The Current Peril of the Legal Profession

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THE RULE OF LAW

Legal scholars, lawyers and statesmen from democratic nations often glibly use the expression "the rule of law" assuming that everybody knows what the expression implies and that everyone recognizes that it is basic to any system of free government. But this phrase, like so many other democratic concepts, is not readily capable of exact definition. It is rather a fundamental attitude, an expression of principles whose growth has been gradual but whose end purpose is to minister to the community life of society, to remove the disharmonies that trouble it, to emphasize justice, and to strengthen the conviction that human beings are inherently capable of thinking and acting for themselves provided they are given a chance to do so by having access to human experience in general and to the particular facts relevant to any decision. The rule of law is thus made up of many aspects and it is easier to describe some of these aspects than it is to define in a few cogent words the concept of supremacy of law.

Because the rule of law is difficult to define, the true significance thereof is not always understood by our citizens, and this is a great peril to democracy. In a recent statement, President Griswold of Yale University highlights this peril and has laid the blame to some extent on the legal profession. He declared:

"Why, then, does the nation seem so divided? Partly," says Griswold, "because of a 'neurotic obsession' that has been fanned and exploited by opportunistic politicians. The treatment of the obsession, it seems to me, is obvious. It is to meet the real part

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of it, the Communistic conspiracy, with realistic plans for defense; and to cope with the other... parts of it with the age-old specifics for such troubles... the specifics of law and learning...

"I think that the law in the United States has suffered some retrogression of recent date. ... I do not think that the full meaning and value of law are communicated to society through the law's own formal processes.... To be effective, the rule of law must be comprehended by society, not as an esoteric concept but as a working principle comparable to regular elections and the secret ballot; and the plain fact is that it is not so comprehend. This, I think is an educational deficiency....

"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. The teaching profession has not succeeded in explaining it perhaps because it has not sensed its true importance. If the two great pillars of society, law and learning, are to stand, the professional representatives of each must come to the aid of the other...."

I shall not attempt to exonerate the legal profession, but rather shall endeavor to describe what to me are some of the more important aspects covered by the the expression "the rule of law."

First and foremost, the rule of law is the exact opposite of the rule of power. Aristotle stated it thus:

"He who bids the law rule bids God and reason rule, but he bids man rule adds an element of the beast; for desire is a beast and passion perverts rulers, even though they be the best of men. Therefore, the law is reason free from desire." 2

The fact that the rule of law envisions reason free from desire, of course, indicates that a pure system of a rule of law is unattainable, for law is administered by human beings and very few men on this earth are not governed in some manner by desire. Consequently, even though true rule of law be our ultimate goal, we must recognize that the struggle is endless. We cannot sit back and rest on our laurels smug in the complacency that we have attained the supremacy of law, for, like the Holy Grail, it is always just beyond the grasp of mere mortal men. Thus in the quest for the rule of law we are engaged in a continual battle between law and power; between government by law and government by power; between the law-state and the power-state. The whole historical development of political theory highlights this war-

2 Politics, III, XVI, 5.
fare, although until the twentieth century it was generally assumed that the course of human development was toward law and away from unrestrained power as the dominant influence in government.

In speaking of the rule of law, we are not using the word law as equated with legality in the juridical sense. 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 Napoleon, Hitler and Stalin were derived from law, even if that law was only that the dictator could do as he saw fit. Even the Communists refer to action “according to law.” One of the latest Communist references to law was Red China’s justification of imprisonment of United States flyers when Chou En-lai justified his action in these words: “The Chinese Court on 23 November 1954 passed judgment on them according to law.” 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 and experienced judges who are bound by 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, that 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; in other words, those elements which democracies include in their bills of rights as fundamental rights of man. Whenever a government infringes upon these freedoms it develops away from

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5St. Louis Post-Dispatch, Dec. 17, 1954, p. 6A.
a state under the rule of law and veers toward 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 judiciary 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.

Another important element of a law-state is the requirement that there be a responsible, capable, honest and courageous legal profession. The legal profession is the medium through which the law reaches the people, and the highest honor and integrity must mark the calling which deals with the rights, privileges and liberties of the people.

Lawyers are the liaison between citizens and their government. The duty of a lawyer in a government under law is threefold. He has a duty to his client as an officer and fiduciary. It rests with him to preserve the purity of the legal system, for if from ignorance, dishonesty or indifference to the effects of his action he advises the commencement of an unjust suit, or the evasion or denial of a legal claim, he defeats the objectives of the rule of law, prostitutes its form, and brings its administration into contempt and disrepute.

The lawyer has a responsibility to the court as an officer and adviser and as a member of the team with the court in the administration of justice. He must be alert to the defects in the administration of justice, and must ever devise means for its improvement.

And finally, the lawyer has a duty to his community and country as a leader to provide responsible leadership. A lawyer's education in the history of the institutions which protect the freedom of a people, in the history of the rule of law, in knowledge of the processes of government, imposes upon him a great public obligation. Lawyers have a duty to see that the foundations of free government are not shaken, that the rule of law shall prevail, and that citizens are aroused to the constant dangers that seek to divert the rule of law at every turn. The legal profession must be aware of the fact that the objectives of

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4 Myers v. United States, 272 U. S. 52, 293 (1926).
government are not self-perpetuation and power, but rather the preservation of human values; that government under law is a meaningful relationship among people based on the dignity of man and the reverence of every life. Thus the legal profession must ever retain an appreciation of the enriching qualities of diversity of opinion, and of the danger of conformity and the menace of stereotype. This requires a tolerance and an insistence and stubborn protection of the basic rights of all men.

The profession of law is not a trade. It is a profession, the main purpose of which is to aid in the doing of justice according to law between the state and the individual and between man and man. Its members should not be hired servants of their clients, nor should they be hired servants of an omnipotent executive. They should be independent officers of the court, owing a duty to public as well as to private interests. Or, as in the words of the preamble of the canons of professional ethics of the American Bar Association:

"The future of the Republic to a great extent depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and motives of the members of our profession are such as to merit the approval of all just men."\(^6\)

**THE PRESENT DANGER**

*Philosophy and Background of Communism*

The twentieth century began as an era of optimism for those who were dedicated to the idea of the rule of law. It appeared that more and more nations were willing to guide their destinies by that principle, and although the later part of the nineteenth century had seen a widespread acceptance of positivists theories of jurisprudence, these were not viewed as creating a serious threat to the advancement of the rule of law and little was done to counteract their poison. The consequence of this philosophy was to place more and more emphasis on power and force, and when the nations dedicated to the sovereignty of law finally awakened to the danger, they discovered that advocacy of unchecked power had resulted in an almost uncontrollable prairie fire sweeping all corners of the globe, and effectively impeding the advancement of liberty under law.

Thus the twentieth century witnessed the rise of two forms of totalitarian government which have repudiated individual freedom and established a new order in which the state dominated and directed

\(^6\)Canons of Professional Ethics of the American Bar Association, p. 1.
all social, economic, political and cultural life. These two forms of power-states, one of the extreme right, the other of the extreme left, are, as you well know, fascism and communism. The fascistic cult had as its underlying concept the dictatorship of a racial or cultural elite, while the communists stress a dictatorship of class. Both were dedicated to what Mussolini phrased as "everything for the state, nothing against the state, nothing outside the state." To this end all human practices were coercively controlled, and everything that was not forbidden was obligatory. Totalitarianism, whether communist or fascist, is autocratic, for no other internal power is permitted to exist to oppose it. It is therefore the uncompromising enemy of freedom and the rule of law. Indeed, although starting from different premises and professing different ideals, both reach the same result of a power-state uncontrolled by law. In both, the government is carried on by an unchecked executive branch which is the very antithesis of all that is connoted by the supremacy of law concept.

Moreover, justice according to law, by which is meant an impersonal, equal and certain administration of justice according to standards more or less fixed, must under a power-state give way as no longer applicable. Modern totalitarianism administers justice without law, that is, cases are decided not according to strictly defined authoritative precepts, but according to fascist or communist conceptions of justice. All legal authority is assumed by the leader, who has the supreme executive power, the supreme legislative power, and the supreme judicial power. Futhermore, legal concepts are not applicable to the political sphere which is regulated by arbitrary measures in which the dominant officials exercise their discretionary prerogatives. Law, in the common law sense, has thus been replaced by an omnipotent and absolute executive. Such a government can be best understood if one equates it with a permanent state of martial law, which Blackstone so aptly declared was "in truth and reality no law, for it is built upon no settled principles but is entirely arbitrary in its decisions."

With the defeat of Italy, Germany and Japan in World War II, the immediate menace of fascism to the continual advancement of the rule of law was conquered; but only one head of the double-headed dragon of totalitarianism had been disabled, and the remaining head, communism, seemed to gain considerably in strength by ruthlessly sucking into the vortex of its power nations debilitated by the fascist scourge. The danger to the rule has in effect increased rather than decreased in the mid-twentieth century.

The war conditioned the free world to cooperate with the Communists, and the military necessity of censorship often failed to per-
mit disclosure of the true unwillingness of the Communists to cooperate with the free world. Thus, at the end of the war, too many freedom-loving people were ignorant of the true menace that Communism posed and were desirous of attempting some rapprochement between law-states and the power state of Russia, on the theory that the world was big enough to hold both, so long as each did not encroach upon the other. Too many people were disposed to view the Communist state as a one-man rule only, which would end with the death or displacement of the dictator, and much wishful thinking existed throughout the world that the threat of Communism would end with the death of Stalin. Subsequent events proved that although Stalin was exceedingly powerful, the power was not the power of one man, but rather the power of a clique of men who could be quickly substituted and rotated without the least disruption of the power-state, thereby proving that the power-state of the Communists is far more dangerous and far more sinister than the power-state of the Fascists. It probably ranks among the highest in history as a menace to government under law, and has three essential distinguishing differences from other power-states which sprang forth in the twentieth century, namely, the complete separation between rulers and people, the absolute economic domination by the government, and a revolutionary concept of a judicial system and legal profession. I would like to point out a few illustrations and characteristics of each of these differences.

Differences Between the Power-State and the Law-state

Separation Between Rulers and People

Although the technique of the Soviet leaders in remaining apart from the people emotionally and otherwise is not their own invention, they have refined and perfected it. This complete detachment from the people is an essential characteristic of Soviet rule. Although previous dictators may have thought they were exercising absolute power, there always remained some emotional tie between the dictator and the people, and this attachment, however small it might have been, was constantly a restraining influence. Regardless of the extreme measures the former dictator practiced, there were certain limits beyond which he would never go. If he shared the standards and values of his community this hidden influence unquestionably restrained him. All dictatorships, even those of the most recent years, seem to have belonged to this category. The leader still retained some of the traditional background of the people, whether religious, professional, or otherwise. However, the leaders in the Kremlin are the first who, for practical
purposes, seem no longer to be bound by any such loyalty or inhibitions. There is a complete separation between the rulers and the ruled. This is the secret which makes the Russian leaders so powerful and unpredictable. Of course, they use the feelings, emotions, and prejudices of the people with whom they deal, and even encourage or discourage such emotions, but they do not share them. The government's disconnection from the people is so complete that even many of the so-called Soviet leaders do not know the few who really rule the destinies of nearly 800 million people. We well recall that immediately after the death of Stalin there was much speculation that Beria would succeed Stalin as dictator, but Malenkov was announced as the leader and Beria was publicly proclaimed as one of his trusted and able lieutenants. Only a few months elapsed before the world found out that Beria had been liquidated. Now, Malenkov is on an "inspection" trip to Siberia.

Much speculation and mystery surrounds the policy of the Kremlin leaders since the death of Stalin. Peace overtures and relaxation of travel restrictions may be announced the same day that they shoot down our United States airmen outside their territorial boundaries. We might summarize by saying that the rulers and the ruled are so completely separated that only a handful of men determine the fate of all the people within their dominion. The ruling few deal with the governed in absolute secrecy, and the victims often hear of the dictator's decision by a knock on the door. The Kremlin dictators remain completely apart from the feelings they manipulate on the giant chessboard of dictatorship.

Through this system of secret maneuvering the individual citizen is cut off from everything which a normal citizen should rightfully expect. Nothing is left to fall back on—even his job, property, family relations, basic human rights, home, and freedom of movement cease to exist. Moreover, there is no public opinion to assist him in his own secret thoughts. The result is that there is a type of fear inherent in the people under the Soviet dictatorship that has never existed before in history—certainly not upon the colossal scale as extending to one-third of the inhabitants of the world. To put it another way, we might say that this is the first time in our history that human society in its entirety is attacked.

Economic Domination

Economic changes are natural in any government, but under the Soviet system, no livelihood or property assuring any type of inde-
pendence is tolerated. The Soviet plan is to destroy private initiative, and make everyone dependent upon the government. It is common knowledge that they start with the big landowner, the great industries and prosperous merchants, and continue down the scale even to the tenant farmer and unskilled workman. The end is to make the daily plan of every single individual depend upon the will of the ruler. Physical survival becomes a privilege which must be paid for by complete conformity. Rapidly, those of independent initiative and courage are gradually eliminated from responsibility. They are replaced with those whom the Soviet rulers completely control.

Revolutionary Concept of a Judicial System

While the attitude of the ruler toward those ruled, and the attitude of the ruler toward the economic life of a nation is without doubt of utmost importance to the stream of a nation’s life, still, from the point of view of a student watching the struggle between law and power, the attitude of the ruler toward law and the legal profession is the ultimate criterion by which to judge the nature and extent of the victory of power over law.

Russian law, both before and since 1917, has more of an Eastern than Western historical foundation. Although like common law systems, Russia did receive an imprint of Roman Law, its Roman Law came via the Eastern Roman Empire by way of Byzantium, which developed along completely different currents from Western Roman Law. Such fundamentals of Western law as the development of the protection of interests of the person, and the development of the protection of interests of substance, never played a dominant role in the pre-Communist law of Russia. In 1917, when the Revolution swept away the entire judicial hierarchy of the Russian Empire, the Soviet reformers determined to retain no part of the legal system of the Czars, and although many of the leaders were well acquainted with Western systems of law, they were equally determined not to incorporate into the Communist system any of the fundamental principles of Western law. The two great currents of liberal legal thought of the 18th century, one from England and the other from France, which culminated in the American and French Revolutions and in the legal reforms of England, had completely by-passed Russia. Therefore, such common protective rights as “due process of law” which mean so much to us of the Anglo-American legal heritage are not even translatable into Russian for want of an equivalent. Soviet leaders wanted no part of this liberal influence, recognizing that such things as an independent
judicial system would be the greatest of all menaces to the advancement of the power-state. The necessity of the rulers to retain at all times complete control of the judicial system was one of the fundamental foundations of the Communist creed. As Justice Robert H. Jackson succinctly pointed out:

"The Soviet reformers abolished the jury trial, which we regard as a great protection to the workers as well as to others. This is explained upon the ground that juries often return verdicts contrary to the wishes of the government in power. This, in the Soviet view, is intolerable. 'The people' in office do not trust 'the people' in the jury box. They established instead co-judges, or lay judges, to sit with the professional judges as more dependable 'weapons in the hands of the ruling class.'

"The Soviets do not regard a trial as an adversary proceeding as we do. They reject the philosophy of a trial by contest. Their court is not an impartial and unbiased umpire to supervise a legal combat. They want the Court and not the parties to try the case."*8

In order to justify this control of the judiciary, Communist legal philosophy took for its starting point the Marxist theories of the disappearance of state and law, both state and law being declared to be the instruments for the aggressive self-assertion of an economically dominant class. It was stated:

"As soon as there is no longer any class of society to be held in subjection, as soon as, along with class domination and struggle for individual existence based on the former anarchy of production, the collisions and excesses arising from them have been abolished, there is nothing more to be repressed which would make a special repressive force, a state, necessary. . . . the interference of state power in social relations becomes superfluous in one sphere after another. . . . the government of persons is replaced by the administration of things and the direction of the processes of production. The state is not abolished; it withers away."*7

It has been pointed out that what the rulers expected to wither away was not political organizations as such, which, on the contrary, are expected to exercise the most important function in social life and to administer the social process of production. But rather, it is law in the common law sense, as a restraining influence upon arbitrary power, which withers away and ceases to exercise its restraining influence. Law is to be wholly replaced by administration.

*Address at the Annual Meeting of the American Bar Association, October 28, 1946, p. 11.
The distinction between law and administration, which is so fundamental to any concept of government based on the rule of law, is completely ignored by Soviet legal theory and, in its place, every act of administration is clothed with legal validity. As I have attempted to demonstrate, the doctrine that administration should be above law or that it is synonymous and co-extensive with law is the complete antithesis of the theory of the sovereignty of law and government under law. It is the purest form of the power-state.

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 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 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 weaknesses; 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 1920 the Soviet legal profession reached its lowest ebb. The representation of clients in legal disputes was made a requirement for every citizen. For a few days each year the common citizen devoted his time to representing his fellow citizens in court. At this stage of the Soviet legal evolution incompetence of counsel was perhaps the highest ever known to man. In addition to the gross inadequacy of representation, this system was subject to the same abuses as the salaried bar, i.e., clients could obtain competent counsel only if they could pay the high fee.

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. They are paid to the college and distributed by the college to the attorneys. The attorneys work a regular eight-hour day, and they are required to sign out of the office when leaving during the day.8

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. As Commissar of Justice Rychkov has written: "The Soviet judiciary is an important and sharp weapon of the dictatorship of the working class in the cause of strengthening Socialist construction and defending conquests of the October Socialist Revolution."9

Prior to the adoption of the New Constitution, Communist writers were proud of their lack of independent judiciary. For instance, Kalinin, speaking at the tenth anniversary celebration of the Supreme Court, declared:

"The Supreme Court is under the eyes of the Central Committee of the Party and the Central Executive Committee of the USSR and its decisions correspond fully to the Party line."10

Another Soviet writer, V. K. Diablo, described the Supreme Court in 1928:

"The decisions of the Supreme Court of the USSR have no independent significance since they are subject to confirmation by the Central Executive Committee."11

Commissar of Justice N. V. Krylenko described the functions of the courts in 1927 in this manner:

"Whereas the basic principle of the bourgeois court is its independence, the irremovability of the judge ... we say plainly that our judge is both removable and dependent; inasmuch as he is an organ of the proletariat dictatorship, he is therefore, both removable and dependent upon the proletariat, the state, the toiling class, whom he is called upon to serve."12

In 1936 the New Soviet Constitution was adopted. It provided for judicial independence, for uninterrupted terms of office for judges,

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1010 Let Verkhounogo Suda Soiuza SSR, p. 5 (1924-34).
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 lawgiver, directed by the dictatorship of the proletariat."\(^{13}\)

Referring to the 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 the USSR) as stated in the Constitution of 1936, has no significance whatsoever. Each member of the Supreme Court of the USSR, including the Chairman, may be at any moment dismissed from his post...."

"The people's judges and the 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."\(^{14}\)

Thus the Soviet pattern for the "withering away" of the law became established through trial and error. First the legal profession was subjected to a thorough purge, special Communist-controlled "action committees" were created within the legal profession and they speedily suspended, executed or barred most of the lawyers from the exercise of their professions, permitting only those few to operate who were subservient to the Communist rulers. Finally the private exercise of the legal profession was completely prohibited, and in its place the working collectives of lawyers were established, regulated by the state and directly responsible to it.

The training of the legal profession, so important an element to the advancement of the rule of law, was destroyed, the main qualification for a Communist candidate being merely that he is a loyal party worker and willing to apply the law as the rulers demand. Furthermore, any fiduciary relationship between attorney and client is not permitted, for each attorney is under a duty to reveal all confi-


dential matters to designated representatives of the state. The professional objectives of the Soviet legal profession are no longer to seek justice under law, but rather to assure that all legal actions are in conformity with Marxist philosophy and are of benefit to the ruling clique. The only conclusion that one can reach is that to speak of a legal profession in connection with the administration of enforcement of Soviet law is a travesty and a mockery.

Although the existence of any power-state on the face of the globe is a definite threat to all freedom under law, so long as the Communists remained within the Russian borders few were willing to admit that they constituted a universal danger. Those nations who for centuries had made more or less steady progress to a law-state were optimistic in the hope that the wartime contact with the Western world would demonstrate the superiority of the law-state to the power-state. But with the war's end it was soon apparent that the Communist ideal of world domination was still a flaming beacon, and wherever the Communist gained a foothold, the scourge of power spread across the face of the land. As one by one the nations fell under the domination of the Soviet Union, the familiar pattern of power over law was repeated.

In many of the countries absorbed by the Communists, it was the task of legal education to train not only young men planning to enter a general practice of law, but also candidates for judges, public prosecutors, public defenders, and governmental civil servants. By purging the law school professors, the Communists in one fell swoop abolished the training for all of these groups. What little legal training is given in satellite countries today is accomplished in a few short months, for it is apparent that with the strict limitations on the scope for interpretation of laws, the rigid guidance provided by the Communist party and its so-called Minister of Justice, and the existence of few interests, either of the person or of property, which are permitted legal protection, the need for a trained legal profession is limited indeed.

The familiar pattern of administering the Soviet legal system in the satellite countries is through the "Peoples Courts." As the method of procedure in the satellite countries has been generally the same, especially with reference to the administration of the Peoples Courts, it would seem appropriate to review the history of this particular brand of injustice. The Peoples Courts are authorized under Article 109 of the Constitution of the USSR, and although the Constitution provides that the judges are elected by the citizens of the district, they are
in fact appointed upon recommendation of the district Party officials.

The Peoples Courts' judges in the Soviet Zone of East Germany have no particular legal training. One author states that 78 per cent of these judges have no legal training or experience. However, it is necessary for these judges to attend the central school for judges officially called "Deutsche Hochschule fuer Justiz." More than one-half of the subject matter of these courses, called "political sciences," relate to Marxism and Leninism. The Peoples Judges are taught only such decisions which "are based on the documents of Stalinism, Leninism, and tally with the views of the Party representing the people and its organs." Such specially trained Peoples Judges have the same chances of promotion as a legally trained jurist.

Since the Peoples Courts operate under a similar plan of procedure in all satellite countries, a personal observation may be helpful. I refer to the establishment and operation of the Peoples Courts in Soviet-occupied Bulgaria, with which I was most familiar in late 1944-1945.

Bulgaria was not at war with the Soviet Union in World War II. Although the Bulgarians and the Soviets had been friends and were bound together by ethnic ties, the Soviet Union declared war upon Bulgaria and occupied the entire country within the five-day period prior to capitulation of the Bulgars to the Allies.

When the Soviets established their military occupation they took into custody the regents of the king, all the Ministers, Department heads and members of the Parliament who were in office at the time of their occupation. Shortly a Peoples Court was set up to try these officials. Approximately 100 were arraigned before the Court in a mass trial. After it had continued for approximately two weeks amid much publicity, through the press and the radio, an order was issued during the last weekend of the trial that it terminate the following Tuesday. Public announcement was made that the verdict would be rendered by the Peoples Court at four o'clock in the afternoon of that particular Tuesday. A general holiday was declared, and I was an eye-witness to the seething throngs surrounding the Palace of Justice just prior to the decision. Members of the labor unions, school children, public officials and hundreds of members of the armed forces in military formation surrounded the Palace of Justice before the verdict was rendered. Hideous placards were carried by the mob. I recall several depicting a criminal with a rope around his neck and soldiers pulling at each end. Promptly at four o'clock the Presiding Judge of the Peoples Court announced the verdict over the radio
direct from the courtroom. Ninety-nine of the defendants were given the death penalty. Only one received a mitigating prison term. He was a member of Parliament and had publicly opposed the declaration of war by the Bulgarians against the United States and Great Britain. Since this verdict was rendered when there was "purported" collaboration between the Soviets and the Allies, the Peoples Court was merciful to this particular defendant. Those receiving the death penalty at four o'clock in the afternoon were executed and all buried in a mass grave before eleven o'clock that evening. Hideous details and pictures of the sentence and execution were carried in the press and constant reminders announced over the Soviet-controlled radio. I am not dealing with the question of guilt or innocence but of the methods and procedure. Needless to say, this example of the swift action of the Peoples Court created fear and uneasiness among all Bulgarians. I might add that restrictions against the native people, as well as the few of us who were foreigners in that land, became promptly and progressively worse until freedom, as we understand it in the United States, was extinct. Even those of our own small United States mission were restricted so that we had no freedom of movement except from our quarters directly to the War Ministry and return. It even became necessary to obtain a permit to go to the airport or off this "beaten path." One of our British officers told me that when he wanted to ski in the nearby mountains just to the rear of his quarters he was required to obtain a permit and a Russian soldier to guard him while he took his favorite exercise.

It will serve no useful purpose to repeat illustrations of the administration of injustice in the satellite states. Ultimately, the judicial system and entire legal profession were regimented, controlled and dominated to such an extent that the "courts" became tools of the Party and agencies of the Soviet hierarchy to enforce the will of the Kremlin—the same as within the confines of the Soviet Union.

The most effective way to obtain actual information concerning the administration of the Peoples Courts in the satellite countries, as well as knowledge of the legal profession behind the Iron Curtain, has been through the organization known as "The Congress of Free Jurists" which began its operation in Berlin and is now administered from The Hague in Holland. Under the able leadership of Dr. Theo Friedenau, assisted by Dr. Walter Linse and other escapees from the legal profession of the Soviet Zone of East Germany, this organization, with headquarters in West Berlin well known to the Communists, compiled thousands of authentic files with reference to actual cases
tried by the Peoples Courts in the Soviet Zone of East Germany. These files included copies of the complaint, evidence, judgment and sentence. Upon invitation and appointment by the President of the American Bar Association, I attended the First Congress of Free Jurists in Berlin in the Summer of 1952. Representative members of the judiciary and legal profession came from 42 of the free nations of the world. Just a few days prior to our arrival the Communists brutally assaulted and kidnapped Dr. Walter Linse, the Vice President of the Congress of Free Jurists, at his home in West Berlin. He was taken to the Eastern Zone and his fate is still unknown. During the Conference the Soviet press and radio referred to our representatives in that meeting as "legal gangsters." However, regardless of threats to those collaborating with the Congress of Free Jurists, hundreds of judges and members of the legal profession of the Eastern Zone escaped to the West at that particular time. More than 200 judges, lawyers and interested persons were interviewed daily at the time of the meeting of the First Congress of Free Jurists. I spent some hours listening to testimony of the escapees and their statements describing the horror and miscarriage of justice in the Peoples Courts of the Soviet Zone. They have records of hundreds of actual cases. The officials of this particular group deserve great credit for supplying information as to actual conditions in the legal system behind the Iron Curtain, as well as assistance given to the victims of Soviet injustice and their families.

The public prosecutor has tremendous authority in the satellite states. Article X of the Soviet Zone law relating to public prosecutors corresponds almost literally to Article 113 of the Constitution of the Soviet Union, which provides that the Solicitor General "exercise supreme control over the strict observance of all laws and regulations issued in the Soviet. The Solicitor General may dispute and challenge any legal decision of a court."

The defense counsel assumes a personal risk, especially if he courageously represents his client. Dr. Theo Friedenau, President of the Congress of Free Jurists, has written:

"Attorneys have frequently been arrested in the course of their work in the courtroom. For this reason more and more lawyers refuse to act as counsel for the defense."15

Moreover, Dr. Friedenau states that the independence of lawyers has ceased to exist with the enactment of the recent ordinance estab-

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15Friedenau, Dr. Theo, "The Present Situation of the Administration of Justice in the Soviet Zone of Germany," Injustice Becomes Law, p. 4.
lishing cooperative societies of lawyers. Fees are required to be paid to the societies, of which the individual associate lawyers finally are given a portion. Further, Dr. Friedenau points out in the restriction of the legal rights of individuals that:

"Legal protection of the individual is further restricted by the fact that citizens can no longer rely on regulations and ordinances publicly announced but the citizens have to obey secret regulations of which the parties concerned may not be informed."\(^\text{16}\)

Such secret statutes issued by the Ministry of Justice now apply to disputes involving family law, which in effect practically nullifies the family law provided in the civil court.

Lawyers' cooperatives were formed in Bulgaria. An Associated Press news dispatch of April 13, 1949, described the regimentation of the lawyers in these words:

"The lawyer's point of view must be changed. In the past your first duty was to protect your client. Now you must have as first aim the protection of the State and compliance with its laws. Protection of your clients is a secondary consideration."\(^\text{17}\)

THE LEGAL PROFESSION AND THE AGE OF PERIL

President Eisenhower has often emphasized that we are living in an "age of peril." Recently when asked to describe the potential duration of this age he replied, "Maybe forty years." Prominent and reliable citizens have described the duration of the cold war as extending over at least a generation. General William J. Donovan, former Director of the Office of Strategic Services in World War II and more recently Ambassador to Thailand, observed, in view of his experiences with the Indo-China War, that he was now of the opinion that the struggle with Communism would last fifty years. A refugee, formerly the president of one of China's leading universities, has optimistically predicted that "China will eliminate Communism within 100 years." And Stalin corroborated all these conclusions when he observed, "You will have to go through 15, 20, or even 50 years of civil and international war." In view of these statements there can be but little lingering doubt that we are in a world crisis of insecurity which may well last beyond our lifetime and the lifetime of our children. The dangers which we face are thus long-term dangers, and

\(^{16}\)Id, at p. 7.

\(^{17}\)New York Times, April 13, 1949.
the success or failure of our cause will depend upon our approach to the age of peril.

Undoubtedly there are many dangerous philosophies and courses of conduct advocated in the world today, but the principal enemy of the rule of law, the principal cause of the age of peril, the principal threat to freedom is the ruling class of the Soviet Union.

The first cause of this danger is that a power-state must be aggressive, for in absolute governments the ruling cliques of the state are conspicuous targets for the hostilities that accumulate against the established order. In democratic systems, the level of hostility can be kept comparatively low by free speech and free elections. But in order to protect their privileged position, the rulers of a power-state must turn mass grievances against outside targets. In addition to the need of protecting the ruling group, the ideology of Communism demands one world under Communist rule, which gives added impetus to the natural affinity of the rule of power for aggressive action.

The second element of this age of peril is the fact that the Russians have through their propaganda been able to exploit many of the hostilities and fears which are inherent parts of any civilization. By carefully infiltrating any group which has a claim, legitimate or illegitimate, against the existing order, they tend to lull the suspicions of groups which would generally be anti-Communist, and then to pervert the power inherent in any group for the purposes of Communism. Nevertheless, although Communist propaganda has achieved acceptance outside the Soviet Union, these successes have been modest in the sense that mass support has seldom been attained. This indicates that freedom under law has powerful assets in the war of ideas. We must strive to retain these assets, keeping mass support on our side and at the same time actively countering the Communist appeal to the discontented by adopting some form of assistance to those who have legitimate claims against the existing order. We must keep ourselves ever aware of the fact that liberty under law is indivisible; no nation can pursue its own freedom unless it is aware of the interconnection of the freedoms of all nations and peoples.

The third danger in this age of peril is that in our anxiety to protect the rule of law we must be exceedingly careful that in the process we do not needlessly sacrifice the very thing which we are defending. We must face the dangers of the rule of power with the techniques of freedom under law. These techniques have long kept us safe and made us strong. To forsake them now is to forsake the most vital weapon in our battle against power. The principal and indeed most
The desperate task of the rule of law is to maintain itself, and following close thereon is the necessity for improving and refining government under law.

What then is the task of the legal profession in this dangerous era? Long ago deTocqueville remarked:

"I cannot believe that a republic can subsist if the influence of the lawyers in the public business does not increase in proportion to the power of the people."

And Justice Jackson has pointed out that in a free society "Lawyers' influence is disproportionate to their number." The legal profession has always played a prominent part in the life of our nation, and more than once we have been amused by the witticism—which contains a large element of truth—that ours is a government of lawyers and not of men. This places upon the legal profession a greater responsibility in the struggle to maintain the rule of law than on any other group in our free society.

First and foremost among the tasks of the legal profession is to see that we maintain a free and independent judicial system. The courts of this country have a body of ancient principles and more recent precedents than they can use to keep at a minimum any unnecessary encroachments by government upon the rule of law. But we cannot rely upon the judiciary standing alone to retain the rule of law during the present crisis. Although our judiciary has a long history of being staunch guardians of the rule of law, still, before the judiciary can act, cases must be brought before it. And herein the legal profession has a great responsibility as officers of the court. The officer of the court who caters to public passion or administrative pressure can do as much damage to the advancement of freedom under law as a paid subversive agent of a power-mad state. It takes courage to defend unpopular causes, but the history of the American bar is full of inspiring examples of attorneys who have braved the immediate disapproval of the community for the sake of even-handed justice in litigation. When men of stature are willing to act with calm consideration on behalf of passion-laden issues, the stability of the rule of law is safeguarded in a large measure. Democracy reposes upon the imperfect but honest admission that no man has found or can find the formula of perfection. It we profess to believe in the rule of law, then our nation exists only as an instrument to promote the welfare of its citizens, hence the tolerance of diversity is imperative, because without it, without the personal liberty and individualism that flow
from it, no liberty under law can exist. As Justice Jackson stated in
the case of *West Virginia Board of Education v. Barnette*:

“If there is any fixed star in our constitutional constellation,
it is that no official, high or petty, can prescribe what shall be
orthodox in politics, nationalism, religion, or other matters of
opinion, or force citizens to confess, by word or act, their faith
therein.”

The preservation of the tolerance of diversity is, then, a rule which
must ever guide the legal profession in its struggle to preserve the
supremacy of law in this dangerous age. Nevertheless, a tolerance for
diversity does not imply that we must be indifferent to those who seek
to use our liberties for our own destruction. Although the prime aim
of the sovereignty of law is the guarantee of the continuance of liberty,
the doctrine of the rule of law is founded upon the recognition that
liberty also necessitates restraint, for unrestrained liberty is merely
license, and license is as destructive of liberty as is tyranny. Thus the
legal profession must guide the nation along a path between a hysteri-
cal fear of Communism, which in the name of law would deprive all
men of liberty, and an advocacy of unrestrained liberty which would
permit Communists to pervert liberty under law for the self-des-
truction of the concept.

The second imperative task of the legal profession is leadership.
Under our form of government, the ultimate responsibility for the
preservation of the rule of law lies with the people. No thoughtful
person doubts that an informed public is essential, but to be en-
lightened is no simple matter. And it is perhaps here, in failing to
provide sufficient leadership to lead to public enlightenment, that the
legal profession has fallen in its duties. There are two problems to be
solved in the relationship of the individual to government under
law, the problem of knowledge and the problem of feeling. Some citi-
zens know, but do not care; some care, but do not know; some neither
care nor know; but the worst of all are those who are not interested
in knowing or caring. In an age of peril at any moment a critical
situation may require that the average man shall act as a supreme
statesman by supporting or repudiating the course taken by his gov-
ernment. All may depend on time—perhaps a few short weeks or even
a few short hours—and unless each American has a deep insight into
the true nature of what is taking place, the people may make the
wrong choice, even as the Germans did when the decisive millions
crowded away from their government and flocked en masse to the

18 319 U. S. 624, 642 (1942).
banners of Hitler. They had not been taught to recognize the danger nor to appreciate the full extent of their individual responsibility toward the maintenance of the rule of law.

The legal profession must arouse an ever-widening circle of citizens to a more active and effective participation in the fight against power. In times of crises there are many factors which tip the scales in favor of a more centralized government, strengthening the executive power and debilitating the separation of powers, so vital to a rule of law. But when a large body of informed citizens is on notice, the likelihood is far greater that there will be a more immediate awareness and resistance to the encroachment on the rule of law by the rule of power.

Charles E. Merriam pointed out:

"That order of things—whether social, economic or political—is most secure which constantly recreates the loyalty and obedience of its members, which constantly redevelops the sources of its interests and power from interest and reflection. That order is weakest which must largely depend upon authority and force with suppression of discussion and reason and criticism." 19

The security of freedom for the nation and for the individual, then, depends upon the widest possible sharing of an enlightened sense of obligation to see that the values inherent in the concept of the rule of law are not destroyed either by power from without or lethargy from within.

Finally, we of the legal profession must not fail to stress, both at home and abroad, the moral issues involved in the struggle. The rule of law is deeply rooted in the divine concepts of freedom and the dignity of man. It can never be over-emphasized that all democratic theory begins with an institution of liberty or of freedom of the individual. Liberty is first, and the condition of all else that follows. Belief in the individual has been a dominant factor in the religion, the morality, the politics, and the economics of nations subscribing to the rule of law. Marxism, on the other hand, is devoted to the concept that the individual exists for the sake of the state and not the reverse; thus the individual in a Communist state is only a means and not an end, and citizens altogether have no freedom, either physical or spiritual. The Communists tolerate no divergent social, political, or religious opinion since divergent opinions threaten to create a dual loyalty, a loyalty which in some instances may be placed over and above the established idol of Communism, namely, the state.

Therefore, as members of the legal profession, we must give emphasis to the spiritual and moral values that underlie liberty under law, and in so doing, through the help of the Creator, we will triumphantly progress in the battle against that atheistic enemy, the despotic power-state. We can succeed if we remain steadfast . . .

“Till danger’s troubled night depart
And the star of peace returns.”

\[\text{\textsuperscript{20}}\]

\[\text{\textsuperscript{20}Campbell, Thomas, "Ye Mariners of England," stanza 4.}\]