The Role of Law: Here and Abroad

By FRANCIS H. HELLER

When, a number of years ago, "Law Day, U.S.A." was launched as an annual observance the originators of the proposal intended that it should be an occasion to highlight the commitment of this nation to law. But what is there about law in the United States that merits special emphasis? Law, after all, exists in all but the most primitive societies, judges appear not only in the Old Testament but in the chronicles of all ancient civilization and—for better or for worse—lawyers constitute one of the oldest professions everywhere.

Let me attempt to bring out, by comparison and by contrast, why it is both appropriate and essential to make formal acknowledgment of the role of law in the U.S.A. But in doing so, I want also to put proper emphasis, in addition to the differences, on the similarities in the way law is viewed in this country and elsewhere.

American lawyers as well as their English confreres tend to pride themselves on the uniqueness of the Anglo-American system of law, a system derived from the practices of William the Conqueror and Henry II. Lawyers in Latin America, in France, in Germany, in the countries, in other words, that derive their legal system from "the glory that was Rome," are very likely to take a somewhat demeaning view of the law of English and American vintage.

The civil law (to use a term for the Roman law tradition that is sometimes used in contradistinction to the common law) assumes that law derives from an act of will by a law-giver, be it a King or a senate or an

1. Proclamation by the President, 23 Fed. Reg. 821 (1959); Rhyno, "Law Day—U.S.A."
2. "...[A]ll but a few of the poorest [societies] have as a part of their [social] control system a complex of behavior patterns and institutional mechanisms that we may properly treat as law..." E. Hovell, The Law of Primitive Man 4 (1964).
5. "...[A] lawyer from a relatively undeveloped nation in Central America may be convinced that his legal system is measurably superior to that of the United States or Canada. Unless he is a very sophisticated student of comparative law, he may be inclined to patronize a common lawyer. He will recognize our more advanced economic development, and he may envy our standard of living. But he will find compensatory comfort in thinking of our legal system as undeveloped and of common lawyers as relatively uncultured people." J. Merriam, The Civil Law Tradition 5 (1960).
all accounts a superb, if highly pragmatic administrator—chose to follow established practices. As he traveled about the country the king (later his emissaries acting under his instructions) would, whenever an appeal was made to him to dispense justice, inquire how similar cases had been decided in the past. Later kings would direct the royal judges to follow the same approach and to be guided by any previous decisions of like kind handed down by the king or his judges. Thus there emerged the notion that law builds on precedent, that legal rules are developed from case to case.

This is, of course, an oversimplified characterization of the common law just as my brief comments on the civil law were, of necessity, oversimplified. What I wish to stress here is that the difference is in the point of departure rather than in the goals. It would, indeed, be possible to enlarge this discussion by bringing into it other legal systems such as the religiously based law of Islam or the ideologically based legal systems of the Communist countries and to make for them the same point that can be made for the systems of civil law and common law, namely, that every civilization finds it necessary to develop a way to translate its notions of justice into a set of rules that can be used to guide the citizen in the conduct of day-by-day affairs. Thus every civilization, except perhaps the most primitive, needs to be able to apprise its members of the possible consequences of their acts. But no civilization ever stands still and there is always a struggle (or at least a tension) between the rules and the values of justice. The command of the law tend to reflect perceptions of right and wrong as society evolved them. As social change the laws gradually evolve; the rules of however, rarely keep pace with evolution. The result is, at best, at least, at worst, repression or changes or rejection of the law.

In arbitrary government the conflict is resolved from above, by statute. But even dictators cannot maintain that they act through the will of the people. Thus when Adolf Hitler ordered the execution of dissidents both inside and outside the Nazi party in a blood bath of June 30, 1934, he was quite accurate in the spirit of justice of the German people" and that it was this party that coined this phrase. Similarly, to take an example of recent memory, the Soviet Union expelled the author Solzhenitsyn on terms that were based on and invoked concepts of "socialist justice." It is, of course, easy to contrive results with the practices of our time. But note that in our count we are constantly engaging in adapting the rules to a concept of justice—our concept of justice, by no means. The tradition of the common law enables us to accomplish some of these adjustments through our own cases as they follow the precedents of other cases or develop new modes of thought by distinguishing the precedents. In the countries of the
ever stands still and therefore, again with the possible exception of only the most primitive settings, there is always a struggle (or at least tension) between the rules and the values of justice. The commands of the law tend to reflect perceptions of right and wrong as society has evolved them. As social mores undergo change these perceptions gradually evolve; the rules of law, however, rarely keep pace with this evolution. The result is, at best, tension; at worst, repression of the changes or rejection of the law.

In arbitrary government that conflict is resolved from above, by dictate. But even dictators commonly maintain that they act through law. Thus when Adolf Hitler ordered the execution of dissidents both within and outside the Nazi party in the blood bath of June 30, 1934, he proclaimed that he had acted "in the spirit of justice of the German people" and that it was this particular conception of justice that compelled the drastic steps he had taken. Similarly, to take an example of more recent memory, the Soviet Union expelled the author Solzhenitsyn in terms that were based on and that invoked concepts of "socialist justice." It is, of course, easy to contrast the results with the practices of our system. But note that in our country as well we are constantly engaged in adapting the rules to a concept of justice— our concept of justice, to be sure. The tradition of the common law enables us to accomplish some of these adjustments through our courts as they follow the precedents of earlier cases or develop new modes of thought by distinguishing the precedents. In the countries of the civil law tradition the assumption is that the judge will follow the code and, if change is needed, it will be brought about by amending or rewriting the code.

In practice, this difference between the traditions of civil law and common law has become less and less. As every American lawyer knows, the statute book looms ever larger in his work and when he consults the case reports it is rarely to discover the common law but rather to ascertain what judges have said about the statutes. The civil lawyer has, of course, long been accustomed to reach for the statute book first but in recent decades the civil lawyer has also begun to interest himself in judicial decisions. Ironically, while in the United States the Supreme Court is moving toward increasing deference...
to the legislature, and in West Germany are displaying increasing and vigorous independence. Law journals in these countries now carry articles discussing just how much freedom a judge should have—and exercise. in the Federal Republic Germany judicial review of legislation has been established now since 1951 and as a result courts in general throughout that country appear to be moving toward increasing assertion of their own judgments.

I am reminded of a comment by President McCain of Kansas State University some fifteen years ago af-

19. R. McCloskey, The Modern Supreme Court, pas-
sim (1972); Howard, Mr. Justice Powell and the Emer-
21. Kommer, The Federal Constitutional Court in the West German Political System, in Frontiers of Ju-
22. Kaufmann and Hassemer, Enacted Law and Ju-

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24. Holmes, The Path of Law 457, 459 (1897), also in Col.
at 170 (1921).

\[ \text{whom our Founders}- \text{the principle of the powers—entitled his \textit{Laws} for law because, he}-
\text{of a nation can be}

\[ \text{laws. More recently,}
\text{put it in these words [of law] is the hist}-
\text{development of the law.}

\[ \text{What Englishmen}
\text{have done that other}
\text{people done, what is so unique when it comes to law as an ideal ab}-
\text{cessities of the day, Under Law” proclama}-

23. It is the tradition more than anything else that differentiates common law from other legal systems, that binds our American law to that of England and of those other countries of the world that have inherited their law ways from her. It is a common need of all societies that enables us to speak of a universality of law, as a social institution without which the fabric of civilization disintegrates.

Yet each nation has to find its own solution to the one great problem of all legal systems, the unending conflict between that inspiring but inevitably vague concept called justice and the essential but sometimes stultifying need to have rules that are certain in their meanings and predictable in their application. Two hundred and fifty years ago, the French writer Montesquieu — from
whom our Founding Fathers drew the principle of the separation of powers—entitled his book *The Spirit of Laws* because, he wrote, the spirit of a nation can be drawn from its laws. More recently, Justice Holmes put it in these words: "[The] history [of law] is the history of the moral development of the race." 24

What Englishmen and Americans have done that other nations have not done, what is so uniquely our heritage when it comes to law, is to place the law as an ideal above the fleeting necessities of the day. "Equal justice *Under Law*" proclaims the inscription above the portal of the Supreme Court building in Washington. These words exemplify an attitude and a tradition, they embody a pervading conception of law linked to justice yet providing the structure within which justice can and should be the goal.

"Law Day-U.S.A." thus celebrates this nation's commitment to law as perceived through the generations since Hastings and Runnymede, law not only as means to an end but law as the vehicle for the realization of justice. This, the linkage of law to the people's perception of justice is the uniquely Anglo-American characteristics that we acclaim today and to which our profession should be committed at all times.

24. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, at 459 (1897), also in Collected Legal Papers 167, at 170 (1921).