies international law. The positivist theory is no longer adequate if it ever was. Machiavelli's writings may very well provide a starting point for the theoretical explanation of the phenomenon that is called "international law."

Anthony A. D’Amato

FOOTNOTES
2. For a recent sharply analytical statement of this basic position, see Stanley Hoffmann, “International Law and the Control of Force,” in Karl W. Deutsch and Stanley Hoffmann (eds.), The Relevance of International Law (Cambridge, Mass.: Schenkman, 1968), 24-48.
4. This is not surprising; states after all are the creators as well as the subjects of international law. See Anthony D’Amato, “International Law -- Content and Function: A Review,” 11 Journal of Conflict Resolution 504 (1967).
6. Id. 1, 9, Gilbert, 1, 218.
7. Id. 1, 45, Gilbert, 1, 268; id. 1, 58, Gilbert, 1, 315-17.
8. Id. 1, 45, Gilbert, 1, 289.
9. Id. 1, 45, Gilbert, 1, 288.
10. Id. 1, 34, Gilbert, 1, 269.
11. Id. 1, 34, Gilbert, 1, 268.
14. Id. 1, 18, Gilbert, I, 257.
15. Ibid.
16. Id. 1, 58, Gilbert, I, 317.
17. Id. 1, 28, Gilbert, I, 405.
18. Ibid.
20. Ibid.
21. The Prince, 12, Gilbert, I, 47.
23. Id. 1, 11, Gilbert, I, 225.
24. Id. 1, 58, Gilbert, I, 317.

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administration of justice because it operates within the existing framework of the trial.

Lastly—and most important of all—it guarantees a fair trial, free of even the possibility of preconceived opinions of guilt or innocence of the accused. We want such a result, regardless of the cost in money, inconvenience or difficulty. The “Trial under a Different Name” proposal gives us that result without cost of any kind.

Foster Furullo

A CLASS SUIT has been entered against the Cook County (Chicago) Law Library to have a statutory S1 law library fee imposed on litigants using the county’s Metropolitan courts declared unconstitutional.

Earlier, another class suit was settled after Circuit Court Justice Walker Butler ordered $75,950 refunded to defendant-litigants and voided the law library fee. Atty. Kenneth M. Rahn was awarded a $195,000 attorney’s fees by Judge Butler.

Rahn’s suit was brought on behalf of a now-deceased client and all others similarly affected as litigant-defendants in Cook County courts since Oct. 1, 1963. The suit lasted five years.

But on August 27, Illinois Gov. Richard Ogilvie signed into law a bill reimposing the library fee on both defendants and on plaintiffs.

The latest class suit seeks to have the entire law thrown out as an unconstitutional tax on the right to bring or defend a legal action.

Manuscripts for the Journal
Society members and other Journal readers are invited to submit articles on topics relating to the general practice of law. Articles submitted should be preferably from 2,500 to 5,000 words in length. All manuscripts received will be promptly reviewed. Preference will be given to original articles. Manuscripts should be mailed to:

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