THE PASSION FOR UNIFORMITY.*

In the ancient and beautiful city of Münster, with its mediaeval arcades and gabled houses, the traveler finds his curiosity excited by the strange spectacle of three iron cages suspended from the tower of a church. If he consults his Baedeker he learns that these cages once contained the remains of three religious zealots, who, desirous to convert the inhabitants to their way of thinking, swept down upon the place with fire and sword, and committed for the good of their cause many acts such as in these gentler times we seek to discountenance by harshly calling them atrocities. For a while their ardent zeal swept all before them, but they were subsequently driven out; and when later they returned to the charge, they were captured, and, after they were duly tortured with red hot pincers and put to death, their bodies were, to speak with legal precision, severally suspended in the three iron cages, as a warning to the people against the excessive indulgence of the passion for uniformity.

The tendency thus visualized pervades all human history, and has been one of the profoundest causes of the struggles which constitute so great a part of the story of the life of man on earth. From the Scriptures we learn that the Hebrews regarded themselves as the chosen people of God. So regarding themselves, they naturally deemed it to be their duty to spread their faith by force if necessary. They looked upon other nations not only as inferiors, but as being enemies because of their inferiority. By the same process of reasoning, they deemed it to be a virtuous act to put their enemies to death, not as combatants but simply as enemies, and they therefore embraced in their destructive plan women and children, so as to prevent the propagation and growth of dissimilarity.

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*An address before the Society of the Alumni of the Law School of the University of Pennsylvania, April 24, 1914.

The attitude of the ancient Hebrews was shared in one form or another by other peoples. To the Greeks, alien peoples were barbarians. Being different from themselves, they necessarily bore the stamp of inferiority. The view of the Romans was the same, and they exhibited even more strongly than the Greeks had done the propensity to extend their power and their institutions to other lands by force. We are told that when the Thracians took Mycalessus they put to death the women and children; that so did the Macedonians when they took Thebes, and the Romans when they took Ilurgis in Spain; while Germanicus ravaged the Marsi with fire and sword and without sparing sex or age. And we are assured that some of the warriors under whom these things were done were counted as humane men.

From these highly authoritative sources, religious and political, the same ideas descend to the modern world. Grotius, whose great work, De Jure Belli ac Pacis, appeared at the close of the first quarter of the seventeenth century, said that war, when declared against a country, extended to all the people, so that the slaughter of women and infants was allowed with impunity, as comprehended in the right of war. Grotius doubted whether he should adduce in support of this right the slaying of the women and children of Heshbon, as recorded in Deuteronomy,[1] or what was done to the Canaanites and their allies, for these were, he said, "the doings of God, who has a more absolute right over man than men have over brutes"; but he quoted as altogether appropriate and sufficient a passage which, as he declared, approached "more nearly to a testimony of the common usage of nations." This was the ninth verse of the one hundred and thirty-seventh Psalm, reading thus: "Happy shall he be that taketh and dasheth thy little ones against the stones." And to this "testimony" Grotius added that of Homer.[2]

Towards the end of the Middle Ages, the passion for uniformity was especially exhibited in a religious form. For many

[1] Deuteronomy, ii. 34.

[2] Grotius, De Jure Belli ac Pacis, Lib. III, cap. iv. 9.

years the European world was convulsed with the struggles which are known in history as religious wars. These contests are commonly regarded as culminating in the Thirty Years' War, which involved the greater part of Europe but fell with peculiarly devastating force upon the states forming the German Empire of that day. It may be true that, as has been suggested, the element of religious faith or sentiment was not so exclusively the cause of these conflicts as writers have generally represented, and that, just as in most human affairs, there was a material element that had to be dealt with. Nevertheless, the element of faith was an active force, and gave to the contests their peculiarly stubborn, relentless character.

We commonly think of the Thirty Years' War as marking the end of religious conflicts carried on with arms, but this view is not altogether justified. Differences in religious belief, although they have during the past three hundred years seldom been the avowed cause of armed conflicts, have no doubt in many instances been highly influential in producing the state of feeling that led to hostilities. We have indeed during the past three years ourselves witnessed a series of struggles in which religious differences bore a conspicuous part; and it is no doubt the blending of these differences with those of a racial character that largely accounts for the singularly fierce and sanguinary aspect that distinguishes the struggles which have lately taken place in the Balkan Peninsula.

When we come to consider the state of the modern world, the thoughts which have just been expressed give rise to interesting reflections. The thing that chiefly distinguishes the modern world from the ancient is the study of the physical sciences, and the application of physical forces to the conveniences of life by means of inventions. Neither in art nor in literature can the modern world boast of achievements that excel the productions of the ancients. In art we still recur to the works of the ancient masters, while in literature and in oratory we can scarcely be said to have gained either in substance or in form by an increasing unfamiliarity with the language of Homer and Demos-

thenes, or with that of Virgil and Cicero. It is a matter of common remark that time has developed nothing in the way of political thought that may not be found in Aristotle's Politics; and this observation may be accepted as substantially true, unless, as some one has facetiously suggested, the idea of a "nation-wide presidential primary" in the United States must be placed in the category of absolute novelty! But by the discovery and application of the uses of steam and electricity, a great change has been wrought in the relations of peoples and states.

In the first place, all parts of the world have, as the result of improved means of transportation, been brought into close and constant contact; the barriers to intercourse that formerly existed have been overcome. In the second place, as the result of this new contact, there has come about a general development of resources which has rendered impossible the predominance which single nations sometimes previously enjoyed. Barely sixty years have elapsed since the Far East seemed to lie practically helpless before the onset of the West; but in that brief period a single Eastern nation has, by a process of conscious and deliberate self-development never before witnessed in the history of the world, raised itself to a position of political equality with the nations of the West; and this has been done not more by the development of political institutions than by demonstrated capacity in war.

We are thus brought face to face with the fact that a condition of things has arisen in which the indulgence on a large scale of the passion for uniformity, after the manner of the zealots at Münster, has become increasingly difficult. For centuries the mind of Europe was haunted with the spectre of universal monarchy. Repeated and long continued efforts were put forth to make it a reality. In the end they disastrously failed; and the renewal of such an attempt at the present day is inconceivable. The general development of the world's physical resources is strengthening more and more the power of the nations to defend and preserve their independent existence. Not only is this so in Europe and in the Far East, but there are abundant

proofs of the operation of the same tendency in other quarters of the globe. Notable illustrations of it may be found among the nations of America. There can be no doubt that, contrary to what is often apparently supposed, the nations of South America today are as a whole far better able to defend themselves against aggression and to maintain their independence than they were eighty years ago, or at any intervening time. Although in some of these states political conditions are still insecure, the prevalent tendency has been in the direction of order and stability, while in many of them rapid and striking advances have been made and still are making in the paths of orderly progress.

From these facts there seem to result certain necessary inferences. One is, that wars for the purpose of extermination, or for the purpose of spreading either political institutions or social and religious conceptions, must be regarded as fatuous. By keeping alive antagonisms, they strengthen and perpetuate differences, as is seen in the history of the Balkan Peninsula. Another inference which it is necessary to draw is that such wars, no matter how futile they may be, can be avoided only by the frank recognition of the fact that differences do not necessarily denote an inferiority which it is the duty of the self-assumed superior forcibly to obliterate.

The importance of accepting these inferences becomes even more apparent when we reflect upon the fact that on the whole national and racial differences do not tend to disappear. No doubt there are cases in which an amalgamation has taken or is still taking place; but even here the result is something different from what existed before. On the whole, taking history as we know it, and speaking in terms of time rather than of eternity, the indestructibility of nations and of races may be accepted as axiomatic.

Differences in social and political institutions spring from differences in disposition and in views of life. Among the qualities that tend to render life not only supportable but enjoyable, none plays a larger part than the sense of humor. In some peoples this sense is highly developed, while in others it seems to be

almost wholly wanting. Not long ago, an intelligent traveler, speaking of the aboriginal element in the population of a country in which he had spent a number of years, said that he had for a long time sought to determine whether this element possessed a sense of humor. Close observation failed to discover any, till one day when he saw some natives working on the roof of a house. One of the workmen, through his awkwardness, slipped and fell to the street, and was instantly killed. This incident, the traveler said, seemed to afford to the other natives, who had retained their footing on the roof, intense amusement, and he came to the conclusion that this attitude towards human misfortune must, as the resultant of underlying forces, exert a decided influence upon the development of customs, laws and institutions.

Even before the time of Pope, philosophers observed the tendency to regard political institutions as the cause rather than the effect of differences between peoples. In reality, if there existed all over the world one form of government, the habits, customs, laws, and even the institutions, of different peoples would continue to be different. When I say that institutions would continue to be different, I mean that they would be so in essence, as tested by their working, even though they were the same in form. We have in the world today many governments which are called monarchies. Some of them are despotic; others are constitutional. Others yet are largely democratic. We have at the same time many republics. All of them are nominally constitutional, or hope to be so; but, while in some of them government is popular and free, in others it is more or less arbitrary, the real differences being due to differences in the character, disposition and development of the peoples from whom it proceeds and over whom it rules.

We observe similar differences in social institutions and laws, proceeding from similar causes. In the United States we have witnessed more and more the development of a tendency to legislate on subjects which were formerly considered to lie within the sphere of individual action. Of this tendency an example is found in the spread of prohibitory laws; that is to

say, laws prohibiting the sale and consumption of intoxicating liquors. The regulation of government in the matter has now proceeded so far that in the capital of the United States the prohibition to serve liquors on Sunday extends even to clubs and precludes a member even from giving a drink to a fellow-member or to anyone else; so that, in order to avoid the chances of a violation of the law, clubs have forbidden members to keep flasks in their lockers. There are other civilized and well-ordered countries in which such a measure would be impossible. Comment has often been made upon the fact that, while the Englishman and the American boast of political liberty, they will submit to a measure of governmental interference with their personal habits such as would probably produce a revolution if tried, for example, in France or in Italy. If the Englishman or the American, quietly submitting to sumptuary laws, is content to consume his spirituous beverages in some sheltered retreat, the Frenchman or the Italian prefers to sip his wine at a table in the open air, and would keenly and quickly resent any attempt on the part of the government to interfere with the enjoyment of this traditional freedom.

But, in considering the passion for uniformity, we must note a capital distinction. Like other natural forces, if wrongly directed or excessively indulged, it operates destructively; but if wisely directed and properly regulated, it may operate beneficially. Even before the Thirty Years' War, philosophers began to dream and to write of a uniform law for the regulation of international relations. More and more impressed with the demonstrated fatuity of the attempt to create unformity by force, they conceived the necessity of recognizing the right to be different, and in order to make such recognition effective, adopted, as the very basis of the new system, the principle that independent nations have in the eye of the law equal rights. In time this principle worked a marvelous transformation. The affairs of nations began to be adjusted in international conferences, and the adjustments so effected were embodied in great international charters. Disorder was succeeded by system; the tend-

ency towards strife was in a measure counterbalanced by a tendency towards federation, and eventually there resulted from this co-operative policy genuine acts of international legislation, culminating in the work of the Peace Conferences at The Hague in 1899 and 1907.

Meanwhile, various proposals have been made for the adoption of a general international code. Drafts of such a code have been prepared by eminent jurists. A German and an American were pioneers in this work; and the draft prepared by the great Italian publicist, Pasquale Fiore, of which an English version may soon appear, has reached a fifth edition. All these drafts, it is proper to say, represent for the most part a summary of existing law; and this remark is made in a spirit of commendation. But as yet none of them has been submitted to an international body for consideration and action.

In the Western Hemisphere a movement has been formally set on foot for an international code. By a treaty or convention adopted by the Third International American Conference at Rio de Janeiro on August 23, 1906, the American nations agreed to establish an International Commission of Jurists, consisting of one delegate from each country, to codify international law; and although discussions in previous International American Conferences, and particularly in the first one, had disclosed in the differences between the jurisprudence of the United States and that of the countries of Portuguese and Spanish origin serious obstacles to the creation of uniformity in private law, they included private, as well as public, international law in the plan. The International Commission of Jurists held its first meeting in Rio de Janeiro in the summer of 1912. By a supplementary agreement each government was permitted to send two delegates instead of one, and a number of the governments, including that of the United States, availed themselves of this privilege. Seventeen states were actually represented, and a delegate from yet another state was on his way to Rio de Janeiro when the congress adjourned.

Immediately on the assembling of the commission the question was raised as to whether codification should be effected by means of identical national laws, or by means of international conventions; whether it should be at the first moment complete, or should be gradual and progressive; in what form amendments should be made or defects supplied; whether new rules should continue to be elaborated so as to keep the code or the agreed points in harmony with the progress of nations. The discussion of these questions at once disclosed what may be regarded as fundamental differences of view. On the one hand it was proposed that the commission should proceed at once to the adoption of codes. This proposal, in view of the magnitude and difficulties of the task before the commission, would have been incomprehensible but for the fact that two eminent Brazilian Jurists, Dr. Epitacio Pessôa, then a member of the Supreme Court of Brazil, and Dr. Lafayette Rodriguez Pereira, a former Minister of Justice of the republic, had respectively prepared drafts of codes of public international law and private international law for the use of the commission. On the other hand, the view was taken that it was practically impossible for the commission to proceed at once to take definitive action upon the texts of codes. In reality, the Brazilian draft codes reached the various governments to which they were sent only towards the end of 1911; and the agreement fixing the date of the assembling of the commission was signed only in January, 1912. On the eve of sailing for Brazil the American delegates were furnished with copies of the original drafts in Portuguese, together with an English translation of them; but there had scarcely been an opportunity to make a competent translation of the texts into English—for by translation I mean not the mere matching of word for word, but the conversion of the sense and idiom of the one text into the equivalent sense and idiom of the other.

It was therefore contended by various delegations, including that of the United States, that the commission should be divided into committees, to which should be assigned certain subjects for investigation and report; that the reports of these com-

mittees should be printed in all the languages represented in the commission, and should be exchanged, and that after such lapse of time as would enable this to de done, the commission should meet again to consider the adoption of texts for submission to the various governments, and perhaps for the eventual consideration of the International American Conference. This view substantially prevailed. The commission was divided into six committees, four of which were to be concerned with subjects of public international law and two with subjects of private international law. The four committees on public international law were to sit respectively at Washington, Rio de Janeiro, Santiago (Chile), and Buenos Aires. To the first committee was assigned the preparation of drafts of codes on maritime war, and the rights and duties of neutrals; to the second, the preparation of drafts on war on land, civil war, and the claims of foreigners growing out of such wars; to the third, international law in time of peace; to the fourth, the pacific settlement of international disputes and the organization of international tribunals. The two committees on private international law were to sit at Montevideo and Lima. The subjects assigned to the first committee embraced capacity, the status of aliens, domestic relations, and succession. To the second was entrusted the consideration of matters of private international law not embraced in the preceding enumeration, including the conflict of penal laws.

The commission, which held its first formal session on June 26, 1912, adjourned on the twentieth of the following month, to meet again in Rio de Janeiro in June, 1914. The date of the next meeting has since been postponed till June, 1915. Some of the committees have already made reports, but there has not yet been an opportunity for the completion of their work, and the printing and exchange of the results of their investigations.

As a concession to those who desired immediate action, the commission while in session at Rio de Janeiro, undertook to act upon the subject of extradition, in the domain of public international law, and on the execution of foreign judgments within the domain of private international law. After compara-

tively brief debate, a draft on extradition was voted. But when the special committee on the execution of foreign judgments came to consider the draft prepared on that subject, it became evident that there existed as between the different delegates irreconcilable divergences of view. These divergences resulted from the circumstance that the members of the committee immediately found themselves dealing with questions of procedure.

During the past hundred years, and especially during the last fifty, great progress has been made in the work of embodying the rules of public international law in international agreements of world-wide operation. This is in one sense codification, whether we describe it by that name or not. The process will go on. The codification of private international law is more difficult, because it deals with private rather than with public law, and involves to a great extent the element of procedure, which, according to a well recognized rule, is governed by local law. This rule is not artificial, but inheres in the nature of the subject. It is important always to bear in mind that the object of law is the attainment of justice; that the different forms which prevail in different countries under their various legal systems have presumptively been worked out for the accomplishment of that end, and that efficiency is more to be desired than a preconceived uniformity of methods.

In dealing with the subject of the codification of international law we may well profit by the example of the Germans in preparing the Imperial Civil Code. When the Germans took up this great task, they appointed in the first place a commission to prepare a project. This commission was appointed in 1874, and devoted thirteen years to its work, presenting its report in 1887. After three years of public discussion, the project was committed to another commission in 1890. The code received the imperial approval in 1896, but did not take effect until 1900—twenty-six years after the appointment of the first commission. And yet, the states for which this code was adopted were not only united under a federal government, with a supreme legislature, but had similar political and legal traditions.

Passing from the sphere of international to that of municipal law, it is not extravagant to say that for the operation of the passion for uniformity, whether in its regulated and constructive or in its unregulated and destructive form, the jurisprudence of the United States presents the world's largest opportunity. Looking at the bewildering confusion in the midst of which we dwell, our first impulse should be to assume that the desire for uniformity had been lacking altogether; and yet our political history affords one of the most remarkable examples of all time of the attempt suddenly to obliterate deep-seated differences by legislative fiat. Scarcely fifty years ago the people of the United States entered upon what was called the period of Reconstruction. The policy of Reconstruction was apparently founded on the supposition that the only difference between, for instance, the New England Yankee and the lately emancipated slave was the fact that the one had had an opportunity to go to school, while the other had not. In order to insure equality in this and in other respects, the emancipated slaves were invested with the elective franchise, in the expectation that they would at once use it intelligently and effectively, not only for the preservation of their own political rights, but also for the good of the community as a whole. In ten years the experiment broke down, and after the lapse of a certain time, in which the passion for uniformity steadily cooled, the States of the South were permitted effectually to nullify what had been done. The pendulum swung from one extreme to the other. Whether it be true, as has been suggested, that the people of the North suffered "a certain paralysis of feeling about the whole matter, due to exhaustion," it is certain that they at length acquiesced in the result.

This incident instructs us in the necessity of examining fundamental conditions, if our lawmaking is to endure. But it in no wise teaches that diversity is in itself a blessing or that we should refrain from seeking to bring about uniformity where convenience, which is the true foundation of all law, demands it.

Three hundred years ago Sir Francis Bacon, in his Proposition touching the Compiling and Amendment of the Laws of

England, declared that, owing to the state of the laws at that time, there resulted among other things (1) "that the multiplicity and length of suits is great"; (2) "that the contentious person is armed, and the honest subject wearied and oppressed," and (3) "that the ignorant lawyer shroudeth his ignorance of law, in that doubts are so frequent and many." He therefore proposed a searching examination of all public and judicial records with a view to a compilation in which the following points should be observed: That overruled and obsolete cases should be omitted; that mere repetitions should be purged away; that idle queries and uncertainties should be left out; that tautologies and impertinencies should be cut off, and that the reports that were preserved should be carefully tested by the records and rectified so far as they were defective.

If Lord Bacon were now alive and were transplanted to the United States, what would he find? Certainly, from the scientific point of view, a legal chaos buttressed with shapeless masses of digests and indexes. And still the augmentation of more or less unformed material goes on at an ever increasing rate. In 1819 the reports of the decisions of the American courts, including the federal decisions, were embraced in one hundred and eighty volumes. Seventy years later, in 1883, the number had grown to three thousand two hundred, with an annual increase of one hundred volumes. At the end of 1913, after the lapse of only thirty years more, the total had reached eight thousand four hundred and twenty volumes, with an annual output of two hundred and fourteen; and the number of reported cases which all the volumes contain is almost beyond computation. The multiplication of statutes goes on apace. Statutory law in the United States may now be sought in more than three thousand volumes, with an adequate annual increase.[3]

[3] The obliging assistant librarian in charge of the shelves of the library of the Association of the Bar of the City of New York has made the following table, which, although it does not purport to be absolutely accurate, is sufficiently so for purposes of comparison:

English Reports, total number of volumes	2431
Present annual increase	16

We have spoken of the annual "output" of judicial reports, and the phrase, with its thrifty flavor, is deliberately chosen; for the publication of reports is little regulated and thoroughly commercialized. With each court there is connected a pipe promptly to convey its product to the great centre of distribution; and from this centre, day by day, month by month, year by year, there is poured out, as through a great main, upon a gurgling, gasping, sputtering Bar, a turgid stream of judicial decisions. Here there is no discrimination, no estimation of merit or of importance. Cases petty and cases important, cases of national interest and cases of interest purely local, final decisions, and decisions either reversed or on the way to reversal, are, with generous impartiality, spread broadcast over the entire land.

This system is supported by the Bar, with mingled feelings of gratitude and despair; for the Bar is conscious of the fact that while it is in a sense served by the system, it is also enslaved and debauched by it. The very multiplicity of cases, and the consequent impossibility of dealing with them scientifically, reduces practitioners to a reliance upon particular decisions rather than upon general principles; and this in turn accentuates the tendency, long ago abnormally developed, to pay undue respect to mere cases as authority. How often do counsel produce with an air of triumph the latest decision, rendered perhaps in some far off jurisdiction by a judge whose opinions derive their weight solely from his official position! How often, too, do they cite cases in their briefs indiscriminately. Some years ago the statement was made that in a single volume of reports then lately published more than five thousand cases were cited; and although this number would seem to suffice, possibly it may since have been exceeded.

American State Reports	7370 volumes	
United States Reports	1050 "	
Total number of volumes		8420
Present annual increase		214
English Public Statutes, total number of volumes		160
Annual increase		1
American Statutes, total number of volumes		3164
Present annual increase		32

From the same causes our text-books also have deteriorated. We do not have to go back very many years to find treatises that rose to the dignity of codes, in the sense that they reduced to "a definite and systematic shape" the "results obtained and sanctioned by the experience of many centuries."[4] Such treatises today are exceedingly rare, and it is becoming daily more difficult to write them, because of the insistent demand of the legal profession for the citation of all decided cases. For the most part the preparation of text-books is now an incident of the publishing business. They consist for the most part of lists of cases strung upon slender propositions, and scarcely rise above the dignity of amplified indexes.

For the conditions that have been described, when and how shall there be found a remedy? The remedy will not come immediately or all at once, but we may form a conjecture as to the lines along which it will progress. In the first place, so long as we maintain the separation of jurisdictions as between the federal government and the States and as between the States themselves—a separation that may be counted upon to continue indefinitely—that which is of general interest must be carefully divided from that which is essentially local. Probably we have been too much disposed in thinking of this division to follow simply the lines of the federal Constitution, but these are by no means adequate. There are many subjects not embraced in the federal Constitution, as so far legislatively construed or developed, which are of general interest, and yet this interest may be of a kind that does not require legal uniformity. Local conditions may so vary in the several States as to make an attempt at uniformity undesirable. It may be worthy of consideration whether the subject of marriage and divorce does not as yet fall within this category, although the tendency at present is to approach it from the point of view of legal uniformity.

On the other hand there are subjects in respect of which, in spite of the fact that national legislation does not deal with

[4] Stephen, History of the Criminal Law of England, III, ch. xxxiv.

them, the general convenience calls loudly for uniformity. This is particularly the case in regard to the law relating to commercial matters. For this reason, I confess I have always considered the conception of the Supreme Court of the United States in *Swift* v. *Tyson*[5] as essentially sound. Speaking through Mr. Justice Story, the Court held that the thirty-fourth section of the Judiciary Act, in prescribing "the laws of the several States" as rules of decision in trials at common law in the federal courts, was to be "strictly limited to local statutes and local usages" and did not extend to "contracts and other instruments of a commercial nature, the true interpretation and effect whereof are," declared the court, "to be sought not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." And the authority of Lord Mansfield was invoked to the effect that the law respecting negotiable instruments may be affirmed to be in great measure "not the law of a single country only, but of the commercial world."

This decision has been criticised by a great Pennsylvania judge as an "unfortunate misstep," on the strength of which the courts of the United States "have persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it, in entire disregard of the law of the State where the question arose."[6] The word "mythical," as here used, evidently was intended to convey the thought that the law which the courts in this instance professed to lay down was not law in the proper sense, because it had never been prescribed by the competent sovereign power. But, howver this may be, we may find in the decision of the Supreme Court a response to the desire which has manifested itself in all times and in all lands, and which has in so many countries led to the establishment, in one way or another, of a uniform civil and commercial law.

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[5] 16 Peters, 1 (1842).

[6] Judge Mitchell, in Forepaugh v. Delaware, Lackawanna & Western Railroad Co., 128 Pa. 217 (1889).

The existence of this desire, which is but an expression of human convenience, emphasizes the importance of distinguishing carefully and in essence between that which is general and that which is local. The tendency of our national legislation to occupy new fields is a matter of common remark. In numerous instances its right has been disputed; but there are spheres unquestionably belonging to it which it has not yet occupied. One of these is the legislative and judicial assurance of the treaty rights of aliens.[7] This defect in our federal statutes has been glaringly revealed on more than one occasion, and no doubt will in time be corrected, so that we may confidently stand before the world in the attitude of enforcing treaties rather than in that of paying damages for their local infraction.

In the effort to ameliorate confusion and gain a rational uniformity of law, it is always necessary specially to beware of that haste and superficiality which so often characterize proposals for codification. Codification, which in a proper sense and in appropriate spheres is an ideal to be kept in view, has in reality been discredited in the United States by many of its advocates. We have even heard the so-called codes of the Roman law invoked as an argument in favor of codification, evidently without knowledge of the fact that the Corpus Juris is not a code in the modern sense. Persons indeed are not wanting who will upon slight provocation undertake to furnish in short order a code either for the world or for a particular country. A legal society is formed, and we should not be surprised if one of its first acts is to appoint a committee on codification, with instructions to bring in, perhaps at the next annual meeting, if not a draft of a code, at least a report as to what such a work should be. The committee, composed perchance of estimable men not known to be specially fitted for the task, takes up its burden with due solemnity, and holds a certain number of consultations, and if at the end of a year the world is not enriched with what was proposed, the fail-

[7] See the valuable monograph, "The Treaty-Making Power of the United States and the Methods of its Enforcement as affecting the Police Powers of the States. By Charles H. Burr, Esq., of the Philadelphia Bar."

ure may be ascribed to preoccupation with other matters or perhaps to a want of facility in dictation. Or, possibly the fact may have been discovered that the task is great, and that the time is not ripe for its performance. Here is indeed a question truly fundamental. When it was proposed in 1815 that a civil code should forthwith be made for Germany, Savigny objected on the ground that German legal science was not sufficiently developed to justify the undertaking; and we are assured by a profound student of political and legal history that every German jurist today admits that Savigny was right.[8]

In the United States the law is at present in a singularly shifting state. Proposals are constantly put forward for material and even radical change, not only in constitutional law but also in criminal law and in various branches of civil law, such as contracts and torts. The difficulties in dealing with such a situation are illustrated by the experience of the Conference of Commissioners on Uniform State Laws, whose members are appointed by the governors of the various States and Territories, under local law, for the purpose of conferring upon and recommending uniform laws in matters in which uniformity seems to be practicable and desirable. The moderation as well as the earnestness of this body is much to be commended, and the general interest in its work is shown by the circumstance that forty-eight States, two Territories, the District of Columbia and our insular possessions are represented in it. In the twenty-three years of its existence it has formulated ten drafts of statutes.[9] The first of these, The Negotiable Instruments Act, has been adopted in forty-six States, Territories and possessions; the second, the Warehouse Receipts Act, in thirty. In no other instance has the number of adoptants exceeded eleven. The Divorce Act has, it may be observed, been adopted in only three States. It is true that some of the later recommendations have not been long be-

[8] Professor Munroe Smith, in the Political Science Quarterly, vol. 2 (1887), p. 134 *et seq.*

[9] These respectively relate to negotiable instruments, warehouse receipts, bills of lading, sales of goods, certificates of stock, divorce, family desertion, the probate of foreign wills and the evasion of marriage obligations.

fore the public, so that their fate is not yet finally determined. But it is evident that, even where the need of uniformity is generally acknowledged, the task of formulating and securing the adoption of a uniform law is always attended with great uncertainty.

An encouraging sign of a tendency to furnish practical relief without awaiting the development of comprehensive schemes of uniformity may be seen in the interest lately taken in the subject of legislative drafting. The loose and unregulated way in which bills are introduced in our legislatures, National and State, with little or no governmental responsibility for their presentation, affords an exceptional opportunity for the services of men trained in the study of legislation and its interpretation. The same need exists in the case of the numerous commissions appointed to investigate and report upon matters which are expected to be dealt with by means of new legislation. These commissions are often largely composed of persons who are much more interested in what they conceive to be the social or moral side of public questions than in the formulation and interpretation of statutes. It would be a great gain for our legislation if provision were made by the federal government, as well as by the State governments, for expert advice and assistance in the drafting and revision of legislative measures.

An interesting incident in its relation to the development of rational uniformity was the formation in New York a year ago of a Conference of Teachers of Law and Philosophy. No matter what may be the fate of this particular movement, a step was taken in the right direction; for I venture to say that reform in our legal conditions must be the work of students and philosophers rather than of politicians and practicing lawyers. Not only does association with political and forensic controversies create prepossessions, but it also absorbs one's time and attention. Should we not have in legal science, just as we have in medical science, an Institute of Research, in which men of ability and learning, profoundly interested in their work, may be enabled to devote their entire time to the study of law, on its theoretical

as well as its technical side, with a view to its development and perfection? The establishment of such an institute, either independently or in connection with some university, might solve the problem of how to obtain that thorough, orderly and comprehensive disclosure of fundamental conditions which is essential to intelligent action.

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