A Concept of the Rule of Law

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This is an introduction to the Rule of Law as it is applied in the United States to safeguard the personal liberties and the property of its citizens. It is directed to explaining our system of safeguards of individuals and of private corporations so that one unfamiliar with our system will understand its workings. This exposition is only intended to be the first part of a primer on this important subject.

As a base for more detailed studies that follow, a background of history is necessary to show how the Rule of Law in this country developed from that of England. Moreover, it is appropriate to delineate briefly the characteristics of the people of this nation and their background so there may be a knowledge of the factors that govern the application of the Rule of Law in the U. S.

The citizens of the U. S. are in large measure recruited from the adventurers and the malcontents of old Europe. Always, aggressive enterprise, imagination and hard work were held at a premium in this country, for this is a land of pioneers. Thus toil, including the most arduous forms of manual labor, has been deified here. Nonproductive ease was never enthroned as the ultimate goal of the successful man; rather it is the wish of most, as our western people say, "to die with their boots on," carrying on their activities to the end. This country is looked upon with envy because of its high economic standard of living, but it is wrong to confuse this with a place where many pursue lives of quiet enjoyment and content. It is a place of constant striving and effort.

Because we are derived from pioneer stock we have a habit of helping the other man, for on the frontiers this was the only prescription for survival. Moreover, because of the great distance between settlements in the old days each man became in a measure a law unto himself. Those in the far West a few generations ago said, "Nothing counts east of the Red" (referring to the Red River). So it is remarkable that our Federal Constitution has always been held in such reverence and awe. Some writers attribute this to the prosperity that this country has experienced under the aegis of our written constitution.

We are surprised, and more than a little uncomfortable, to find ourselves, at this stage of history, the most prosperous country and the one to whom other nations look for leadership. We would like to produce a *pax Americana* similar to the *pax Britannia* that was a useful balance wheel in the 19th century; but such strong tides are running in the world today that this may be too much to hope for.

One of the important contributions we can make to mankind in these troubled times is the Rule of Law. This Rule under which we exist is derived in nearly all of its principles, and in many of its important details, from the unwritten constitution of the British people. Our constitution with its Bill of Rights is accorded a worship in our country that is unique in history. There is a tendency to accredit the authors of our Federal Constitution with godlike powers of prophecy and of insight into the principles of justice to which its authors dedicated this document. It must be kept in mind, however, that they had the heritage of the British Constitution, largely unwritten except for a few important milestones such as the Magna Carta. Further, many of the colonies whose citizens drafted the Federal Constitution had written constitutions that survived many years of test and amendment before our Constitutional Convention where our Federal Constitution was drafted. It is interesting to see, for example, the separation of the powers of the legislative, the executive, and the judicial in the constitution of Massachusetts as it was adopted in 1779. Article XXX of the Constitution in the Annotated Laws of Massachusetts reads: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

The U. S. has been fortunate in times of national import to find men equal to the task, but it is not realistic to ascribe to them capacities beyond the human or to believe that our constitution was handed down from heaven as the Bible described the tablets of Moses on Mount Sinai.

Background of Higher Law

Society always had rules by which it was governed, but in early times those rules were personified by the chief, who made his own laws as the emergencies of living and the problems of ruling arose. However, with the passage of time all groups of men, tribes or nations, developed a total polity which in general embraced the division of government into the legislative, the executive, and the judicial.

There has been in recorded history a reliance upon

what is called "the higher law," also somewhat loosely designated "the law of nature." This law constitutes the wellspring from which all laws are derived. In his *Rhetoric*, Aristotle advises advocates to "appeal to the law of nature" when they had "no case according to the law of the land" and argue as said by Sophocles that "an unjust law is not a law."

Cicero leaves no doubt of his conception of natural law: "True law is right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions. . . . It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from nor abrogated. Indeed by neither the Senate nor the people can we be released from this law; nor does it require any but ourselves to be its expositor or interpreter. Nor is it one law at Rome and another at Athens; one now and another at a later time; but one eternal and unchangeable law binding all nations through all time. . . ."

This law is a higher law, a law of nature, founded in the conscience of man. It transcends expediency and must be the activating ingredient in man-made laws if they are to survive the test of time. The Ciceronian concept survived through the centuries through the writings of Saint Isidore of Seville, and through identification with the church and the teachings of Scripture.

The precepts of the higher law were inherited by the Colonists in America, for in the main their background was that of the laws of England. These colonies which later united to form the United States considered themselves founded under divine law. Those who were destined to join the colony at Plymouth entered into a compact which reads: "In the name of God, Amen. We whose names are underwritten, the loyall subjects of our dread soveraigne lord, King James . . . doe by these presents solemnly and mutually in the presence of God, and one another, covenant and combine ourselves togeather into a civill body politick, for our better ordering and preservation . . . and by vertue hearof to enacte, constitute, and frame such just and equall lawes, ordinances, acts, constitutions and offices, from time to time, as shall be thought most meete and convenient for the general good of the Colonie, unto which we promise all due submission and obedience." So, before debarking from the ship that brought them, these founders of the colony of Plymouth submitted themselves to the rule of a higher law.

The Rule of Law in Brief

The English Rule of Law, which we enjoy in the U. S., was not built on statutes enacted by a legislative body, but on the decision upon the merits of each controversy that came before the courts. By the individual consideration of each case that came into litigation, the courts built a mass of decided precedents and the structure became "the rule of law"; a unique doctrine by which the courts defeated "the divine right of kings" and the king no longer controlled the polity in England. The lawyers erected the common law to a position of power in the state which the crown dared not contest, for the common law acquired an aura of inviolability by reason of the hardening through the years of custom into law.

The English Magna Carta, a document that the barons forced the unwilling King John to sign in 1215 to guarantee baronial liberties, was intended to be a bulwark of feudal rights, but its terms were extended to all Englishmen by interpretation. The language seized upon by the lawyers was the historic language found in the thirty-ninth chapter which reads, "No freeman shall be taken and imprisoned or dis-seized or exiled or in any way destroyed, nor shall we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land." "Peers" here referred to the barons and "law of the land" meant the feudal law of 1215, but the Puritan revolution aided by the common lawyers turned this document into a shining charter of liberty for the middle class Puritans.

The constitutional struggle in England, of which the struggle around the writ of *habeas corpus* is typical, illustrates the strange twists and turns that may occur in arriving at the consolidation of an important landmark in man's struggle for justice. The writ of *habeas corpus* (have the body) is used to free a person unjustly imprisoned or held. Originally it was used to get subjects into jail.

In England the essence of the rule of law is the supremacy of Parliament and the crown and the judiciary are subordinate. On the continent the executive dominates in most countries. In the U. S. the judiciary is the dominant branch of the government. While in England the constitution, with a few exceptions such as the Habeas Corpus Acts, is unwritten, in the U. S. the rule of law is based on a written constitution and a dominant judiciary that has the power to declare any act of congress unconstitutional as well as any act of a state legislature. The constitution of the United States is short and somewhat vague, which are the requisites for a good constitution, as expressed on occasion by Sir Winston Churchill. One writer has somewhat inaccurately compared our constitution to a list of pious protestations, analogous to New Year resolutions; but it has the respect, indeed reverence, of the citizens and it is an efficient balance wheel that well serves the ends of justice in an economy of great complexity that is growing still more complex, year by year.

Both constitutions, the English and the U. S., protect certain fundamental rights. In both countries the government is as nearly as practicable a government of laws and not of men. To safeguard the impartial application of the laws in both countries the judges (except in the case of some of the judges of state courts in the United States) hold their appointments for life, at salaries that cannot be diminished, and they can be removed from office only for malfeasance.

But in the last analysis the courts of England and the United States have been of inestimable value as crucibles in which to form the basic structure of inalienable rights enjoyed by the citizens of these countries. Some of the important aspects of the work of the common law court are: (1) all parties on all sides of the case are fairly and fully heard; (2) impartial application of principles known and established contribute to the result; (3) the judge is personally responsible and is fully identified with his decisions; (4) subject to some unusual exceptions, the case is tried in public.

It is true that the basic rights of citizens are formed in the common courts. These basic rights are established by the accumulated result of particular decisions and not the sudden production of a declaration. There is the same common court for all suits and all parties, not one for litigation in which an official is a party, not one for constitutional problems. Without the slow and tedious accumulation of cases decided by the common courts over the centuries we would not have in England and in the United States the beneficial and universally admired system of justice which we call the Rule of Law.

Moscow's Pull-to-One-Side Policy

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On June 30, 1949, on the eve of his advent to supreme power, Mao Tse-tung formally proclaimed his lean-to-one-side policy which has since become well known. The subsequent close cooperation between Soviet Russia and Communist China, however, is not due to this policy alone but also to Moscow's pull-to-one-side policy whose essential aim is to prevent Communist China from straying from the Soviet fold.

The Chinese Communists came to power in October, 1949, less than a year and a half after the Soviet-Yugoslav split toward the end of June, 1948. In other words, they took over the mainland at a time when Tito's defiance of Stalin was mounting to a climax and the movement of international Communism was suffering a tremendous setback. Stalin and other Kremlin leaders by then must have learned a painful lesson from the Yugoslavs. They knew that the Communist movement and Soviet Russia herself could not afford another Tito, least of all another Tito in China. Consequently they took precautions against Titoist possibilities in China and tried to tie the new China to Russia with hoops of steel. With this end in view, they wanted to introduce Soviet influence, cultural, political, and economic, into China and to give the Chinese people a new orientation in their outlook. Casting their eyes over the vast China scene, however, they realized that a great deal had to be done on the negative or destructive side, namely, the removal of the tangible and intangible obstacles that had been set up in China by the Western Powers, notably by the United States.

Since 1844, when the first Sino-American treaty was signed, American interests and influence had been slowly built up in China. In 1908 and again in 1924, the American government decided to return to China the remaining portion (around US$17 million) of its share of the Boxer Indemnity and suggested that it be used to develop educational and other cultural activities. This generous gesture made it possible for more and more Chinese students to go to America to study and more and more American scholars and missionaries and social workers to go to China to work in their respective fields. At the same time, American business and entrepreneurs were active in the treaty ports, and American missionaries found their way into the smaller towns and less known places. In the big cities, many American-supported universities and colleges and schools sprang up, employing many American scholars and using American textbooks for many subjects. Hollywood, of course, contributed considerably toward enriching the American atmosphere. While Great Britain, France, and Germany also had played a part in the transformation of China, there is no doubt that American influence had been most pervasive during the two or three decades prior to the advent of the Chinese Communists to supreme power.

It is no wonder, then, that the Kremlin wanted first of all to get rid of the American influence. In

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