

February 1961

World Rule of Law--The Role of the Individual Lawyer

Robert N. Wilkin

United States District Judge, Northern District of Ohio

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Legal Profession Commons](#)

Recommended Citation

Robert N. Wilkin, *World Rule of Law--The Role of the Individual Lawyer*, 63 W. Va. L. Rev. (1961).

Available at: <https://researchrepository.wvu.edu/wvlr/vol63/iss2/3>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

World Rule of Law The Role of the Individual Lawyer of the Individual Lawyer*

JUDGE ROBERT N. WILKIN**

A new and magnificent duty now rests on the legal profession. It has been created by modern political and scientific developments. Evolution has so increased and facilitated travel and communication that the world has become one community. But that world community is divided into two powerful factions, generally referred to as East and West, and they are directly and fundamentally opposed. As a consequence, cold war rages and hot war threatens. Science has so increased the destructive power of missile and atomic bombs that total war would produce total destruction; life not destroyed by direct explosion would be poisoned by contaminated air, water and soil. Historians say that the world is confronted by the most fateful crisis that humanity has ever known.¹ Statesmen, religious leaders, scientists, philosophers and jurists have said that the only way to prevent world war is to establish for international affairs a system of enforceable world law.² The responsibility for such accomplishment naturally rests mainly on lawyers.

This essay will proceed to discuss the responsibility of lawyers. It is assumed that there is no longer any need to emphasize the imminent and fateful nature of the crisis; nor is it necessary to argue that law is the only substitute for war. A mind that does not accept those facts seems isolated from reality. Isolationism is not rational; it is an egocentric and emotional fixation of mind. Argument would be futile against it even if time and space were allowed.

The primary and most important part of the lawyer's duty is to analyze the issue and clearly define what it is that separates the factions and causes the opposition. As Sir Richard Livingston

* This article is appearing simultaneously in the American Bar Association Journal.

** United States District Judge, Northern District of Ohio, retired.

¹ For a moving and convincing discussion of the crisis, see *Will the Future Redeem the Past?* by Dr. Charles H. Malik, former president of the United Nations General Assembly, published by the Virginia Commission on Constitutional Government. See, also, MARITAIN, CHRISTIANITY AND DEMOCRACY (Anson Trans. 1950).

² See, ABA COMMITTEE ON WORLD PEACE THROUGH LAW, COMPILATION OF QUOTATIONS, and statements of representatives of many countries in UNITED WORLD FEDERALISTS, INC., ONE WORLD OR NONE.

has said, "In political and social questions true diagnosis is the first need and the rarest gift." Lawyers are especially trained for such work. An old adage of the legal profession says, "A case well stated is a case half won." The real question which underlies any dispute has a tendency to become lost in bitterness, emotionalism, personality and extraneous matters. The duty of the lawyer, as counsellor and as advocate, is to strip the issue of all impertinent considerations and show what the real difference is. This professional function is also exemplified in the service of a judge to a jury. He analyzes the contentions and arguments, excludes irrelevant matters and states clearly the real question to be determined.

THE ISSUE—LAW

The need and duty of lawyers is further emphasized by the very fact that in final analysis the crucial issue is found to be a difference between the two great powers in respect to law. The United States and allies champion the rule of law, Russia recognizes no law above the will of the dictatorship. As Vyshinsky said in his *Soviet Constitutional Law*, "The dictatorship of the proletariat is a power unrestrained by any laws."³

Dictatorship of the Proletariat is a deceptive phrase of the Marxian dialectic. It would be impossible for the proletariat to act as dictator—the attempt would be anarchy. The power that rules Soviet Russia and its satellites is the dictatorship of the leaders of the communist party. The laws enforced in Russia are merely the arbitrary will of the dictators. Laws and lawyers are considered mere tools for the implementation of the will and policy of the rulers. Soviet Russia proclaims such dictatorship and avows its intention to extend it over all the world.⁴

The United States proclaims and maintains government not of men but of law, and, together with its allies, champions such government for international affairs. The West opposes dictatorship and will fight to the death to avoid its imposition. So, we see that the crucial issue is the struggle between arbitrary will and established law. C. H. McIlwain, formerly Professor of the Science of Government at Harvard, after reviewing the long history of that issue,

³ Stason, *Law and the Administration of Justice in the Soviet Union*, 43 J. AM. JUD. SOC. 154 (1960).

⁴ Goodman, *The Soviet Design for a World State*, serialized in *Freedom & Unity*.

concluded "The problem of law versus will remains the most important of all practical problems."⁵

NOT COMMUNISM

It seems clear that the real issue between East and West has not been fairly presented to the people of the world. The prevailing popular opinion is that the real issue is between communism and capitalism. Such opinion is caused by the fact that the Soviet leaders refer to themselves as communists and to all the people of the West as capitalists. It is true moreover that more government ownership and less free enterprise prevail in the East than in the West. But that is not a cause for war. Communism and capitalism are not absolutely antagonistic. Absolute communism does not exist in Russia and absolute capitalism does not exist in the United States. The problem of humanity everywhere is to find the golden mean between those two extremes. Experience has proved that neither extreme is practicable.

By nature men are individual and social. No political or economic arrangement can absolve men from the responsibilities imposed by that fact. Men cannot with impunity surrender their individual integrity, nor can they escape from the responsibilities imposed by community life. Until the millennium is attained it is not advisable to put all property in the possession or under the control of those who govern, nor is it advisable to leave it entirely uncontrolled in the hands of individuals. So far as communism and capitalism are concerned, peaceful co-existence and friendly competition could exist.

Our traditional attitude toward communists has been kindly and indulgent. Communism was given a test in this country under most favorable conditions in such settlements as those at Zoar, Ohio; Economy, Pennsylvania; Bethel, Missouri, and Communia, Iowa. But it had to be abandoned in every case because it was impracticable. Practical-minded Americans have looked upon communists as utopian dreamers, but they have not feared or hated them.⁶

Those simple communes were law abiding, moral and quite generally religious. The theories of the international communists today, however, are based wholly on a materialistic and economic-

⁵ McILWAIN, *CONSTITUTIONALISM, ANCIENT AND MODERN* (1947).

⁶ WITKE, *WE WHO BUILT AMERICA* (1937). See, *Ora et Labora*, 67 OHIO HIST. Q. no. 2.

determinist attitude, and they oppose all the moral, legal and political principles and values on which our way of life is based.

It is the policy and practice of the international communists to prey on an inherent weakness of humanity in order to satisfy their lust for world domination. That human weakness displays itself as arrogance in those who have great possessions and power and as envy in those who have not. Those two faults are merely opposite phases of one human frailty. Those who cannot be rich without arrogance could not be poor without envy, and those who cannot be poor without envy could not be rich without arrogance. The present Soviet leaders pander to that want of equanimity and strive to fan its opposite phases into class hatred, which becomes irrational, immoral and destructive. The conduct of Nikita Khrushchev in the United Nations General Assembly demonstrates that fact.

Those who direct the efforts for world domination and those who support it as active or subversive participants, as fellow travellers or parlor-pink intelligentsia, simply do not understand or do not heed the requirements for a well ordered society. If they should succeed in their destructive efforts, all the gains of our legal, political and economic evolution and all our civil rights and liberties would be lost. As has been said, Marxism, the basis of modern communism, was not a science or a philosophy, but "an intellectual and ethical ferment."⁷ It supplied nothing to replace what it sought to destroy. If Russia and China would accept and abide by established world law, economic adjustments between communism and capitalism could proceed according to the needs of different times and different places.

CONFUSING WORDS

A fair analysis of the issue should remove the confusion attending certain words and phrases, such as *world government*, *sovereignty* and *democracy*. The champions of lawful order for international affairs to not propose one government for all the world. That would be impossible. They propose merely an organization to establish and maintain enforceable law over international affairs. National and local governments would still control national and local affairs. The prevalent fear of world government would disappear if it were made clear that the international organization would

⁷ SABINE, HISTORY OF POLITICAL THEORY 712-15 (1937).

exercise only such power as is expressly delegated to it and expressly limited to that field where now there is no lawful control.

Such an arrangement would not occasion the loss of any nation's sovereignty. No nation has sovereignty over international affairs. Sovereignty that never existed cannot be lost. The policy of the West is to extend the sovereignty of law to that sphere where heretofore there has been no sovereignty.

Such an international organization would have to be a federation made up of representatives of all the member nations. It should be made clear to the advocates of extreme democracy that world affairs and international relations cannot be controlled by such an assembly as the old town-meeting, nor by plebiscite. It is important today to accept the natural limitations of democratic government. History proves that popular government has generally failed by extending the democratic processes too far. The efficiency of government becomes lost in what Madison called "the popular vortex." The operation of government, like all other classifications of human activity must be entrusted to specialists, specially trained for their responsibilities.

LAW—HISTORY

Since a careful analysis reveals that the real issue is the struggle between will and law, and since the West champions government of law in opposition to the arbitrary will of dictatorship, it then becomes apparent that it is the especial duty of lawyers to give the people an understanding of law, its history, purpose, and function. The democratic principle has grown so strong that governments decline to act in important matters until they have assurance of popular support. An editorial in *Saturday Review* on the President's proposal that the rule of law be substituted for the rule of force, said, "It is important that the President be made to feel that he now has the backing of the overwhelming majority of the American people." Such backing will not be given unless the people of intelligence and character, who mold and express public opinion, have some comprehension of the evolution of law, its purpose, and how it functions.

It is beyond the limits of this discussion to deal with the history of law. Its importance, however, must be emphasized.⁹ If we are

⁹ For a brief outline, see *The Rule of Law—What it Truly Means, Freedom and Unity*, July-Aug. 1960. For a more extensive discussion see, ZANE, *THE STORY OF LAW* (1928); WIGMORE, *PANORAMA OF WORLD'S LEGAL SYSTEMS* (1928).

to maintain government of law and extend it to international affairs, it is time that the public schools begin to teach the youth what law is, why it is, and how it operates.

For the purpose of this essay, it is sufficient to rely upon the fundamental principles of law, as stated by Cicero two thousand years ago. George H. Sabine, in his *History of Political Theory*, says of that great Roman lawyer:

“Cicero’s true importance in the history of political thought lies in the fact that he gave to the Stoic doctrine of natural law a statement in which it was universally known throughout Western Europe from his own day down to the nineteenth century. From him it passed to the Roman lawyers and not less to the Fathers of the Church. The most important passages were quoted times without number throughout the Middle Ages. The ideas were, of course, in no sense original with Cicero, but his statement of them, largely in Latin expressions of his own devising to render the Stoic Greek, became incomparably the most important single literary means for spreading them through Western Europe. A few of Cicero’s great passages must be kept in mind by anyone who wishes to read political philosophy in the centuries that followed.”

Cicero said, “Law is the bond which secures our privileges in the commonwealth, the foundation of our liberty, the fountain-head of justice.” He said also that law was the real basis for the union of humanity. He insisted that before the law all men are equal. He admitted that they are not equal in learning, and that it is not expedient for the state to try to equalize their property. But in the possession of reason, in their underlying psychological makeup, and in their general attitude toward what is honorable or base, he said all men were alike.

Cicero gave a definition of true law in words which C. H. McIlwain said are “among the most memorable in political literature”:

“There is, in fact, a true law, right reason in accordance with nature; it applies to all men and is eternal. It summons men to the performance of their duties, it restrains them from doing wrong . . . To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law . . . It will not lay down one rule at Rome and another at Athens . . . But there will be one law . . . binding at all times upon all peoples . . . The man who will

not obey it will abandon his better self, and, in denying the true nature of man, will thereby suffer the severest of penalties, though he has escaped all other consequences which men call punishments.”⁹

Dean Pound, the greatest authority on jurisprudence in our time, has made it clear that there is law and also rules of law. Law is universal, but the rules of law may vary from time to time and place to place. If the law is adopted for the control of international affairs, the rules of law for the regulation of the details of life could differ in different nations, so long as they do not contravene the principles of true law. Dean Pound gives us a definition of law which indicates its source and how it is discovered. He says it is “experience developed by reason and reason tested by experience.”

Athens and Rome learned by experience that the Mediterranean community could not be governed by the rules of law of a city-state. The Roman magistrates discovered, however, what they referred to as *ius gentium* (law of nations or peoples) or *lex omnium generalis* (law of every species or common law of mankind). The administration of that law was the basis of the *pax Romana*, and it enabled Cicero to tell the Senate that there were provinces where the Roman rule was preferred over the arbitrary rule of local kings. History now repeats. The nations are learning that the world community cannot be governed by the rules of law of a nation-state. The world community requires universal law. (Precedents of such law can be found in charters, constitutions, statutes, and numerous decisions of national and international courts. Law of the sea (admiralty) is universal. Its principles are being extended to outer space.)

LAW—PURPOSE

It is incumbent on lawyers to keep the people informed as to the purpose of the law. The basic purpose is to maintain civil order—to restrain crime and violence and keep the peace. Its aim is the welfare of the community, its ideal is justice. There is a realm of life where law is absolute; the law commands what must and what may not be done. There is another realm where freedom is absolute; each individual is at liberty to do as he pleases. Then there is a realm in between those two realms, where the law

⁹ SABINE, *op. cit. supra* note 7, at 164.

does not command but the individual is not entirely free. In this middle realm individual rights and obligations and social and economic rights and obligations are controlled generally by customs and by rules of civil decency and decorum. It is the policy of Western liberalism to keep this middle realm as broad as possible, because the extension of the realm of absolute law tends to totalitarian government, dictatorship and tyranny, which thwart human evolution.

LAW—FUNCTION

As Cicero said, "The law is a voiceless magistrate; the magistrate is the voice of the law." In order to accomplish its purpose, law must have a sustaining organization. The power of such organization must be distributed to three separate departments: one to promulgate, one to adjudicate, and one to enforce the law. The judicial function is the most important, and as to it there is the greatest misunderstanding and reluctance. It is in the judicial court that law finally prevails over will. That is why the most willful forces most bitterly oppose the judicial function.

Wherever human interests impinge disputes arise. When a dispute cannot be settled by negotiation or arbitration, the only way it can be settled peacefully is by "third party judgment." Any dispute that threatens the peace or welfare of the community must be justiciable because the welfare of the community transcends other interests.

As law was the gift of Rome to the world, so the best way of administering the law was the gift of England. There the judicial function was separated from other functions of government, and judges were given independence and security of tenure, so that they might be wholly devoted to the law. For hundreds of years after the Dark Ages, with few exceptions, the only educated men were men of the church. After the Norman Conquest men of the church presided over the courts of England. The robes which judges wear today are a relic of that period.

Judicial history is a record of commendable accomplishment. It shows that when men are given a fair chance, they prove worthy of trust and confidence. When men of character and learning in the law have been chosen for judicial office, their service has been free from racial, religious, national or other bias. It was the work of such judges that made government itself subject to law. They were the authors and expounders of such cardinal principles as

“supremacy of the law” and “due process of law,” a term that includes such concepts as impartial tribunal, fair trial, due notice to interested parties, right to call and examine witnesses and right of counsel, and also the principle that the judgment of a court must be, not the expression of arbitrary will but “the voice of the law.” John Fiske has said that the most valuable provision in the United States Constitution was its creation of an independent judiciary.¹⁰ Fiske also said, seventy-five years ago, that to Americans the Constitution had become so much a matter of course that they needed to be told how much it signifies. And he expressed the hope that it would serve as an example to other nations, “whereby peace may gain and violence be diminished.”

The need of the law for an enforcement agency has been demonstrated by the military forces of the United Nations. The authority of the United Nations, however, needs to be increased. Cities, states and nations maintain enforcement officers to restrain violations of the law and to arrest and suppress law violators. The possession and use of fire-arms and dangerous weapons are restricted to law enforcement officers. Similar provisions should now be made for the protection of the world community. The munitions of war have become so destructive that they dare not be entrusted to the arbitrary will of nations.

WHY DUTY OF LAWYERS

It is the especial duty of lawyers to establish and maintain lawful order for the world because they are ministers of the law. It is a fundamental principle of life that power and influence entail responsibility. The power and influence of lawyers result from their profession of the law and their especial training. Their responsibility, moreover, is increased by the disinclination of other sources of public instruction to espouse the cause of law. Politicians and the press assume no responsibility to educate the public regarding the history, purpose and function of law. Politicians generally desire office and publishers generally desire profits. Politicians, if they have the ability to expound the law, are reluctant to incur the opposition of those voters who have not yet outgrown the provincial or isolationist attitude. Publishers of popular magazines consider a discussion of law devoid of the amusement and sensationalism which they think their readers require. Publishers

¹⁰ FISK, *THE CRITICAL PERIOD OF AMERICAN HISTORY* 300-302.

of newspapers consider a discussion of law too complex and extensive, and too lacking in current news value to be given space.

Some informed and public-spirited citizens have created such organizations as Federal Union, Inc., and United World Federalists to meet the public need, but mainly the burden rests on lawyers. It is encouraging that recent presidents of the American Bar Association have emphasized the opportunity and responsibility of lawyers, and the Association has appointed a Special Committee to foster world peace through law.¹¹

WHAT LAWYERS SHOULD DO

Now all lawyers should support the efforts of that Special Committee. City, county, and state bar associations should endorse the efforts of the American Bar Association and appoint committees to cooperate with the ABA Special Committee. The local associations should publish lists of members who are willing to speak for the cause to service clubs, chambers of commerce, religious groups, and other gatherings. Most of all, however, they should maintain the highest professional standards in all their work in order to stimulate public respect for the law.

No doubt the most potent professional influence on public opinion is that of municipal, police and traffic courts. Those are the courts that have most numerous and most intimate contacts with the people. Unfortunately, however, many of such courts have adopted a procedure which seems to have been prompted by industries' assembly line and mass production. Cases are rushed through court with slight attention to individual rights or the requirements of due process. Such courts frequently act upon improper evidence, which the accused has not even seen, and statements by witnesses whom the accused has had no opportunity to cross-examine. A finding of guilt is entered by the judge and a fine is imposed, which the accused, in most cases, pays because it would be more expensive to retain a lawyer and prosecute a trial and appeal. The accused then learns that the fine entails payment of costs and a stamp of conviction on his driver's license. Daily people are leaving such courts with a sullen resentment toward the law and all officers of the law. Lawyers should change this condition.

¹¹ See publications issued by the Committee. See also, address of President Seymour before the Nebraska State Bar Association, Oct. 6, 1960, *Am. Bar. News*, vol. 5, no. 11.

If there is a want of enthusiastic popular support for the proposal that law be substituted for force, one of the prime causes is the unfortunate experiences which so many people have had with such courts of law. An unjust judgment against anyone is an infraction of the political structure and a rent in the social fabric that should protect every individual. If the state or any subdivision takes over the administration of the law in any sector of life, it must assume the burden of doing it according to the ideas of the law. No policy of expediency or economy can justify the abandonment of just legal procedure. If government of law is to be maintained and extended to the world, it must have the absolute respect of the people.

WHO ARE LAWYERS?

Unfortunately, all members of the bar are not lawyers. A license to practice as an attorney at law cannot make a lawyer. Too many members of the bar have made their practice a trade instead of a profession. A true lawyer is one who is imbued with the spirit of true law and the professional spirit. On the other hand, there are worthy members of the legal profession who have never been admitted to the bar or licensed to practice. Some of the most influential men in the forming of our federal government were not members of the bar, but they were students of Cicero, Montesquieu, Coke and Blackstone. "The legal profession has always accepted into its communion all those who are moved by its spirit to seek and serve the law."¹²

If there could be a general revival of the spirit of the legal profession, lawyers would be able to do for the United Nations now what lawyers did for the United States at the critical period of their history. They could create public opinion that would prompt and support our government in Washington in a declaration to all nations that the United States is ready and willing to hold its sovereignty subject to law in international affairs. If the United States would make such declaration and move to invest the United Nations Organization and The International Court of Justice (and such other courts as may be necessary) with full authority of law to control the munitions of war and maintain world peace,¹³ there would

¹² SPIRIT OF THE LEGAL PROFESSION 44 (Yale Univ. Press).

¹³ WORLD PEACE THROUGH WORLD LAW (Harv. Univ. Press).

be no occasion to fear the loss of prestige. The good people of all nations would be impelled by their inherent nature to support such a movement. Governments that oppose would in time be removed by the people.

An editorial in the American Bar Association Journal, written in praise of "The International Law of the Future," published by the Carnegie Endowment for International Peace (April, 1944), said:

"Because of the strength and position of America, we, the lawyers of America, face an opportunity to take a decisive part in shaping the future world."

That opportunity has become a moral duty.