

# The Supreme Law of the Land

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## THE SUPREME LAW OF THE LAND \*

PROFESSOR ROBERT A. MILLIKAN, in his three lectures on science recently delivered at Yale College,<sup>1</sup> emphasized changes which had come since his student days in the fixed fundamental and unchangeable principles of matter. He speaks of having listened to a lecture in the early nineties delivered by one of the world's famous scientists, in which the lecturer stated that probably all the great discoveries in physics had already been made, and that future progress was to be looked for not in bringing to light qualitative new phenomena, but rather in more exact quantitative measurements upon old phenomena. Then came in 1895, and later, the Roentgen-ray and radio-activity, proving the nineteenth century to be the beginning, not the end, of discovery; that there were new properties of matter, and that this was a dynamic instead of a static universe. "The dogma," Professor Millikan said, "of immutable elements is gone forever; the physical world is a changing, evolving, dynamic, living organism. *The keynote of modern science,*" continued this eminent scientist, "is service, the subordination of the individual to the good of the whole."<sup>2</sup> We perhaps are a little bit too near to our own profession to realize that the same processes have been going on in the law, and that we are now sounding the same keynote.

This fact illustrates that knowledge moves abreast in almost all fields of man's activity and thinking. Progress and growth develop along the same lines in law as in science. The late Lord Haldane, twice Chancellor of Great Britain, in his "Philosophy of Humanism," says, "The doctrine that every department of knowledge belongs to a single entity and can be adequately interpreted only in its organic relation to other departments is the very essence of humanism \* \* \* between the pure mathematician and the poet and the law-maker there are no gulfs fixed; each deals with a unique

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\* Address delivered at the Commencement Exercises of St. John's College School of Law, Brooklyn, N. Y., on June 3, 1930.

<sup>1</sup> Millikan, Science and Religion.

<sup>2</sup> *Supra* Note 1 at 83.

reality which belongs to the whole."<sup>3</sup> And the same thought has been expressed by Mr. Justice Holmes in these words: "The remoter or more general aspects of the law are those which give it universal interest. It is through them that we become not only masters of our calling, but connect our subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."<sup>4</sup> The central point of the philosophy of Bergson, the French philosopher, is that there is nothing real save that which lives; and to live is to change. "Life," he says, "is a continuous becoming."<sup>5</sup>

We bring this idea a little nearer, perhaps, to our own profession when we take from Warren on the Supreme Court his statement: "The idea of vested rights in any well-governed community must develop correspondingly to the ever-changing conditions of time and place."<sup>6</sup>

May I, with your permission, make this somewhat personal, and note the changes which have come in my time, indicating a steady development of the science of the law?

When I came to the Bar of Kings County in the early nineties, few among the leading lawyers then practicing had ever seen a law school; many had never been to a college of any kind. The law schools were just beginning to receive the attention of the profession. Admission to the Bar was after a most cursory examination, the applicants generally being known personally to the judges or the committee in charge. The prerequisite study was short and meager; the curriculum at the Columbia College Law School, which I attended, included contracts, real property, torts, evidence, equity and the Code.

Everything has changed. The study of the law and of jurisprudence has become such an important part of our education that this last year the Carnegie Foundation for the Advancement of Teaching published a survey of the present-day law schools in the United States and Canada, made by Alfred Z. Reed,<sup>7</sup> which took three years to prepare. The cur-

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<sup>3</sup> Haldane, *The Philosophy of Humanism*.

<sup>4</sup> Holmes, *The Path of the Law* (1897), 10 Harv. L. Rev. 457, 478.

<sup>5</sup> Bergson, *L'Evolution Créatrice*.

<sup>6</sup> Warren, *The Supreme Court of the United States*.

<sup>7</sup> Reed, *Present-Day Law Schools in the United States and Canada*.

riculums of any recognized law school now cover public service corporations, public utilities, municipal corporations, bankruptcy, conflict of laws, constitutional law, private corporations, domestic relations, insurance, mortgages, quasi-contracts, suretyship, trusts, negotiable instruments, wills and administration, besides those subjects covered which I have mentioned as being part of the old course of study. Many, if not most, of our law schools, are closed to those who have not a scholastic degree from some recognized institution of learning, and by a recent amendment to the rules of the Court of Appeals, hereafter it will be necessary to have two years of scholastic college work before commencing the study of law.<sup>8</sup> The three years, which is the recognized period of study in a law school, has been found to be insufficient to treat any of the subjects thoroughly, or to touch upon other subjects which are developing into importance every day. Departmental practice before administrative bodies at Washington or the capitals of the various states has very much widened the activities of the lawyer. Income, inheritance, and franchise taxes have become specialties. Consolidation and merger of corporations now monopolize the best brains of our Bar. Banking and trust investments, by and through banks, are widening in their scope and use. All of this indicates that the lawyer today must know much more than he ever did before; in fact, he must be an up-to-date business man. Instead of corporations driving the lawyer out of business, he is becoming part of their business enterprises, the executive as well as the adviser in their undertakings. The head places of many of our banking institutions and public service and business corporations are filled by lawyers. Twenty years ago, Mr. Justice Holmes, in an address delivered at Harvard, said: "The man of the future is the man of statistics, the master of economics."<sup>9</sup> The prophecy has come true in our day. The lawyer of any size must know something of economics, sociology, the sciences and philosophy of government. In the last report of the Dean of the Columbia College Law School, he called attention to the large increase during

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<sup>8</sup> Rule 3 of the Rules of the Court of Appeals for the Admission of Attorneys and Counsellors of Law.

<sup>9</sup> *Supra* Note 4 at 469.

the last ten years in the number of students attending law school, particularly in New York City, where at present there are registered in six law schools more than 10,000 students, as compared with 2,700 in 1916.

This increase is due largely to the widening field of law activities and the demand for trained legal minds in business. The situation, however, presents a problem. Some have suggested that the law school course be extended to four years. Mr. Reed in his Carnegie Foundation Report, to which I have referred, indicates this solution: "A burden that has become too great for any law school to carry in its entirety must be distributed among the schools. Abandoning the ambition of preparing general practitioners of the law, two or more different types of law schools would better each concentrate upon a portion of the field. The graduates of each type could then be more adequately prepared for the limited responsibilities that would be theirs. Graduates of any and every law school would no longer regard themselves as fully qualified to render any kind of legal service when, as a matter of fact they are not. On the other hand, lawyers who gravitate into narrow specialties would not waste so much of their preparatory time upon relatively unrelated branches of legal activity."<sup>10</sup>

My suggestion is that we should consider the study of law in some of its branches as a cultural study. The weakness of the four-year college course, the ordinary educational course, is that it scatters in its subjects, no one of which can be dealt with very thoroughly. In Cambridge, England, a student may choose, in his second year, some legal subject or studies in law which will lead to a degree in the same way that the study of a Romance language or of philosophy or history might do. Many of our young men have become discouraged when they looked forward to four years in college and four years of preparation before coming to the Bar. This is apt to carry a man too far along in life in comparison with the opportunities offered in other careers. I make the suggestion that we could well adjust, in this country, our college courses to the European idea, and consider some of the broader legal studies as part of his scholastic course. This is

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<sup>10</sup> *Supra* Note 7.

neither the time nor the place to develop this suggestion, but I put it forth for what it is worth.

If we turn from the study and the expansion of the law to its fundamental principles, we find that these, too, have yielded to change. For decades the struggle was to maintain and establish individual rights, personal liberty, and to settle the limits of federal and state governments under the doctrine of state rights. Then with the expansion of business, development of commerce, there came a period when the emphasis was placed upon contract law and the establishment of property rights. The law was looked upon as that means of government which granted security to vested rights, the right of property. Was not a man's home his castle into which not even the government should intrude? And under this idea a certain sacredness was cast about all forms of property and a man's freedom to do as he pleased, as long as he did not interfere with the freedom of others. This was the period of contract, of property, of personal liberty.

Now these principles of the law are somewhat shaken with the coming of a greater right, or through the emphasis upon a so-called pre-eminent right which we call the "good of society." This is the age of social justice when a man's property and his liberty and his vested rights must yield somewhat more than ever before to the welfare of the whole nation or community, or for the good of others not so fortunate as himself. C. W. Pipkin, in his recent book on "The Idea of Social Justice,"<sup>11</sup> says that the interest today in England seems to be greater in the distribution than in the production of wealth. Judge Francis T. Swasey, of the highest court of New Jersey, wrote a few years ago in the *Harvard Law Review*<sup>12</sup> regarding this shift in legal opinion. He said: "Something very like sociological interpretation has begun in this country. One of the notable characteristics of our age is that in science, sociology, economics, psychology, philosophy and religion, the movement is from the abstract to the concrete, from speculation to experience, from logic to life."<sup>13</sup>

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<sup>11</sup> Pipkin, *The Idea of Social Justice*.

<sup>12</sup> Swasey, *Judicial Construction of the Fourteenth Amendment* (1912), 26 *Harv. L. Rev.* 1.

<sup>13</sup> *Supra* Note 12.

And in his work on the "Sovereign State," Mr. James Brown Scott, one of our leading authorities on International Law, has said: "Public opinion is, after all, the greatest force in the world, and sooner or later the most powerful and headstrong nation bows to its dictates; it is the supreme court from which there is no appeal."<sup>14</sup> Perhaps the most startling statement appeared in a book review of A. V. Lundstedt's "Superstition or Rationality—An Action for Peace," in the *Columbia Law Review*. It was said: "All that should concern us in the making and interpretation of law is consideration for the public welfare, without regard for individual rights and duties which are mere superstitions handed down to us from an imagined natural law."<sup>15</sup>

These few quotations sufficiently indicate that the law following public opinion is more interested today in the general welfare of society than in merely individual rights. The liberty and property of all of us, under the modern interpretation of our constitutions, must yield to social progress and welfare, within, of course, moderate and reasonable degrees. And such tendency we can see in the rulings of the courts.

Nothing was more firmly established as a branch of our jurisprudence than the law of negligence. The law of Master and Servant became encumbered in less than a century with the fellow-servant rule and the assumption of risk. So refined had it become that, at the time of *Fitzwater v. Warren*<sup>16</sup> (in the year 1912), it was almost impossible to tell when a foreman or superior was the master or a fellow-servant. Suddenly there came the Workmen's Compensation Law in England, then adopted in this country, which placed the burden of loss from personal injury upon capital and took it from the shoulders of labor, and this irrespective of fault or negligence as theretofore known at the law. This gave rise to *Ives v. The South Buffalo Railway Co.*<sup>17</sup> (in 1911), where the Court of Appeals thought that this was depriving persons of their property without due process of law and declared the Workmen's Compensation Law unconstitutional. Actually,

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<sup>14</sup> Scott. *Sovereign States and Suits*.

<sup>15</sup> (1926) 26 *Col. L. Rev.* 1050.

<sup>16</sup> 206 *N. Y.* 355, 99 *N. E.* 1044 (1912).

<sup>17</sup> 201 *N. Y.* 271, 94 *N. E.* 431 (1911).

the view of the court depended upon whether the judges realized this change in public opinion, and the shift in emphasis from vested rights to general welfare. The Supreme Court of the state of Washington in *Mountain Timber Company v. Washington*,<sup>18</sup> differed with our court merely in the view it took of the economic and sociological question. It considered the Workmen's Compensation Law a proper police regulation, which subjected property rights to this movement in behalf of the working man. This case was affirmed in the United States Supreme Court.<sup>19</sup> The trouble we went to, therefore, in this State to pass an amendment to our State Constitution, was all unnecessary. The United States Supreme Court, before affirming the Supreme Court of the state of Washington, had said in *New York Central R. R. Co. v. White*:

“One of the grounds of its [the public's] concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations.”<sup>20</sup>

The United States Supreme Court itself had previously divided very closely, five to four, in *Pollock v. Farmers' Loan and Trust Co.*,<sup>21</sup> on the constitutionality of the income tax. So strong, however, was public sentiment, that thereafter, by Constitutional amendment, the income tax became a law.

The law is a law for all of us, whether it be in the Constitution or a decision of the court. My point is that the law responds to the general sentiment of a country and the advance and growth of its people. *Matter of Jacobs*,<sup>22</sup> decided

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<sup>18</sup> 75 Wash. 581, 135 Pac. 645 (1913).

<sup>19</sup> 243 U. S. 219, 37 Sup. Ct. 260 (1917).

<sup>20</sup> 243 U. S. 188 at 207, 37 Sup. Ct. 247 at 254 (1916).

<sup>21</sup> 158 U. S. 601, 15 Sup. Ct. 912 (1895).

<sup>22</sup> 98 N. Y. 98 (1885).

in 1885, has always come in for much unjust criticism. We must not judge the past in the light of the present. It reflected the public sentiment of the time, in which the judges simply shared. An act of our State Legislature,<sup>23</sup> which was to improve public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses, in certain cases was declared unconstitutional. Since then we have had a flood of labor laws, tenement house laws, public health laws, seeking to protect the lives and health of citizens, operatives and tenement dwellers.

*Lochner v. New York*,<sup>24</sup> decided in 1904, held that a law<sup>25</sup> limiting employment in bakeries to sixty hours a week and ten hours a day was an arbitrary interference with the freedom of contract guaranteed by the United States Constitution and not a valid exercise of the police power. In 1923, the same Court, in *Radice v. New York*,<sup>26</sup> decided that a similar law<sup>27</sup> relating to the labor of women in restaurants was constitutional. I doubt very much whether the *Lochner* case, which has frequently been criticized, would receive the same interpretation today by the United States Supreme Court. But whether so or not, we are becoming more familiar with the push of society in demanding laws for general welfare, and the courts, as they are being manned by judges of modern education, take the more recent view of this subject. The so-called emergency rent laws,<sup>28</sup> and the zoning law,<sup>29</sup> both approved by the United States Supreme Court, illustrate the extent to which the courts must go in meeting modern conditions and relieving the burdens and difficulties of modern society.

Our personal liberty has followed in the wake of personal property and has been much restricted in this onward movement for social progress. We see it in laws for the licensing of real estate and insurance brokers, employment

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<sup>23</sup> N. Y. Laws of 1884, ch. 272.

<sup>24</sup> 198 U. S. 45, 25 Sup. Ct. 539 (1905).

<sup>25</sup> N. Y. Laws of 1897, ch. 415, art. 8, sec. 1010.

<sup>26</sup> 264 U. S. 292, 44 Sup. Ct. 325 (1924).

<sup>27</sup> N. Y. Laws of 1917, ch. 535, p. 1564.

<sup>28</sup> *Durham Realty Corp. v. La Fetra*, 230 N. Y. 429, 130 N. E. 601 (1921), *aff'd* 257 U. S. 665 (1921).

<sup>29</sup> *Wulfsohn v. Burden*, 241 N. Y. 288, 150 N. E. 120 (1925), approved of 274 U. S. 603 at 610, 47 Sup. Ct. 675 at 677 (1927).

agencies, dealers in farm produce and dealers in securities.<sup>30</sup> And, of course, the Volstead Act and the Eighteenth Amendment are constantly before us.

In the realm of speculation we have still to face the propositions for the minimum wage or the abolition of our wage system, compulsory arbitration for labor disputes, public housing propositions, the restrictions of monopoly, old-age pensions, and workmen's insurance, together with the unraveling of our divorce laws. Whether we like it or not, we must face facts and conditions as they are and examine them intelligently. We must admit, I think, that all the changes have been for the best, and that it is a wholesome, encouraging sign when the state and the nation, which merely mean the majority of the citizens, are awakening to their duties and obligations toward man both here and abroad. Much that was formerly left to private initiative has now become a public duty. There is such a thing as the conscience of a people, and our recent decisions and legislation indicate that that conscience is alive. It is a wonderful thing to realize that with all the other sciences there is a *law for the law*, and that that law, the great and ultimate law, is gradually revealing itself to the intelligence of man. We of the profession have our part to perform in this progress. To quote the words of Sir Oliver Lodge, "The revelation of faith and the working of reason will be consistent and mutually sustaining, and the universe, as we perceive it, will take on a beauty and a perfection at present only dimly guessed."

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<sup>30</sup> 243 N. Y. 51, 152 N. E. 461 (1926).