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THE REIGN OF LAW

By William S. Culbertson*

I.

In our more than twenty countries in the Americas we find a baffling diversity of laws which are often in conflict. Statutes and decrees have multiplied in untold numbers. Precedents have been laid down by thousands of judges; interpretations have been declared by thousands of officials. Volumes of decisions and volumes of comments have been written. The laws of the countries which we represent seem to have the variety of the Amazonian jungle, the transitoriness of a mirage on the Chilean pampas, and a barrenness of the morasses south of the Beagle Channel.

What unity is there in this mass of legal fact and fiction? Is justice merely a shifting concept that changes under the influence of time and place? Or are there some principles which underlie all the conflicting scenes of legal life? Are there ultimate norms and standards hidden in our array of nationalistic laws?

The ancients were troubled by these questions. Men in every age have sought to know the origin and the nature of law. We, too, are seekers. The search which we, the delegates to this meeting of the Inter-American Bar Association, are to institute is not merely an intellectual venture appealing to our reason, but a practical work which, if successfully accomplished, will lay the secure foundation of inter-American understanding and strengthen our influence in the post-war world. My emphasis then today will be, not on laws, but on law.

*Address before the First Conference of the Inter-American Bar Association. Habana, Cuba, March 26, 1941. Mr. Culbertson was Vice-Chairman of the Delegation of the Pennsylvania Bar Association and a delegate of the American and Federal Bar Associations. He is a member of the Franklin County Bar Association. Formerly he was Vice Chairman of the United States Tariff Commission, American Minister to Rumania, and American Ambassador to Chile. His home is at Charmian, Pennsylvania.

1Cp. Lon L. Fuller, The Law in Quest of Itself, (Chicago, 1940).
II.

A paradox of our times is the decline of law in the midst of the enactment of many laws. Laws have multiplied under the impact of narrow nationalism, class politics, and personal ambition for power. No country in the Americas (or in the world for that matter) has escaped the evil effect of these tendencies nor are lawyers in a position to disclaim a fair share of the blame for them. The result is that, overburdened by mountains of laws, law itself is breaking down.

Let me enlarge a little on these tendencies which are world-wide in their influence. They have, in the first place, affected national law. We have witnessed the infiltration and spread of ideas in derogation of civil rights and the rights of private property. It is a curious development that these ideas seem to have become more effective politically in countries which are economically immature or in countries which are suffering from abnormal economic conditions. In the Americas, as well as elsewhere, the collectivism of Marx and Lenin has its defenders.

I would be the first to agree that law without orderly social change becomes tyranny. But reform without due process of law, reform by force and confiscation, is retrogression. It begins as a rule with an attack on private property. Then, follows inevitably an attack on personal rights. The interrelationship between human rights and property rights is often not realized until encroachment by government on the former begins. In fact, it usually happens that the very groups in the population for whose benefit property rights are attacked are the groups whose personal rights are in the end most seriously infringed. It is for this reason that the laboring classes in Great Britain have rejected the doctrines of Lenin and are the uncompromising enemies of Hitler.

The violation of law by a government does not nullify law. It merely controls by force a particular situation. The greatest menace to civilization is a government which considers itself above law.

Contributing also to the breakdown of national law is the assumption of heavy economic responsibilities by governments without a corresponding development of judicial control and administrative efficiency. Frequently there is not an adequate appreciation of due process of law and fundamental rights, guaranteed by an independent judiciary. In many cases there are legal forms and phrases which are nullified by political realities. Under the inspiration of nationalistic and socialistic ideas, governments minimize the place of the individual in the social order and preach their own omnipotence by propaganda.

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2Cp. MAINE, ANCIENT LAW, on property rights in primitive communities.
3Cp. E. SCHWET, CATHOLIC SOCIAL THEORY, transl. by B. Landheer. St. Louis, 1940, on the theories of Thomas Aquinas and St. Augustine.
The tendencies which are breaking down law have, in the second place, affected international law. They have resulted in some cases in the virtual denial of the existence of international law, especially the law of diplomatic protection. Governments seek to avoid responsibility for their unjust acts by the argument that national law is always superior to international law. They deny all protection against the collective force of the State. In part this situation results from a failure to distinguish between the substantive and the procedural aspects of international law. It can be shown, I believe, by the great mass of authorities, writers and findings of international tribunals, as well as by the decisions of national courts, that there are accepted principles of substantive international law which protect and guarantee the personal and property rights of aliens who cross frontiers. Here and there differences of interpretation exist, but no serious dispute exists over basic principles which fix the responsibility of nations with respect to the property and personal rights of aliens within their borders.

It is when we turn to the question of procedure that the political element enters and law begins to break down. This is due to the fact that nations have not set up adequate courts, tribunals or commissions for the purpose of applying to particular cases the accepted principles of substantive international law. Therefore, the only resort, once there has been a denial of justice in the offending country, is a political appeal to that government either directly or through the diplomatic channels.

Obviously, this procedure may not be satisfactory. Foreign offices are burdened with a variety of issues, and their views with reference to the merits of a particular case may be colored by other matters which may seem for the time being more important. Nevertheless, it is an accepted principle that the nationals of a country are entitled to the support of diplomatic interposition for the purpose of protecting under international law their personal and property rights in foreign countries, and the ineffectiveness of this procedure in some cases does not modify one jot the substantive rights of an injured alien under international law.

War follows in sequence the breakdown of international law. Somewhere in Plutarch we read that the laws speak too softly to be heard in the noise of war. In war the laws are silent. Unhappily they are not only silent; they are for-

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4Grotius was the first one to stress the possibility of a super-national law which was based upon the community of states.
5Except, naturally, in case of nations which deny fundamental individual rights altogether.
6"Silent enim leges inter arma," CICERO, PRO MILONE, 4.
Men learn the immediate advantage which may come to favored groups from the use of force. Conceptions of justice, order and impartiality are repudiated and law is set at naught.

Forces of destruction have been loosened by the present war—forces which are not only destroying material things but which are undermining the social and political restraints which are the accumulated results of civilization. They are giving impetus, if not sanction, to the above-mentioned destructive tendencies. They are ignoring principles of law and weakening respect for law.

We live then in an age which has forgotten first principles. Even lawyers seem to have forgotten first principles. Laws are like raw clay in our hands which we seem unable to mould into the useful pottery of our every day life. We have no philosophy of law to guide the shaping of a new social order.

V.

We should again reaffirm and give life to the simple truth that the reign of law is supreme both over individuals and over governments. W. A. Robson in his book 'Civilization and the Growth of Law' says (271-3):

"There are many different conceptions of the nature of juridical law. Each shows us a picture of some ultimate basis, beyond reach of the individual human will, that stands fast in the whirl of change of which life is made up. This steadfast ultimate basis may be conceived as the divine pleasure or will or reason, revealed through a divinely ordained immutable moral code. It may be put in the form of some ultimate metaphysical datum which is so given us that we may rest in it forever. It may be portrayed as certain ultimate laws which inexorably determine the phenomena of human conduct. Or it may be described in terms of some authoritative will for the time and place, to which the wills of others are subjected, that will deriving its authority ultimately and absolutely in some one of the preceding forms, so that what it does is by and large in no wise a matter of chance.'

"The liberation of the human mind from the cramping influence of religious assumptions respecting the nature of the universe; the destruction of authoritarian dogmas concerning the sanctity of law and the behaviour of physical matter; the banishment of sprites, demons, angels, gods, witches, and wonder-workers of all kinds to the realm of myth and legend; the substitution of rational analysis for a belief in supernatural intervention and miraculous interference in the affairs of daily life; the awakening of a spirit of patient and
impartial enquiry into the processes of Nature; the belief that the behaviour of all phenomena is subject to the operation of known or knowable causes and effects; the recognition that the laws of men are what men make them and the laws of Nature what men discover them to be: all this constitutes a supremely important movement in the evolution of the human race. It forms, one may say, the most essential step toward freedom and knowledge and power that the human mind has yet taken.

"No less impressive is the craving to discern some ultimate foundation of truth and certainty on which to rest the laws of Nature and of man. All through the ages and still today men have sought a rock upon whose stubborn sides the waves of doubt and disbelief could beat in vain and on whose surface the ravages of time would leave no mark. To discover by the light of reason a substratum of ultimate and unchanging truth, and to know, again by reason, that it would stand for all time impregnable against the assaults of reason; such was the aim of the ancient Greek philosophers who lived and held their discourse more than two thousand years ago. Such is still the aim of those who hold aloft the torch of reasoned thought today."

Scholars in the ancient world and in later times, scholars trained in both the Anglo-American and Civil systems of law have discussed the origin and nature of law. Law, they severally tell us, comes either from God or from reason or from experience.

1. God. Plato began his "Laws" with a reference to the divine origin of law. Even when we have rejected the sacrosanct conceptions of law which controlled when the human spirit was subservient to magic and fear of the supernatural, we find persisting with tenacity the belief that the universe is governed by a moral force; that we live in an ordered world; and that any elimination of the divine from law leads to the unpleasant conclusion of an atheistic world. In our sophisticated age, we like to avoid the question whether there is a universal reason or a universal moral law. Personally, I find no inconsistency between the recognition of a divine law-giver and the acceptance of a rational system of law. Moreover, I doubt whether from a purely practical point of view man can, especially in this age, dispense with the moral or religious element in the administration of law.

7"Athenian Stranger. Tell me, Strangers, is a God or some man supposed to be the author of your laws? Cléinias. A God, Stranger; in very truth a God . . . ." (Jewett's Translation, Dialogues of Plato).
8O. Willmann, Geschichte des Idealismus, (2nd ed. Brunswick, 1907).
9I of course do not mean ecclesiastical influence.
2. Reason. In the first century Cicero said: 10

"... What is more divine, I will not say in man only, but in all heaven and earth, than reason? And reason, when it is full grown and perfected, is rightly called wisdom. Therefore, since there is nothing better than reason, and since it exists both in man and God, the first common possession of man and God is reason. But those who have reason in common must also have right reason in common. And since right reason is Law, we must believe that men have Law also in common with the gods. Further, those who share Law must also share Justice; and those who share these are to be regarded as members of the same commonwealth."

"In civilized countries," says Roscoe Pound, 11

"Men are compelled to administer justice by formulas. These formulas are designed to express ideas of right and justice and as a means to promote right and justice. But there is always danger that we forget those ideas and lose sight of those ends and treat the formulas as existing for their own sake. Since the time of the Stoics, men have appealed to 'Nature' to save ethical, political, and juristic thinking from this danger; and by 'Nature' they have meant reason and general principles of right. The appeal to reason and to the sense of mankind for the time being as to what is just and right, which the philosophical jurist is always making, and his insistence upon what ought to be law as binding law because of its intrinsic reasonableness, have been the strongest liberalizing forces in legal history."

Blackstone believed that the human mind could subjectively discover, so far as they are necessary for the conduct of human relations, "the eternal immutable laws of good and evil." 12 Jeremy Bentham poked fun at Blackstone's law of

10 De Legibus (Loeb translation) p. 321. Cp. Sec. 1 of the Institutes of Roman Law by Gaius, translated by Edward Poste, (Oxford, 1904): "The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. The rules established by a given state for its own members are peculiar to itself, and are called jus civile; the rules constituted by natural reason for all are observed by all nations alike, and are called jus gentium. So the laws of the people of Rome are partly peculiar to itself, partly common to all nations; and this distinction shall be explained in detail in each place as it occurs."


12 Cp. Sir William Blackstone, Commentaries on the Laws of England, Vol. I, Introduction, Sec. 2: "Human law must not contravene nature—This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."
nature but he was quite as abstract and as dogmatic on urging his objective test of right and wrong in law and legislation; namely, "the greatest happiness of the greatest number." Both of these writers had implicit faith in reason's ability to discover the ultimate standards of law and to apply them to human society.

I could not in a volume, much less a speech, review the literature on natural rights and law of nature. I may be called old-fashioned for even mentioning them. But "natural rights" played a mighty role in the creation of the American states. A mere sense of gratitude should impel us to respect their memory and it might even invite us to consider whether we have achieved the social ideals which were the promise of the days of the great liberators and patriots who found their inspiration in the law of nature. Should we yield to the new ideologies, less adapted to our social and economic needs, before we give reality to principles which were written into our republican constitutions?

3. Experience. The historical school of law undertakes to discover the principles of justice and right from human experience. It was a reaction against the codification movement and its arbitrary rules which lacked a sufficient historical foundation. Principles of law, it argues, have become established through the trial and error of history. The pendulum of experience has, as it were, finally come to rest at standards of conduct which the community accepts as right. Conclusions of right and wrong expressed in custom and in the cases decided by judges throughout the years are the rules which mankind recognizes as law. We associate with this school such names as Friedrich Karl Savigny and Sir Henry Maine.

4. Other theories of law are current—philosophical, historical and analytical. Some of them are products of nationalistic and socialistic movements and are to be judged for what they are worth as part of the propaganda of these movements and as attempts to give a philosophic basis to economic or political programs. I am not willing to classify as a philosophy of law the suggestion that laws are merely a working basis of human existence and that justice is determined by the pragmatic test of whether or not it works. Nor do I accept as a philosophy

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the materialistic concepts of law that law merely reflects the system of production and economic power-relations which exist in a society in any given time.\footnote{\textit{Ferdinand Lasalle, Ueber Verfassungsweisen} (1862), \textit{cp. Chang, The Marxian Theory of the State}, (Philadelphia, 1931).}

The mechanical positivist theories of law have had considerable vogue.\footnote{In Europe Kelsen was one of the main exponents of a legal positivism (\textit{cp. his Reine Rechtslehre}, 1934), and John Austin for the common law world, (\textit{Lectures on Jurisprudence}, London, 1869).} They have been sharply criticized and the German jurist, Bergbohm, has even shown that they have taken over parts of the theory of natural law. The sociological theory of law also has its followers. It at least has the merit that it aids us to discover the inadequacy of positive law. Moreover, the results of its analysis supplements the vagueness of natural law.\footnote{\textit{Erhlich, Fundamental Principles of the Sociology of Law}, (Cambridge, 1936), and \textit{Nicholas Sergeyevich Timasheff, An Introduction to the Sociology of Law}, (Cambridge, 1939).}

In seeking a theory of law we sooner or later come back to the conception of freedom. Immanuel Kant thought that he gave us an adequate answer. Freedom, he argued, is not the antithesis of law; it is the highest expression of law. Man is free as an ethical subject, but he is governed by a system of law imposed upon himself.\footnote{\textit{Kant, Fundamental Principles of Morals} (The Harvard Classics, Volume 32): "As a rational being, and consequently belonging to the intelligible world, man can never conceive the causality of his own will otherwise than on condition of the idea of freedom, for independence on the determining causes of the sensible world (an independence which Reason must always ascribe to itself) is freedom. Now the idea of freedom is inseparably connected with the conception of autonomy, and this again with the universal principle of morality which is ideally the foundation of all actions of rational beings, just as the law of nature is of all phenomena," \textit{cp. Article on Kant in Encyclopedia of the Social Sciences, Macmillan Co.} (1952).}

VI.

Necessarily my review of the theories of law has been sketchy. I will be content if it has served to help to stimulate thought and discussion among the lawyers of the Americas. I do not expect agreement. For some lawyers one theory will be more persuasive than others. In my opinion, those thinkers have the best of the argument who hold that there are laws—great principles of human relationships—which men in civilized countries obey whether there are sanctions or not. They include at least a workable respect for civil and property rights and for contract obligations; also due process of law not only in suits between man and man but also in suits to which government is a party. The application of these principles change; they themselves do not change. They define the relation of man to man; of government to man and man to government, and of government to government. Nationalism, socialism, or capitalism do not modify the approach
which they compel. Nationalistic, communistic, or individualistic creeds or systems can distort them but they rise above restraints and abuses and finally triumph. Legislative law should seek to proclaim these fundamental rules of conduct and to apply them to the changing needs of our time. No difference how far short of the ultimate standards of justice the authorities of our different countries fall, we need the guidance of these ultimate standards to make efforts toward improvement in the social order worth while.

VII.

Whether we like it or not we are destined to live in a world of many laws. Government is playing and will play an increasingly important role in the regulation of human activities. This tendency can be, but need not be, destructive of ultimate principles of law in an enlightened society. In fact, government can and should become a force, not destroying as it is doing in many places today, but preserving and protecting the realm of individual right in which law reigns.

Unfortunately the great principles of law, even when accepted in theory, are often distorted in their application. Personal and political factors intervene. Law is a human institution. Public officials in dealing with both national and international questions often seek an excuse for not applying principles of law to a particular case when they would readily admit the soundness of the principles in the abstract or even in the particular case if their political objectives called for the support of the principles.

We are here in Habana to compare laws. Let us compare, not our bad law, but our good laws. We are also here to seek in our systems of law a common basis for living in peace and in cooperation. The civilization of a community of human beings can be measured by its laws. I do not mean merely the statutes which it enacts or decrees from time to time, but also its acceptance and enforcement of those minimum standards of conduct for men and governments which reason and experience in all nations and in all ages have been wont to associate with an enlightened society. Not only individuals but governments violate at their peril these ultimate standards of justice, impartiality and fair dealing.

Dr. Albert M. Justo of Argentina observes in the introduction of a recent work:21

"Comparative law shows the way to arrive at an understanding of the world's great juridical systems. This method enables us to get away from the regionalism or the conservatism in which as a rule

the law-making process unfolds.

"Far from favoring a unilateral conception of the law, we think it indispensable, in this period of international confusion, to fight for a reciprocal understanding of the systems in force in the American countries in order to orientate the legislative reconstruction toward a frontierless juridical order."

Can we ever realize a juridical order without frontiers? If we look superficially only at laws, we cannot. But if we look behind the laws, we will find the unity of law—a unity of principles which give life and power to both Anglo-American and Civil law and which give us a common frontier in the universe of our hopes and aspirations.

VIII.

I have tried to speak today, not as a citizen of the United States, not as a citizen of the Americas, but as a citizen of that commonwealth of men everywhere in which law should reign. Even if we should succeed in discrediting the theories of law which condemn law to slavery under nationalistic and socialistic creeds, we will still hear plausible arguments for regional or inter-American law. We should not yield to this temptation. Isolation is no more an intelligible policy for the hemisphere than it is for a nation.

I recognize the contributions which jurists and statesmen throughout the Americas have made to the clarification and development of law and this effort should be encouraged, but at times in former conferences of the American states attempts have been made to have local and specialized conceptions of law proclaimed as inter-American law. We will not fall into this error if as such cases arise we remind ourselves that fundamentally there is no such thing as a system of Inter-American law as distinguished from law in and among all nations; that the principles of justice which we may proclaim and codify do not differ from the principles which apply to human relations in all the continents.22

Political and military leaders on Continental Europe and in Eastern Asia are today seeking unity through force. Instruments of power and empire! Force has

22 Cordell Hull, Secretary of State, said at the Eighth International Conference of American States, Lima, Peru, December 10, 1938: "... Nor has the earnest search for world order under law been confined to any one portion of the globe. The developments which have taken place in the Western Hemisphere have been a part of a mighty stream of new ideas, new concepts, new attitudes of mind and spirit, which has coursed and ramified, with differing degrees of vigor and success, throughout the world. We have made important contributions to that stream, and have, in turn, been nourished by it." Cp. Mr. Hull's address on THE SPIRIT OF INTERNATIONAL LAW, (Nashville, Tenn., June 3, 1938).
been systematized and organized. It has been provided with a philosophy and its disciples are legion.

Even in these uncertain times when many hesitate, awaiting the outcome of battle, we at least should not falter in giving our answer. Our answer to unity through force is unity through law. It is a unity as old as the Hebrew prophets and as young as the hopes and aspirations which spring up daily in the hearts of the millions who love peace with justice. It comprehends in its ample scope not only the peoples of the Hemisphere but all the nations of men. It offers security and prosperity within nations; understanding and peace among them. If it be said that I am visionary, if it be said that tanks and bombers do not permit us now to dream of a better world, I reply—

"'tis not what man does which exalts him, but what man would do!"

HABANA, CUBA

WILLAM S. CULBERTSON