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THE LAW ABOVE NATIONS

Address delivered by Hon. Robert H. Jackson, Associate Justice of the Supreme Court of the United States, before the Inter-American Bar Association, Washington, D. C., November 20, 1942.

At this time dissension and lawlessness have the upper hand in much of the world. But we members of the legal profession throughout the Americas happily are united in a community of interest in the development and improvement of the legal systems of our several countries. Our common task is to enable each of our countries to realize the common aspiration of all our peoples for freedom under law. These professional interests bridge our differences of nationality, language, and legal philosophy. Some build on an inherited foundation of civil law; others, on the common law. But whether the law we evolve is Romanic-American or Anglo-American, our task is to adapt to the conditions of our American Hemisphere and to the problems of our day legal philosophies which had their origins far away and long ago.

Legal systems were early transplanted to the Americas, chiefly from Spanish, Portuguese, French, or English sources. Struggling new settlements met their need for law by borrowing from the older culture with which their people were most familiar. A highly developed legal system was brought to the American colonial empires of Spain and Portugal and has been an integral part of the life and culture in that vast territory for centuries. Legal concepts and philosophy have an importance in the minds of Romanic-American lawyers above the mere day-to-day practical adjustments of particular controversies. So, too, the French and English brought their law to the New World. But legal ideas, no matter whence they came, were modified by the impact of a hard and stubborn way of life in which the individual had new dignity and importance, and men lived and dealt on a plane of unprecedented equality. Men improvised governments as they needed them, with no mystery about their origins. American climate of opinion did not anywhere favor growth of a mystical concept of the State, as something above or before men and for which the individual must live and breed and die. In spite of the different cultural and legal traditions of the Americas their outlook on life was sufficiently alike that they created basically similar, and in many ways original, forms of constitutional government.

"The law," however, in the sense of a body of rules to govern the relations of persons to each other and to property and to be applied by the courts in adjusting controversies, is something surprisingly aloof from and independ-

ent of political government. Both our civil law system and our common law system have proven to be more persistent in the life of a people than any system of government. Both legal systems have survived many political upheavals. They have both served monarchial and republican régimes, and both have proved amazingly indifferent to forms of governmental authority as they have spread among people far from the lands where they originated.[1] Of course both systems of law do defer to territorial and national influences and to political controls, but law is woven into the habit of society as its warp and woof, while political governments are relatively superficial.

The persistence of both of these systems, as systems, is in contrast, however, with the readiness with which particular rules may be reformed. They have not the immutability of the law of the Medes and Persians. The usefulness and justice of living principles are constantly called up for reëxamination in the process of their application to the conflicts which new conditions stir among men. And while the rule determines the controversies, the conflicts also test the rule. Each generation is forced to rethink its particular rules of law, to rework them to fit new problems and to revise them in terms of its own life. This process of reviewing and reforming steadily but slowly works into the law of each country the new principles that experience convinces will make for the better life.[2]

[1] The capacity to survive is striking in the history of both systems of law. Apart from its survival of the fall of Rome and its steady evolution on the Continent under most varied conditions, the American experience of the civil law attests its durability. In lands once held by Spain and Portugal the pattern is unbroken. Although they refused further submission to those governments, they remained by choice subject to their civil law. Haiti, the first Latin-American colony to win independence, revolted against Napoleon but retained the Napoleonic Code. Cuba, the last to gain freedom, adopted political institutions quite out of the Spanish tradition, but kept the civil law derived from Spain. Likewise, the common law flourished in England through many political upsets. The United States threw off the political authority of England, but the states were unanimous in continuing the English common law tradition in their courts.

[2] An example is found in the history of the rules governing expatriation and naturalization. Europe, strongly influenced by the relation between kings and their subjects, held generally in both common law and civil law countries that an individual could not throw off the allegiance into which he was born and take on a new citizenship of his choice except with the consent of his sovereign. Older countries from which people were migrating insisted that wherever they went they still owed loyalty and even military service to the land of their birth. But in the New World a new doctrine arose responding to our need of population. The United States and other American countries championed the right of the individual voluntarily to expatriate himself and take on a new allegiance by naturalization. The difference in legal doctrine has been a persistent source of controversy, as the history of diplomatic exchanges between my country and governments of the Old World shows. Indeed, it had a large part in provoking the War of 1812. We could not accede to the proposition that members received into our new society might still be under obligations, including that of military service, to the countries they had left behind. In fact, no small part of our grievance against

The dissimilarity of method by which the civil and the common law systems submit their particular doctrines to change seems to me one of the most significant of their contrasts.

The civil law depends for progress on legislation, rather than on judicial pronouncements. Its method is to promulgate and from time to time to amend comprehensive codes of rules. To the judge is left only a small discretion; his duty is merely to apply the legislative rule to the specific case. In doing so he creates no precedent binding upon himself or others in the future. The emphasis in study and in application of the civil law is on principles, not cases.

It is quite the contrary in our common law countries. The great body of our private law has developed without ever being considered by any legislative body. The emphasis is on the customary law as declared in judicial decisions, particularly by courts of last resort. In declaring the law in a concrete case today the common-law judge does more—he unavoidably makes law for tomorrow. The precedent influences the common law in the direction of uniformity, stability, and predictability. While we have much legislative lawmaking and leave it to our legislature to take hurdles in law reform too great for heavy-footed judges, the judges also take a hand in revising and reforming rules of law.

Our people are becoming increasingly conscious, and our judges increasingly candid, about the lawmaking part of the judicial function.[3] A case-law court of last resort may not be excused for an unconscionable judgment merely because a precedent may be cited for it. In such cases when old rules must be changed to fit new occasions, or new rules devised where there were none before, logic and tradition are not enough. "The life of the law," said Mr. Justice Holmes, "has not been logic: it has been experience." [4] In the quest for experience common law judges are not required to forego lessons learned under systems other than our own. There is nothing irreconcilable between the wisdom of the common law and the wisdom of the

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Germany today is that even yet she does not recognize the principle of expatriation which most other Powers of the world have finally, if reluctantly, accepted. She still demands that German emigrants yield her obedience and service, even against the countries in which they have made their new homes.

[3] See Cardozo, "The Judge as a Legislator," Lecture III, The Nature of the Judicial Process. Yale University Press (1921).

Sir Frederick Pollock wrote: "The best and most rational portion of English law is in the main judge-made law. Our judges have always shown, and still show, a really marvelous capacity for developing the principles of the unwritten law, and applying them to the solution of questions raised by novel circumstances." 9 Law Quarterly Review 106 (1893).

Lord Mansfield is a classic example of the law-reforming common law judge. In effectiveness he was a one-man Parliament.

[4] Holmes, "Early Forms of Liability," Lecture I, The Common Law. Little, Brown & Co. (1881).

civil law.[5] And common law judges may, and do, take their law where they find it.

But in general the disciples of each system of law in the Americas have pursued their way with a good deal of aloofness toward each other. What we seek by association now is, of course, not the dominance or the capitulation of either system. We of the United States are awakening to a need for a full exchange of information, experiences, and professional opinion, such as will fertilize and enrich our jurisprudence and legal literature and thought from civil law sources.[6] Consideration of the number and complexity of the problems that require legal solution here and which are also being dealt with in civil law countries will show how genuine is this need.

In constitutional, administrative, and public law all of our countries are in search of workable and just rules to achieve much the same ideal of liberty under law. The professional field of vision should include this whole hemispheric laboratory of republican government where experiments of great variety and importance are proceeding. The Western Hemisphere is preeminently a land of written constitutions. Our own is the oldest functioning Constitution. Our forefathers practiced economy of words to such an extent that it is written in a sort of legal shorthand, many of its phrases having meaning only by reference to contemporaneous legal doctrine. Our Bill of Rights is a series of majestic generalities. Amendment is difficult and heavily weighted in favor of inertia. Inertia is a factor so powerful as to be a real fourth department of our government. The constitutional history of the United States has been relatively a static one, nearly every great Power having extensively revised its institutions since ours were established. Judicial interpretation has been the chief method of adaptation to new problems. The responsibility which this casts upon the legal profession on the Bench and at the Bar is extraordinary, and every source of enlightening experience or responsible commentary should be laid under tribute for our task.

[5] Common and civil law systems coexist in both Canada and the United States. Quebec and Louisiana adhere to the French tradition. Several others of the United States have been much influenced by Spanish law and retain doctrines from it, such as community property holding between husband and wife. Common law states have shown a marked tendency toward codification. This has been one of the most useful devices of those who work for uniformity of law among the states, such as the National Conference of Commissioners on Uniform State Laws. The American Law Instítite, while chiefly engaged in restating case law, has also proposed a model uniform Code of Criminal Procedure.

The Union of South Africa is an interesting example of the compatibility of English common law with Dutch civil law.

[6] This recent interest is both evidenced and stimulated by such contributions as the address by Dr. Ricardo J. Alfaro to the American Bar Association, "The Legal Profession as Seen Through the Eyes of a Latin-American," 28 American Bar Association Journal 742 (1942); also, "New World Constitutional Harmony," by George Jaffin, 42 Columbia Law Review 523 (1942); Studies of the Comparative Law Section of the American Bar Association; and, of course, most importantly by the deliberations of the Inter-American Bar Association.

While the other American Republics have looked to Europe for their systems of private law, they have without exception adopted written constitutions which embody the basic concepts found in the Constitution of the United States. But all of the other constitutions came much later in point of time. Half of the American Republics have framed new constitutions since 1932.[7]

Five of our neighboring peoples, like ourselves, have adopted federal forms of government. But Canada, Mexico, Venezuela, Brazil, and Argentina, have each enacted variations from our system determined by their appraisals of our weaknesses. Writing near the time of the Civil War, in support of the British North America Act, Sir John Macdonald pointed out that it had been framed to avoid "that great source of weakness which has been the cause of disruption in the United States." Each of the constitutional departures in this hemisphere from our practice is likewise a considered judgment upon defects or merits of our own system.[8] We may not agree with those conclusions, but we cannot afford to ignore the informed opinion of those whose detachment from our internal affairs gives their judgments a perspective which our own often lack.

One of the problems with which these later constitution-framers have struggled is how wisely to allocate power as between local and central authority, a problem that is particularly delicate as between a federal government and its constituent units. The implications of our federalism as to the allocation of power between the States and the central government has constituted the most recurrent and bitter controversy in our constitutional history. It seems likely ever to remain a source of vexation and discord. James Bryce visioned our federal system in the United States as a phase of more extended constitutional history which he considered to be a ceaseless struggle between what he called "centrifugal" and "centripetal" forces. Bryce wrote of the strength and weakness of our federal system as accurately as a scholar can. But our neighbors, like ourselves, are living with this system and experiencing these strengths and weaknesses. These contending forces come to rest on the basis of some given formula such as our Constitution or some of our great constitutional decisions only for a short time.

[7] Dates of adoption of constitutions now in force are: Argentina, 1853; Costa Rica, 1871; Guatemala, 1879; Colombia, 1886; Ecuador, 1906; Mexico, 1917; Chile, 1925; Peru, 1933; Uruguay, 1934; Honduras, 1936; Venezuela, 1936; Brazil, 1937; Bolivia, 1938; Nicaragua, 1939; Haiti, 1939; Salvador, 1939; Paraguay, 1940; Cuba, 1940; Panama, 1941; Dominican Republic, 1942.

A compact but comprehensive survey of legal institutions and doctrines is given in a series of lectures, Law of the Latin-American Republics, by Crawford M. Bishop, of the Law Library of the Library of Congress.

[8] Professor Dowling at our last meeting pointed out the parallel between the constitutional problems of Argentina and the United States. The Argentinian Supreme Court in 1887 had exactly the problem Marshall dealt with in 1803 in Marbury *v.* Madison, and in 1876 faced the same issue Marshall decided in McCulloch *v.* Maryland in 1819.

New problems upset the old equilibriums and require resettlement. A series of these resettlements, whether made by amendments, or by judicial decision, or by legislative bodies, show the trends and drifts from which no government can isolate itself.

It is a commonplace observation that the pressures of economic and social maladjustments in the United States today are insistently and almost uniformly demanding the exercise of authority by central at the expense of local government. Even apart from the overshadowing war power, centripetal forces are in the ascendant. Many people are concerned lest these proceed too far or too rapidly. Other opinion here parallels that in Australia which Sir Owen Dixon has recently reminded us "has led some among us to doubt what is the place of federalism in the modern world."[9] Both of these schools of opinion might be enlightened by dispassionate examination of the causes and consequences of different allocations of power between central and local authorities in different of the Americas. Colombia had a federal system from 1863 to 1886, but abandoned it. At some risk of oversimplification it may be stated that the more recent constitutions show an increased degree of centralization, having in general increased the central government's powers and multiplied the occasions for direct federal intervention in the government of constituent states.[10] The American federated republics whose constitutions are easy of amendment and respond more quickly to current pressures and opinions are perhaps the greatest modern source of experience, whose lessons might help the United States to avoid both the evils of sectionalism and those of overcentralization.

[9] 28 American Bar Association Journal 733.

[10] The experience of Brazil is a case in point with respect to the recent history of federalism in some of the South American countries. At the outset Brazil's constitution provided for a system under which the powers of the federal government were strictly enumerated. The balance of governmental power rested in the states. They had their own constitutions, governors, and legislative assemblies, and in the course of evolution they attained a degree of independence and autonomy far beyond that in the United States. The situation became such that sectionalism began to become prevalent. *Cf.* Karl Loewenstein, Brazil under Vargas (1942).

However, by the decree of Nov. 11, 1930, the former constitution (of 1891) was suspended. The decree provided, among other things, that the chief of government might appoint for each state a federal delegate called the "Interventor." This is incorporated in Art. 9 of the Constitution of Nov. 10, 1937.

> The Federal Government may intervene in the State, through the nomination, by the President of the Republic, of an interventor, who will assume, in the State, those functions which according to its Constitution, belong to the Executive Power, or those which, in accordance with the necessities and the requirements of each case, are given him by the President of the Republic:
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> (a) to prevent the imminent invasion of the National Territory by a foreign country or of one State by another, as well as to repel both forms of invasion;
>
> (b) to reëstablish order which has been seriously disturbed in those cases in which the State will not or cannot do so;
>
> (c) to administer the State, when, for any reason whatsoever, one of its powers shall be prevented from functioning;
>
> (d) to reorganize the finances of a State which has suspended, for more than two

And then there is the ever-difficult problem of reconciling liberty with authority, a problem which each nation must solve in setting up its own institutions, and the United Nations will have to solve in implementing the Atlantic Charter as an instrument of world peace. The equilibrium between restraint and freedom is always somewhat unstable, because the apprehension of dangers from war, for example, leads to increased emphasis on restraints, while fears of overcentralization tend to put the emphasis on liberty. Liberty is prized by all of the peoples of this hemisphere, and every country's constitutional history reveals important adjustments and readjustments to meet the needs of their condition and time. The constitutional history of this hemisphere is a veritable encyclopedia of experiments in liberty under law.

Another prevalent trend of the later constitutions of the countries in the south has been the incorporation directly into their constitutions of broad concepts of social welfare.[11] Our own practice has been to leave detail of this kind to be dealt with by the legislature, although some of our states have

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> consecutive years, the servicing of its funded debt, or which has failed to liquidate, after more than one year in arrears, the loan contracted with the Union.
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> (e) *to assure the execution of the following constitutional principles*:
>
> 1. republican and representative form of government;
> 2. presidential government;
> 3. rights and guarantees assured by the Constitution.
>
> (f) to insure the execution of Federal laws and sentences.

The Interventor acts for his state as does the President for the Union. He is the executive authority of the union within the state and exercises jointly all legislative and executive powers. He may be recalled by the federal government. The mayors are appointed and dismissed by him.

Argentina is also making use of interventorship, but to a more limited extent. The power to appoint an interventor is given under Art. 6 of the Argentine Constitution of 1926.

> The Federal Government intervenes in the territory of the Provinces in order to guarantee the republican form of government, or to repel foreign invasions, and, at the requirement of their constituted authorities, to support or reëstablish them, should they have been deposed by sedition or invasion from another Province.

[11] Our Constitution refers in general to the protection of life, liberty, and property, whereas the Uruguayan Constitution of 1934 extends protection to "life, honor, liberty, security, labor and property, without distinction between citizens and non-citizens." Art. 7; *cf.* Art. 35 (52). It also provides social and economic guarantees on a large scale with respect to the family, public health and welfare, labor and education. Nor are these safeguards confined to Uruguay. We find them in the constitutions of some of the island republics and other countries on both the east and west coast of South America, as well as in Central America and Mexico.

The Uruguayan guarantees are summarized by George Jaffin in "New World Constitutional Harmony: A Pan-Americanadian Panorama," 42 Columbia Law Review 523, 550.

Compare the comprehensive safeguards provided in Art. 43 *et seq.* and 60 *et seq.* of the Cuban Constitution of 1940. (See Jaffin, *op. cit., supra*, p. 551, note 76.)

There are also safeguards provided directly in the Mexican Constitution (1917, see especially Art. 123), the Constitution of Brazil (1937), Venezuela (1936), Panama (1941), and Peru (1933). For further discussion of the Constitution of Peru, see Bishop, *Constitutional Law and Lectures on the Law of the Latin-American Republics*, p. 58.

lately gone a long way in the same direction. What experience will prove as to the wisdom of putting matters of this kind into fundamental instruments remains to be seen, but the distinction between constitutional and legislative provisions may be less important where amendment is easy.

In the field of administrative law and legal administration other governments of this hemisphere are engaged in trying out a variety of procedures with some of which we in the United States have little experience. As government tends to become more centralized and regulation becomes more extensive simple procedures for the prompt determination of constitutional and other legal rights claimed to be invaded by officials become more important. Administrative law has been highly developed under the civil law systems both in Europe and on this side of the Atlantic. Lawyers of the United States are not alone in solicitude for fair administrative procedures. Indeed we may hardly claim preëminence for the common law or our own statutes on this important subject. Cuba in its new Constitution not only provides a direct action to test the constitutionality of official acts but sets up a special court to decide such questions. Mexico and some others of the Hispanic states have a procedure under the name of *amparo* which provides a summary and direct test of the constitutionality and legality of official action at the suit of the injured party.[12] Others of the republics have under different names variations of these procedures.[13] Canada may obtain an advisory judgment from its court of last resort on constitutional questions, a practice which our Supreme Court early rejected. Unfortunately, as our system operates, laws have sometimes been held unconstitutional after they have been in operation several years.

Of course it is impossible to appraise the results of any legal system, procedure, or rule of law on the basis of a paper acquaintance. A part, perhaps the most significant of any country's law, is the attitude it evokes in judges and administrators who apply it. We should not discount the wisdom, as related to laws and governments, of the precept that "What's best administered is best." But without going into fields of private law, which would further confirm the observation, it is evident that what our profession in each nation does and thinks is of interest to all lawyers everywhere. Professional relations between lawyers of the Americas must not merely be a by-product of commerce. We must meet each other on the level of disinterested and open-minded legal research and scholarship. The time may soon come when

[12] The "Law of Amparo" has been adopted also in El Salvador (1886, Art. 37, 102), Honduras (1925, Art. 29, 135), Nicaragua (1911, Art. 63, 124), and Guatemala (1935, Art. 34, 85).

[13] Colombia has contributed a procedural machinery for protection of constitutional safeguards in the form of the "*acción popular*" or "*acción pública*" under which a private citizen may directly challenge the constitutionality of any law (1936, Art. 149). Cuba, Venezuela and Haiti have similar procedural safeguards. There is also a special procedure to handle appeals on questions of unconstitutionality in the form of the so-called "*recurso de inconstitutionalidad.*" See Jaffin, *op. cit., supra,* 567.

our educational institutions will regard instruction in our Anglo-American system incomplete unless it includes essentials of the parallel system of Romanic-American jurisprudence.

I have no thought of entering the controversy among academicians about the nature and the sources of that which we speak of as "the law." It is enough for the moment to recall that there is in the tradition and experience which we include under the name of "the law" a wisdom higher than that of any legislature or its statutes and more sure than that of any court or its decisions. "The law" is something that manages to serve both the stability of our society and its capacity for improvement; something that survives the mistakes of legislatures and courts; something that embodies great truths which will not be distorted for long to the selfish service of a client, a class, or even of a nation.

We may not well serve "the law," either common or civil, if our vision of our professional function be limited by the case in hand or confined to the segment of the profession's work carried on within any one nation. The advocate's danger of becoming preoccupied with the routine and the transitory is considerable, and gives point to the old story of the stonecutters who were asked what they were doing. The first workman gave the uninspiring, but very practical reply, "I am earning a living"; the second workman, without lifting his eyes from his immediate work, said, "I am cutting this stone"; but the face of the third lighted up as he said, "I am building a cathedral." We, too, whether or not we are aware of it, do more than earn livings; we do more than carry on particular cases. We are building the legal structure that will protect the altars of human liberty—the structure that will express man's faith in his worthiness and capacity to be free.