

# Washington University Law Review

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Volume 1958 | Issue 3

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1958

## Law and Lawyers in a Divided World

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### Recommended Citation

Robert G. Storey, *Law and Lawyers in a Divided World*, 1958 WASH. U. L. Q. 247 (1958).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol1958/iss3/1](https://openscholarship.wustl.edu/law_lawreview/vol1958/iss3/1)

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# WASHINGTON UNIVERSITY LAW QUARTERLY

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Volume 1958

June, 1958

Number 3

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## LAW AND LAWYERS IN A DIVIDED WORLD

By Robert G. Storey†

The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This tenth annual lecture was delivered on March 27, 1958.

Most people, including historians, are concerned almost exclusively with the forms and institutions of government and only incidentally with legal systems. Abrupt and radical changes in political power make headlines in the press. Professor Whitney R. Harris aptly described the condition when he said: "Legal systems by contrast are drab and technical, and when changes occur they are seldom recognized as having great significance."<sup>1</sup> Political systems rise and fall according to the vicissitudes of popular interest and the designs of ambitious men. However, the basic structure of established legal systems usually survives the most violent political storms.

One of the strong features of the British government is that irrespective of whether the Socialists or the Conservatives are in power, the revered and strong legal system survives. Indeed, the common law of England is the great stabilizer to the British ship of state. Changing political winds have not been successful in overturning her legal anchor.

In modern history only four revolutionary political changes have deeply affected the underlying legal systems. They were the American Revolution, the Napoleonic, the Meiji Restoration and the Russian Bolshevik Revolution. It is rather interesting to analyze the revolu-

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1. Harris & Schwarz, *Comparative Law: Important Contrasts in the Administration of Justice in the United States and Western Germany*, 30 *Texas L. Rev.* 462 (1952).

tionary political changes and their impact upon the law. Considering them in chronological order, may we examine some of the results :

*American Revolution:* The Revolutionary War with England was waged by the colonies under a very loose form of government with the ineffective Articles of Confederation. School boys and girls recall from their study of early American history the hardships of the colonies during this period. No effort was more pathetic nor yet so sublime as the half-frozen, ill-clad and under-nourished soldiers under General Washington at Valley Forge. As soon as the military victory was a certainty, the colonial leaders, most of whom were lawyers, were concerned with a permanent government and a binding legal structure.

The foregoing revolutionary political changes did not destroy the respective legal systems but on the other hand strengthened them. The civil law as enunciated in the Napoleonic Code was very much alive at the outbreak of World War II. It was the foundation of what has been commonly known as the "Continental Law" in Western Europe prior to the second world war. Under the Meiji Restoration the Japanese system of law was the principal legal system in the Far East.

The Anglo-American legal system, with its common law background enshrined with the great principles of freedom enunciated in the Magna Carta and at issue in the bitter contest between Coke and the Stuart kings, survived with the great principle as immortalized in the words of Bracton that the king is "Under God and the Law." This system of jurisprudence, at the beginning of the second world war, was the dominant legal system throughout the British Empire, the United States, and extended to the colonial possessions of Great Britain and the territories of the United States.

*Napoleonic:* Irrespective of the extension of Napoleon's empire, the numerous battles that he won, the vast territory brought under his domain, and his various political accomplishments, history does not eulogize him for his conquests. His defeat at Waterloo ended his military career and his various material achievements were forgotten. However, the Napoleonic Code still lives. It codified the continental legal reforms of the late eighteenth century. Not only is it the basis of law in France and her colonies but in various countries of the world, both on the continent of Europe, the Middle East and Latin America. The Napoleonic Code is the backbone of the law in civil law countries. One of our own states, Louisiana, has retained the basic principles of the Napoleonic Code.

*The Meiji Restoration:* This revolution swept away the remnants of feudal Japan. The new legal system in Japan was of Germanic origin. By the time World War II broke out it had become the fixed

legal system in Japanese-occupied Korea and in the various Japanese possessions of the Far East.

*Soviet:* At the beginning of the second world war the communist legal system was in effect throughout the Union of Soviet Socialist Republics. The objective of Soviet law as originally pronounced by Marx and Engels and as interpreted by Lenin, Stalin and Vyshinsky glorified the state with the principle that "law is a tool of the state." The individual rights were subordinated to those of the state and the Communist Party.

### SURVIVING MAJOR LEGAL SYSTEMS

Of the four major legal systems in effect at the beginning of World War II only two dominant legal systems have survived: The Anglo-American and the Soviet.

While it is true that Great Britain and the United States have granted independence to most of their former colonies and territories, it is most significant that the Anglo-American judicial system with its independent judiciary survived in the newly created independent nations. The Continental system of law, notably in Germany, has undergone some major changes including a constitutional form of government based upon a separation of powers. The former Meiji legal system in Japan and Korea has been replaced by a constitutional government including the principle of the separation of powers and the independent judiciary.

The Soviet system has extended its original jurisdiction over some two hundred millions of people in the Soviet Union proper to its satellites and communist controlled countries which now approximate one-third of the total population of the world. While the civil law system remains strong and continues to be effective in many countries, it has been subordinated to the Anglo-American and Soviet systems of law. The result is that one-third of the people of the world now live under the Anglo-American system of law with the freedom of the individual as its basic cornerstone. Another one-third of the people of the world are subject to the Soviet legal system. The remaining one-third of the people who reside in uncommitted nations are subject to the all-out struggle for the minds of men. One of the basic issues of this contest is whether or not the remaining one-third of the population will adopt a legal system that guarantees the freedom of the individual or become subject to a system of law that is committed to the supremacy of the state.

### COMPARISON OF ANGLO-AMERICAN AND SOVIET LEGAL SYSTEMS

Our basic law is the Constitution of the United States. This instrument was drafted principally by a young lawyer, James Madison,

and adopted in a constitutional convention of which more than half of the members were lawyers. Thus, it is understandable why we lawyers of this day speak with such pride of our constitutional government and why we constantly strive to uphold the Constitution against every unjust attack.

One of the issues which clearly arose in American constitutional history was whether the Congress of the United States could enact legislation which was contrary to or exceeded its delegated powers under the Constitution. The great Chief Justice John Marshall in *Marbury v. Madison*<sup>2</sup> established the principle and the precedent that Congress and the Executive in this country are subject to the limitations imposed by the Constitution. In England Parliament is supreme. In the United States legal supremacy is to be found in the written Constitution of the United States and in the constitutions of the several states.

The Constitution of the United States constitutes a compact between the people of this Republic and their government pursuant to which the rights of men to freely hold property and to engage in a business of their own choice are clearly recognized. No man can be deprived of his property without due process of law in the United States. This rule applies as against the federal government by reason of the fifth amendment of the Constitution; and against state governments under the fourteenth amendment of the Constitution.

To note a few basic differences between the constitutions of the United States and the Soviet Union would be appropriate. In the first place, our Constitution was adopted through a long, tedious and careful process. All of us are familiar with the failure of the Articles of Confederation; the difficulties of prosecuting a war with England with no binding authority between the several states; the final call of the constitutional convention in Philadelphia in May, 1787; the long ordeal of secret sessions, difficulties, adjournment, compromise, and a final document signed September 17, 1787. But this was not the end. Bitter campaigns were waged in the several states for ratification. The first ten amendments were agreed upon as a condition of ratification and proposed in the first Congress in September, 1789. By December 15, 1791, eleven of the original states had ratified them.

Another striking difference is the fact that our Constitution was created by the people and all powers not specifically delegated under the Constitution were reserved to the people. It is a document of limited powers. It is hard to amend. Since 1791 only twelve new amendments have been adopted out of more than 4,000 proposed con-

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2. 5 U. S. (1 Cranch) 137 (1803).

stitutional amendments. It preserves fundamental rights and freedoms to the individual even against the government.

On the other hand, the constitution of the Soviet Union was *handed down* by decree of the Supreme Soviet in 1936. There is no true separation of powers. The Supreme Soviet is the repository of the legislative, executive and judicial powers. It was a *promulgation* of certain alleged constitutional rights rather than a *creation* of a constitution. The 1936 constitution provided for judicial independence, for uninterrupted terms of office for judges, and for popular election of certain judges. What has been the effect of these constitutional provisions according to Russian writers? In 1938, Poliansky said:

It is self-evident that the independence of the judges (referring to article 112 of the new constitution) does not release them from the duty to obey political directives, which of course also cannot go against the Soviet law that expresses the will of the people, the law-giver, directed by the dictatorship of the proletariat.<sup>3</sup>

Concerning judges' tenure of office and election of judges, N. S. Semenov had this to say:

The provision of an uninterrupted five year term for the judge (of the Supreme Court of USSR) as stated in the Constitution of 1936, has no significance whatsoever. Each member of the Supreme Court of USSR, including the Chairman, may be at any moment dismissed from his post. . . .

The people's judges and people's assessors, as stated in article 109 of the Constitution of the USSR, are elected by the citizens of the district for a term of three years. Actually, however, the judges and assessors are nominated and appointed at the direction of the district Party organs. The techniques and conditions of these elections are such that the candidates nominated by the District Party Committee are invariably appointed as judges.<sup>4</sup>

#### THE PRACTICE OF LAW IN RUSSIA

In order to carry forth the basic concept of the withering away of the state—by which was meant government under law—the first profession affected by the revolution was the organized bar of Imperial Russia which was abolished by decree on November 22, 1917. Nevertheless, the Soviet rulers quickly discovered that some form of legal profession was necessary even if only to enforce or assist in the administration of the communist law. This in effect meant that the rulers were omnipotent and what they proclaimed to be justice was indeed justice. Several plans for establishing and controlling a Soviet bar were adopted and then rejected when they proved unsatisfactory.

The Soviet government first attempted to control the bar by a

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3. Poliansky, *The Stalin Constitution on the Judiciary and the Procurator's Office*, Sov. Gos. No. 3 (1938).

4. Semenov, *The Soviet Judicial System as Represented in Diagrams 15* (1953).

decree on February 22, 1918, providing that "persons wishing to appear as attorney for a fee had to apply for membership in a college created in each soviet." However, this controlled only attorneys appearing for a fee, and since many persons were too poor to afford professional attorneys and had to rely upon the aid of friends or relatives, the control was incomplete.

In order to expand control the Commissar of Justice, in July, 1918, created a professional salaried bar on the payroll of the state. This system also had its weakness. The state's salaried attorneys would often accept additional compensation so that unless the client could afford to pay the excessive "tips," he stood little chance of being adequately represented.

In 1922 following the enactment of the civil and criminal codes, Soviet law, in the present sense, began to function. Attorneys are organized into colleges. Fees are set by the state. The attorneys work a regular eight-hour day and they are required to sign out of the office when leaving during the day.<sup>5</sup> Both the judges and attorneys are under state control, and are an essential force in subjecting the common people of Russia to the dictator's power.

Fees are fixed by this body and the fees are paid to the secretary who retains an average of thirty percent for expenses of the headquarters and the balance is distributed among the members. All lawyers must belong to the trade union of government workers. Their earnings are small. The lawyer's prestige and social position are low. The Soviet statistical report of June 30, 1956, shows lawyers with a university education are fewer in number than any other profession.

Having visited the Soviet Union as a tourist prior to World War II and having had frequent contacts with the Russians during the prosecution of World War II and at Nuremberg, having travelled behind the Iron Curtain since World War II, including a trip to the Soviet Union in August, 1956, as a member of a small committee of the American Bar Association, I have had the opportunity to make personal observations, and I shall refer to a few contacts.

Bar associations are designated as "Colleges of Lawyers." We were told by the president of the bar in Moscow that there were about 1250 practicing lawyers in Moscow, a city of approximately seven million inhabitants. In Kiev, the capital of the Ukraine (population 1,250,000), we were advised by a member of the "College" that there were about 250 practicing lawyers.

It is rather noticeable that trials are generally conducted in the people's court without lawyers and sometimes with a lawyer for one party and none for the other. The procedure is largely inquisitorial,

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5. Hazard, *Law Practice in Russia: The Organized Bar in the U.S.S.R.*, 35 A.B.A.J. 177 (1949).

as opposed to our adversary types of trial, and it is unnecessary for a lawyer to appear since under the inquisitorial system the judges conduct the trial. Lawyers have very little to do in actual trial except to give a summation. The average practicing lawyer who defends the accused in a criminal case has little freedom in behalf of his client. The preliminary investigation is made and completed without the assistance of counsel. Even his visits to the client in prison are subject to restrictions. The lawyer's part begins at the hearing. Under the present rules, if the Procurator is present the defense lawyer must participate in the trial. But in practice this is not always true.

A commission of jurists and lawyers from France visited the Soviet Union in April, 1956, and learned that at one of the prisons there was an accused condemned for a period of several years without having had the services of a lawyer to assist him. One of the members of this commission made this observation: "When the lawyer intervenes at the hearing, the opinion of the judges has practically been reached." The lawyer cannot appear before the Supreme Court of the Republics nor before the Supreme Court of the Soviet Union in cases of appeal or revision. Thus we see that Russian lawyers only practice law to an extent allowed by the state and are not allowed to use their own skill and ingenuity for their client.

#### THE RULE OF LAW

A popular expression used by members of the legal profession and the public, "The Rule of Law," has appeared frequently in the news in recent months. Legal scholars, lawyers and statesmen in the free world seem to assume that everybody knows what the expression implies and that it is basic to any system of free government. Like so many other democratic concepts, it is not readily capable of exact definition. Various attempts have been made to define the expression but nearly all realize that it is an attitude or an expression of principles rather than capable of being reduced to an exact definition. The rule of law is thus made up of many aspects, and it appears easier to describe these aspects than to enunciate principles as the concept of supremacy of law.

The International Congress of Jurists, with representatives from forty-eight friendly nations, at its meeting in Athens, Greece, in the summer of 1955, attempted to define "The Rule of Law" by adopting what is known as the "Act of Athens." The pertinent part of the pronouncement reads:

1. The State is subject to the law.
2. Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement.



3. Judges should be guided by the Rule of Law, protect and enforce it without fear or favor and resist any encroachments by governments or political parties on their independence as judges.

4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.<sup>6</sup>

Pursuant to the above declaration a committee from the Section of International and Comparative Law of the American Bar Association under the chairmanship of Norman Angell, of New York, has continued the study, consideration, and elaboration upon the rule of law with the objective that an appropriate statement of common principles of law may be accepted by the legal profession of the free world.

The President of the United States emphasized the basic principle of law and justice in his address before the American Bar Association in 1955 on the 200th anniversary of the birth of Chief Justice Marshall when he said:

Our nation is ranged with those who seek attainment of human goals through a government of laws . . . But we must never agree to injustice . . . well knowing that if we accept destruction of the principles of justice for all we cannot longer claim justice for ourselves.

The recent proclamation by the President of the United States in designating May 1, 1958, as "Law Day—U.S.A." was a most significant milestone in the development of the rule of law.

Charles S. Rhyne, president of the American Bar Association, began his description of this significant event in these words: "The Law: it has honored us; may we honor it." Appropriate programs and tributes to "The Rule of Law" will be held in all states and major cities of the United States on "Law Day—U.S.A."—May 1, 1958. The President's proclamation and the legal profession's emphasis upon the rule of law is an appropriate answer to the Soviet's usual celebration of May Day by a display of armaments and military strength. Hence, we of the legal profession have countered the major emphasis of the Soviets—atheism, materialism and armaments—with reverence and respect for the law.

The rule of law does not mean that the powers of government are derived from the law, for this is true of even the most despotic government. The powers of Mussolini, Hitler and Stalin were derived from law, even if that law was only that which the dictator saw fit to make. Even the communists refer to action "according to law." The public press carries frequent references to arbitrary action behind the Iron Curtain as being "according to law." To the communists, law may be the latest decree of the dictator or pronouncement

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6. Report of the International Congress of Jurists, Athens, Greece 9 (1955).

of the Supreme Soviet. The rule of law is therefore something different than governmental power. The main element of this distinction is the extent of discretion permitted in the administration of justice. The rule of law envisions definite curbs on discretion. It envisions trained, experienced and independent judges who are bound by basic principles leaving but a marginal element of discretion. When justice is administered by untrained men with almost unlimited discretionary powers, you no longer have a rule of law. Justice according to law is the outstanding characteristic of the state in which the rule of law prevails. This does not necessarily mean that all disputes must be settled by juridical proceedings, but rather that justice is meted according to just laws, either as the determining or controlling factor. Insofar as disputes are committed to agencies other than courts, judicial review of their determination is essential. It is only to the extent that judicial justice serves to keep these other agencies in line that the rule of law can be said to be maintained.

Aristotle pointed out that the rule of law required both God and reason. In other words, the rule of law presupposes that there are certain principles above the state, i.e., that there are certain principles which the state cannot abrogate. From these principles are derived those concepts which are usually included in the term individual rights of the person, such as freedom of the person, of belief, and of expression of opinion. These are the elements which democracies include in their bills of rights as fundamental rights of man. Whenever a government infringes upon these freedoms it is veering away from the rule of law and is becoming a state under the rule of power.

Furthermore, the rule of law indicates that there must be some division of power in a law state. Whenever the executive, legislative and judicial power are in the same hands, there is no longer a government under law. As Mr. Justice Brandeis stated, "The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power." The main characteristic of a power-state, as distinguished from a law-state, is the concentration of all governmental powers in the hands of one man or group of men. Hence, separation of powers is an essential part of the rule of law.

#### CONCLUSION

The legal profession must assume bold leadership in furthering the rule of law. Such leadership must be positive. Too much emphasis is given to Soviet armaments and too little in the development of leadership. Such positive leadership should find expression in the thorough study and comparison of the two dominant legal systems—the Anglo-American and Soviet, and in the proper dissemination of

such studies and findings to members of our legal profession and to the public.

We should stress the moral basis of our democracy and the spiritual foundation of our rule of law. Our basic individual freedoms should be interpreted properly and objectively; the dignity of man should be paramount; the writ of habeas corpus extended; the independent judiciary maintained and improved, and the separation of powers safeguarded. We should interpret the rule of law in simple terms to society. President Griswold of Yale University put it this way:

I do not think that the full meaning and value of law are communicated to society through the law's own formal processes. . . . The American people do not sufficiently understand the rule of law because it has never been properly explained to them. The legal profession has not succeeded in explaining it perhaps because it has been too busy with *ad hoc* issues and winning cases.<sup>7</sup>

Spiritual and atheistic principles are incompatible. Man's soul should be free. Free men are creative. But man cannot form, maintain and improve an independent legal system if he is conscious that law may be the last decree or expression of a dictator. Atheism denies the existence of a soul.

Finally, the rule of law must be subject to "eternal vigilance" by the independent legal profession. A free and independent judiciary cannot function effectively in a society that does not have a free and courageous legal profession. Our democracy cannot fail if we of the legal profession uphold, defend and maintain the rule of law in all that the name implies.

The impact of a divided and shrinking world has imposed a greater responsibility upon the legal profession of the free nations. The Attorney General of the United States, Herbert Brownell, Jr., speaking in Westminster Hall during the 1957 convention of the American Bar Association in London, summarized our task to create an effective rule of law between nations in these words:

The opportunity now presented for men and peoples skilled in the law is therefore the greatest of all time. . . . What we need is the development of the law of nations in our age which will first bind the countries of the world into solemn voluntary pacts governing their great interests on the world scene, in contrast to unilateral exploitations by the mighty. . . . We must establish an era where nations as well as individuals are subject to justice under law.<sup>8</sup>

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7. Griswold, *The Need for Law*, Time, Dec. 20, 1954, p. 54.

8. Brownell, *The London Meeting: Opening Ceremony in Westminster Hall*, 43 A.B.A.J. 883, 891 (1957).