

THE BEGINNING AND THE END OF LAW

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1. Habits or practices older than the human race, which later crystalized into customs having the force of law, are embedded in the statutes of every civilized state. When the nascent intellect of the primitive bush-man or cave-man had evolved from the brute instincts of his animal ancestors to the point where he could note and in some sort consider his surroundings, he found that his existence was greatly influenced by usages which were already very old. About him were not only swarms of bees, flocks of geese, herds of deer, packs of wolves, and bands of monkeys, but also groups of men uniting from time to time for common action in gangs or hordes in which the will of each was partially at least subordinated to the general will. He found not only birds pairing during the mating season and left, without interference from others of their kind, to build their own nests; and beasts of prey in pairs raising their young in exclusive dens; but also men and women, coupled in more or less permanent and exclusive sex relations, with their offspring in nest-huts or caves which they had fashioned or appropriated. These families and their shelters were often unmolested for considerable periods of time, for trespasses upon them might well bring down upon the evil-doer the vengeance not only of the persons directly injured, but also of the entire group of which they formed a part. Where each had something to lose to the like aggression, interference with the individual was apt to be resented as a common wrong. But savage murders, frequently accompanied by torture, and predatory outrages of all kinds committed by the stronger individuals and hordes upon the weaker, were common, and people did not die of old age, but inevitably succumbed to wild beast or savage man, to disease, to hunger, or to cold. So the most that could be said for the inherited usages that formed the early family and horde was that they, to some extent, mitigated the hardships of life, and that man was better off under them than if he had been entirely alone and unsupported in the struggle for existence.

2. The social forces which stimulated development from the primitive customs of savage man to the most advanced civilization of to-day may be tabulated as follows:

I. Life-preserving Activities:

1. Preserving the life of the individual:

- (a) connected with nutrition—food process;
- (b) connected with defense against (1) inanimate and (2) animate nature;

2. Preserving the life of the species:

- (a) reproduction,
- (b) care of offspring.

II. Life-mitigating Activities:

1. Moral—aiming at the good;
2. Aesthetic—aiming at the beautiful;
3. Intellectual—aiming at the true.

Society was first sought through self love, rather than through love of others. Its origin was not reciprocal benevolence, but reciprocal fear. In the primitive state in which man first found himself there was constant struggle, every man against his neighbor, whenever cupidity or passion had sufficiently roused him who had not to use violence against him who had. Now the first law of nature is the instinct of self-preservation, so that man soon felt the need of growing out of this state of insecurity and finding peace. Unlimited fear forced him to consent to a transfer of certain of his rights and powers to a central control or governing body, destined to define the honest and the just, and to make and enforce decrees for the protection of man's person and property, and the general betterment of his condition. Thus, private law is grounded on the need of the majority for protection against transgression on the part of the individual—it is the harmony of the majority of wills to avoid struggle. To maintain private law the state exists, and therewith public law. The state rests in a social-contract basis—is founded on agreement, the begetter of "natural law." The conception of natural law is an old one—of law founded in the very nature of man, common to all men, alike for all times and places, and universal and immutable in its validity. Slavery was *contra naturam*, for by nature all men are equally entitled to "life, liberty, and the pursuit of happiness." The principles of natural law are found in the dictates of right reason, which tells us whether man's actions conform to justice. There is a parallelism in the development of language and law. Experience teaches us that language is always derived from the generalization of a local dialect, and that national law first develops from the generalization of the customs or laws of a particular province. At the beginning, language had only enough words to express sensible objects, and law was active only in the confines of material facts; later there appeared the metaphor in language, and the law developed through symbols. The metaphor and symbol raised the mind from the simple perception of the object of sense to the conception of intellectual facts and abstract ideas. But this advance was not free from manifold opposed ramifications and periods of strongly pronounced decline, for the logic of the world's history is mixed with much that is illogical. Side by side with reason stands its opposite, and the greatness of history is attested simply by this, that in the final development reason triumphs. In Rome, private law was at first strict, ironclad, and cramped. Gradually it extended, becoming facile, general, supple, and equitable. And finally, after many fluctuations, it became human law, and proclaimed the principle that men, in accordance with natural law, are free and equal. History shows that law has often been imposed upon a people, even in conflict with the popular wish and customs—either by a con-

queror, or by a dominant class, or by a despotic ruler. Such law may, however, if found to fit the needs of the times and upon receiving the indorsement of public opinion, become right and natural law.

3. Law can never depend solely upon the physical power of the lawgiver who formulates it. Force is necessary to coerce those who might resist, but the rebelliously inclined must be only a minority, and the majority, including the strongest and the wisest, must be willing to support the law for some reason other than mere fear of penalties. This much at any rate is true, that some parts of the law would be completely denatured, if their sole sanction was punishment. Since, therefore, force is needed only exceptionally, and the community for the most part observes the law from its own choice, the law's main support must consist in some other element, *i. e.*, the consent of the majority, and this consent is a manifestation of the popular conscience, or public opinion. Respect for the law rests on the degree on which the law is felt to be adapted to satisfy the community's needs and interests, public and private. As the times and the public needs change, the popular conscience, too, alters its standpoint; and the law is right and just, and will have the support of the popular conscience or opinion, in the degree that it shows itself capable, by evolution and adaptation, of supplying the needs and vital forces of the individual and of society. The popular conscience is regarded as resting on voluntary contract implying a consent to the law—on the dogma of popular sovereignty and the principle that the state cannot abolish the reserved rights of the individual. Whatever is not subject to force does not become subject to the state. Acts, therefore, can be controlled, but neither opinions nor creeds. Founded by men, the state has no superior right, but exists solely for the good of its members. Absolutism, privilege, primogeniture, entailed estates, church interference in the state, whether founded on "divine right," or class domination, violate the law of nature—the essential rights of man—and are doomed to extinction. Human reason must supply the specific rules of right or natural law, and any institution of society not in accord with such law ought to be extirpated, even by revolution, if necessary. Obedience to right law must be enforced, because otherwise the state would fail in the very end for which it has been formed, and human society could not exist.

4. The end of law is the greatest good of all the people. Every sane community proposes the happiness of man as its object. Right law is the sum of those conditions which insure that the liberty of one man shall not interfere with the exercise of corresponding liberty by another man. Men having organized society by consent with the object of attaining ends not attainable by individual powers alone, the aim of law must be to remove all obstacles to men's pursuit of happiness and the development of their natural powers. The object of right law is to bring the conditions under which man exists as nearly as possible to a state of perfection. It has the mission of so distributing material possessions that they will be of the greatest service and benefit to humanity. It must adapt itself to a constantly advancing civilization and be so formed as to readily harmonize which the changing demands of progress,

with it must promote rather than hamper and oppress. Egoism is one of the greatest propelling forces of mankind, and in motion works wonders. It stimulates human activity, urges man to constant effort, sharpens his wits, and causes him to be unremitting in his search for new resources. Since altruistic intentions alone are too weak an impulse to invigorate human action, the legal order could not do anything more foolish than seek to uproot or even to combat egoism; for one of the most essential processes in history is this use of individual instincts to improve the situation of the whole. Man's will must not be undervalued; for only if it possesses an important place under the law can personality expand, and, through this development of individual personality, the full force of humanity's powers be made effective. But these concessions to individuality must stop far of that exaltation of the "superman" indorsed by Nietzsche and other German writers (who maintain that the first mission of law is to favor the expression of superior talent and give it a wide scope of activity; that a people is not great because of the happiness of the largest part of its constituent individuals, but only when it has men of genius who open up new avenues of endeavor, even though otherwise it is deep in misery; and that the superman should be encouraged to dominate the course of history, to order life and the world, and to employ violence according to the exigencies of his ideal and in favor of the objects worthy of attainment as he sees them, for their theories introduce something very like "divine right" in a new and aggravated form, and connote retrogression rather than progress. Bentham's basic maxim was that the test of right and wrong is the greatest happiness of the greatest number. Find out, said he, what rules are best adapted to secure the well being of the many, adopt these rules as laws, and a political and legal millennium is assured. He subjected the English system of jurisprudence to the test of expediency, insisting that all its provisions should be brought by legislation to conform to the wants of men and to the promotion of the greatest happiness, and made men see once more that law was made for man and not man for law. But the evil of a divorce between law and the life of a community recurs, and rules and distinctions survive long after they have ceased to have any value, if they ever had. Practical considerations are often forgotten or deliberately neglected to satisfy the requirements of theoretical philosophy or scholarship, and learned men has even been known to contend that "law is an object of pure science, and pure science is in no way concerned with the question of application or applicability." No state has perfect laws because no man, or set of men, has been able to discover and prepare a system of laws that will work "the greatest good of all the people," and it is reasonable to suppose that no man or set of men will ever be able to fully attain that high ideal. This, however, is no reason why we should not strive to approach it as nearly as possible.

5. Plato studied the laws of different nations, and said that Athens could never be happy and civilized while ignorant of the good and evil of the regulations of other countries; Aristotle collected notes on many constitutions, relied largely

on legislative comparison, and may be said to have founded the school that gives major importance to the comparison of laws; and in the two thousand years that have intervened since these great men lived no better way of approaching the subject has been devised. No community can expect anything but crude results without preparation. Many teachers, students and practitioners must become familiar with the world's methods of juristic thought—must familiarize themselves with what has been accomplished by other nations—if there is to be proper preparation for the coming years of legislative activity. The laws of each country must, of course, be worked out ultimately by its own thinkers to fit its own needs; but they should by all means first be equipped with a knowledge of the state of this branch of learning throughout the world. The following are some acid tests to which every proposed law may well be subjected before it is passed: 1. Has it, or will it receive, the consent of the majority? 2. Does it protect the present attainments of society? 3. Does it tend to further (a) social progress, (b) justice, (c) honesty, and (d) morality? 4. Is it equitable, simple and speedy in operation?