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International Law between Sovereign Nation-States

Jaber S*
Department of Law, Shahid Beheshti University, Iran

Abstract

An idealized community of the rural America of our formative era in which neighbourhood and individual were economically independent and self-sufficient was sufficiently near to the facts and accorded with the received ethical and economic views of the public.

Keywords: Divinity; Europe; Declaration; Labour Unions; Committee; International Awareness

Introduction

Today no such clear and definite picture is possible. That the received ideal must be replaced by one nearer to the facts is evident and admitted. That redrawing of our picture of the ideal community is called for, is conceded. But we have not as yet been able to redraw it. We are not satisfied with the received nineteenth-century measure of values [1]. A new measure for the twentieth century has not yet been formulated. In consequence, there is a general fumbling for a new idea of justice, such as has gone on more than once before in legal history in like eras. Juristic thought is affected no less than judicial decision. New theories of the social order have sprung up. The individual is no longer regarded as the unit. Some see a society made up of groups and relations and associations, which, therefore, call for a higher valuing than the individual, some see a society made up of institutions, of undertakings and enterprises having a de facto significance and interests pressing upon the legal order for recognition. These institutions, it is taught, set up authorities and develop organs for the realization of their idea and bring about a community of interest among the members of the group toward realizing it. Their efforts in that direction are directed by the organs of authority and come to be more or less regulated by a definite procedure developed within the institution. Such an institution is before our eyes constantly today in the labour organization. We did not succeed well in the last generation in judging it by an ideal of a society in which the individual man is the unit. But a technique for a society made up of institutions has yet to be developed. Such a technique is quite as likely to develop in judicial decision and doctrinal writing as in rough and ready trial-and-error administration. At any rate, it is worth noting that those who now urge preferring the institution to the individual are often the same who had been urging securing individual interests by a maximum of state action-by an omni-competent political organization of society [2]. In the progress of their thinking from social individualism to social institutionalism, they have been constant to one idea, namely, the idea of an autocratic power in public officials. They have continued to believe in supermen administrators free from the checks of law or rights or judicial review. Philosophically we may see behind the development of the new idea of public law and of a supplanting of private law, partly the Marxian economic interpretation of history and doctrine of the disappearance of law, partly psychological determinism, applying the Freudian idea of the wish to jurisprudence, and partly certain new types of thinking since the world war, either relativist and largely influenced by Einstein, or phenomenal. Marx thought of history as the record of a progressive unfolding or realizing of an economic idea-of an idea of the maximum satisfaction of material wants [3]. This interpretation was little noticed till the last decade of the nineteenth century, when it came into vogue on the Continent. It spread to the United States in the first decade of the present century. The idea behind it, the idea of satisfying material wants as the end and aim of society, rather than one of satisfying a spiritual want to be free, has gradually had a profound effect upon political and legal thought, and so upon political and legal institutions throughout the world. In a materialist polity there is no place for law. Marx urged that law was a product of class domination and that with the elimination of private property and consequent disappearance of classes, law, too, would disappear. For a time Soviet Russia went upon this assumption. Law was to be replaced by administration. As the juristic and economic adviser of the Russian government put it, in the ideal society there is no law, or rather but one rule of law, namely, that there are no laws but only administrative ordinances and orders [4]. This idea of the disappearance of law has been gaining acceptance in many quarters. Along with it has gone a rise of political absolutism in Continental Europe, setting a growing fashion of administrative absolutism everywhere. Economic realism, as it calls itself, was the first outgrowth of Marx's economic interpretation [5]. It holds that all action, all human behaviour proceeds on economic motives; that judges decide, lawmakers make laws, jurists work out theories of rights and moralists develop theories of justice or of right and wrong solely as expressions of the self-interest of the dominant social class. Hence law is nothing but a formulation of class self-interest [6]. Next came a combination of Marx and Freud in the form of psychological realism. This teaches that as a matter of psychology it is impossible for a human judge to decide objectively. He can only do what his temperament and prejudices and predispositions, determined by his bringing up and social surroundings dictate. A decisive element in the judicial process is the Freudian wish. This was soon followed by a combination of Marx and Einstein. Yellow-plush said of spelling that every gentleman was entitled to his own. The sceptical relativist says that in political and legal thought everyone is entitled to whatever starting point he chooses. 48 Laws are only threats, and the making and enforcing of these threats are relative to the personalities of those who wield the power of a politically organized society for the time being [7]. There are no rights. It is not that men have rights and the state makes threats in order to give effect to them. The ruling class has interests, and the threats made to secure them give rise to claims miscalled rights Most of all, however, the idea of public law, as a subordinating law, replacing private law has been furthered by the general acceptance since the world war of what may be called a give-it-up philosophy. According to the

***Corresponding author:** Jaber S, Department of Law, Shahid Beheshti University, Iran, Tel: +08777776435, E-mail: sayvania@ymail.com

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philosopher from whom I quoted at the outset, judgments of values cannot be proved or verified. Hence they cannot be recognized as valid except in the scheme of some individual system, and even in that system, valid for the individual whose scheme it is, the criterion of highest value is not demonstrable to that individual [8]. The content of law and of morals are wholly different and coincide only by chance. The nineteenth-century meta physical school tried to bring about such a coincidence but failed because they left out of account the ideal relation between men and the idea of security, that is, of a stable, harmonious, peaceable social order. Accordingly of the three theories as to the basis of the binding force of the legal order, neither can give a satisfactory answer. As between the juridical theory that a law is only binding when commanded by a force imposing itself upon all other forces, the political theory that the obligation of law is based upon consent, and the philosophical theory that the value of law may be deduced directly from the idea of justice, each has a relative value, but there is an irreducible contradiction and at bottom everything is at large. Philosophy of law, to which we had always turned for help when the law found itself struggling to achieve new tasks, fails us. It gives up. Ultimately all is irreducible contradiction. I can only say a word as to phenomenon. It tells us that there is nothing behind or beyond phenomena. They are all that we have to do with. There is nothing behind them but their own phenomenal. They are all equally significant and equally insignificant. As one might put it, all phenomena were created free and equal. Hence every item of official action is valid in and of itself as a phenomenon. We don't qualify the phases of the moon as good or bad. It is unscientific to make such subjective value Judgments [9]. Therefore we should not make them in the social sciences. Law in the coordinating sense is a futility when it seeks to systematize the items of governmental action which are valid and self-sufficient without regard to any system. What the official does is itself law. It is a self-sufficient phenomenon. The law and the state itself are only the aggregate of official acts. Politically, the rise of the subordinating idea as to public law in America is a reaction from the extreme tying down of administration in the last quarter of the nineteenth century, and like all reactions is equal to the action and in the opposite direction [10]. I have spoken of this on other occasions and need say no more than that it ought to have spent itself and would no doubt have done so had it not been reinforced by the recent movements in thought of which I have spoken and the exigencies of new social programs [11]. Let me be understood. I am not preaching against administration, much less against an administrative law which is a true law, and not a calling of everything law that is done by a commission or board or bureau because it does it. I recognize the need of administration, and of a great deal of it, in the urban industrial society of today. It is needed as an administrative element in the judicial process [12]. It is needed as a supplement to the judicial process. It is needed as a directing process in a society so organized economically and so unified economically that things must be done more speedily, with more adjustment to unique situations, with more coordination of special skill and technical acquirements than the judicial process, looking at controversies after the event, can afford. But to admit that development of the administrative process is necessary does not involve admitting that it should be free of checks such as a due balance between the general security and the individual life have led us to impose on both the legislative and the judicial processes [13]. In the legislative process there are committee hearings, successive readings of bills, successive consideration by two houses, executive approval and publicity as to each step; all insuring not merely deliberation, but an opportunity for all interests to be heard. In the judicial process there are the pleadings, setting out the exact contentions of each party. There is the record of the evidence, there are recorded findings, and the judgment must flow from application of the law by a known technique to the issues raised by the pleadings in view of the evidence. All this is of public record. Moreover, if the case is reviewed, the reviewing court files one or more opinions, of public record, in which its reasons are set 'forth in writing and soon thereafter appear in print [14]. Contrast the absence of checks upon administrative rulemaking. It is not so long ago that a case got to the Supreme Court of the United States and was at the stage of argument to the court when it was discovered that there was no such administrative rule as that upon which the proceeding was assumed to be based. The difficulty and even at times impossibility of finding out what the administrative rules are have become notorious. The contrast is quite as marked if we compare the administrative determining process with the judicial process. Training, a taught tradition, the record, the publicity attending each important step, and above all the criticism of a profession trained in the same tradition, hold the judge to the lines prescribed by law [15,16]. There are no such checks upon the administrative determining function. Nor is a positive custom of administrative determination developing in most of our administrative bureaus and boards and commissions. Many of them expressly refuse to follow their past action in like cases, much less to develop their past action by analogy so as to start an administrative customary law.

Conclusion

I grant that in the exercise of the guiding function the circumstances of particular cases must be decisive. But the directing or guiding function must be distinguished from the determining function. Administrative officials are likely to apply the method of treating each case as unique, which is appropriate to the former, to the latter also where it is not appropriate.

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Conflict of Interest

None

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