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THE EVOLUTION OF THE LAW*

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It may prove profitable, and certainly cannot be devoid of interest to lawyers, to trace the evolution of the law through the processes incidental to the administration of justice, and inherent in our institutions.

If we may fairly define our problem, the first steps shall have been taken towards its solution. What is law? Definitions abound, but in seeking the goal of the jurist, it is apparent that the broader subject must be circumscribed by the elimination of much that might be described as law.[1] Fundamentally, law is the principle that controls the operations of the materials and forces of which the universe is composed. It is omnipresent, perennial, and pervades all things that can affect the senses.

It is a conception of the uniform order of sequence, for example, the laws of motion, of growth, of gravity Law in that sense inheres in the nature of things and dominates the physical world. It is eternal, changeless, created "in the beginning", and is merely discovered, not made, by man. The uniformity is in the nature of things and there is no law outside of them to be consulted or obeyed. As physical beings we are subject to physical laws. In a similar sense we are governed by moral or spiritual laws, whether or not we are conscious of it. We find ourselves ever in the clutch of elemental laws that brook no disobedience and depend upon no human sanction.

But laws of that character are quite apart from the conception of law with which courts are concerned in their work, and about which lawyers contend in their daily grind in the ordinary administration of justice. If our statutory and evolved laws be sound, they must be consistent with the others mentioned, and, to a large extent, made by unseen hands and derived

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[1] Compare Carter, "Law, Its Origin, Growth and Function", pp. 9–25.

from imperceptible sources. It is in some such sense that the saying is true that we do not make laws, but merely discover them.

Passing the law of natural things, the sway of moral principle, and the axioms of experience which have the force of law, we approach in a practical way the consideration of law as enacted by statute, and as evolved by judicial reasoning from accepted postulates. Such laws are necessary for the disposition of concrete social conflicts and for the regulation of human action in an organized society The idea of law with which we now concern ourselves relates to the origin and application of the rules and regulations that govern the transactions and relations of men, formulated or accepted by constituted authority, and enforceable by established agencies. There are, indeed, laws that affect the lives, liberties, and properties of clients, and our purpose is to seek the sources of those laws and to find the foundations upon which they are erected. As expressed by a writer in the latest edition of the Encyclopedia Brittanica. "It is proposed to define law for the jurist as the sum of the influences that determine decisions in courts of justice. This will be found to satisfy the conditions expected of a working definition."[2] What are the influences that determine such decisions? And how are they found, developed and determined?

The motives, springs and purposes that underlie the law and actuate alike the legislator and the judge, are at the very threshold of such an inquiry Demosthenes, with a finality that approached revelation, thus described it.

"The design and object of all laws is to ascertain what is just, honorable and expedient, and, when that is discovered, it is proclaimed as a general ordinance equal and impartial to all. This is the origin of law, which, for various reasons, all are under obligation to obey, but especially so because all law is the invention and gift of heaven, the sentiment of wise men, the correction of every offense, and the general compact of the state, to live in conformity with which is the duty of every individual in society."

Proceeding from purposes of that exalted character, the law must be worked out by the jurist in an atmosphere that not only affects, but to a large extent, shapes his decisions. The great body of professional opinion, as well as public opinion in general, operates directly, albeit unconsciously, upon the mind of

[2] H. Goitein.

the judge in choosing the path he must pursue. The law journals largely are the organs of that opinion. Dissenting opinions are addressed primarily to the judgment of the profession, and whatever value they may possess is derived from the power of convinced minds to influence the thinking of the judges until a new opinion supplants the old. It is not very common, but sometimes a minority view ultimately becomes the controlling one.[3] It is this fact that gives vitality to the maxim that no question is ever settled until it is settled right.[4] Actuated by the purpose to find a just rule, animated by the desire for fair play, and affected by the pressure of the prevailing professional and public opinion, the judge is far from being free to impose upon the law his personal views or peculiar predilections. Yet the philosophies of the judges, the experiences upon which they depend for understanding and enlightenment, the individual social attitudes, are not entirely lost, but affect and color their interpretation of the influences that enter into the formation of judgments.

Over-emphasis may easily be placed on the social, political or economic views of judges. Conviction is a characteristic of every strong man. Without it no judge could worthily fulfill his function. Responsibility and study are apt to sober the most radical, as it is likely to liberalize the most rigidly conservative. If the judge has character and capacity for growth, if his tendency is towards self-improvement, little fear of his superficial predilections need be entertained.

Speaking of the Supreme Court Justices, a very able writer has said.

> "Of course a justice should be an outstanding lawyer in the ordinary, professional acceptance of the term, but that is the merest beginning. Once recognize the true nature of the judicial process in these constitutional cases, and the determining factors in the qualifications of a justice become his background, the range of his experience, and his ability to transcend his experience."[5]

And it must be remembered that the prevailing opinion in any state of society is influenced by history, and the views of judges vary as their knowledge of the background of the law varies. The law has been likened to a great pool gathered from the fountains of justice. Every legislative act and judicial

[3] *Terral* v. *Burke Construction Co.*, 252 U. S. 529, 21 A. L. R. 186.
[4] *Lexington Hydralic & Mfg. Co.* v. *Otts*, 119 Ky. 598.
[5] Felix Frankfurter, 36 Harvard Law Review, 917.

decision raises the level of that pool, and affects the quality and content of the whole, but it is equally true that the new legislation and the latest decisions are themselves affected by the fusion with the existing body of the law. So, the law, slowly evolved through the ages, is the fruit of many factors other than the mere will of the actors. The function of administering justice thus becomes an agency in the working out of principles, and it is impossible for it ever to become a mere instrumentality for the expression or enforcement of the personal will or wish of the judges, or of the legislators, or of both combined. And it can never become the manifestation even of a dominant desire or will, unless it possesses the permanence to enforce itself upon all the influences that enter finally into the formulation of the accepted postulates of justice. This thought is implicit in a statement of Judge Cooley

"There will never come a time when all our laws will be in the form of statutes, never a time when the judiciary law, which is evolved in, and constitutes the very act of, administering justice, will not form a part of our legal system. It is only a question at any given time how far it is necessary or expedient to transmute the judiciary law into statutory form.[6]

But even the enactment of well thought out statutes does not end the constructive work of the courts. Indeed, a study of the adaptation and interpretation of statutes and their effect upon the development of the law, will demonstrate that the work of the judges, although often aided by enactments, has been rather retarded by the necessity of assimilating a vast amount of ill-considered legislation. Perhaps many legislators, untrained in the law, are surprised, if not shocked, at the results accomplished by their work after it has passed through the refining process of judicial interpretation.

We may put aside, as foreign to our purpose, the simple cases in which the result is foreordained and which are disposed of as a matter of course without the necessity of pausing to re-examine the foundations upon which their determination rests. Such cases form the mass of judicial pronouncements, and seldom touch the field where divergence of opinion is likely. But the rare cases that offer opportunity for choice among several possibilities provide debatable territory, and furnish the real battlegrounds of the law. How do the Courts proceed to

[6] Cooley, Constitutional Limitations (6th Ed.), p. 64.

determine such cases? It need not be noted, of course, that all judges do not consciously proceed from one expedient to another, following a system of averages or alternatives, until a decisive formula is found. There can be no such thing as compartments in the law, where parts may be found to fit every need. But actually all judges are subject in some degree to the various decisive forces that underlie all law and operate on all having to do with its administration. Individual defects will be discovered. Some judges may be so committed to legal theories that decision for them is impossible unless the problem may be assigned to some definite doctrine established by authority, at least of some sort. Others may not be ingrained in the philosophy and history of the law, and stand ready to determine every decision from an individual sense of what immediate justice requires. There are two special types of critics that are always abroad in the land. One set asserts that the judges who dare to advance new doctrines, or to extend old ones, are rewriting the law and affecting, if not effacing its landmarks. Even Lord Bacon inveighed in some such vein. The other class of critics condemn the courts as archaic, oblivious to the demands of justice, and bewail that they are crucifying the rights of modern men upon the altar of some ancient outworn formula that may have been all right in its time, but can be serviceable no longer. These two types of judges and critics represent the falsehood of extremes, and accentuate the inherent difficulty in working out justice with due deference to new ideas and events, and with proper respect for time-honored precedents. Both types may be found in nearly every jurisdiction, and doubtless serve a useful purpose in keeping the institution alive to its duties, as well as aware of its difficulties. Yet it is easy to divine the chaos that would come if they were permitted permanently to control. The true principle will be found in picking and choosing wisely from the good that has been established, and assimilating it to the things that are found to bear the tests of truth. It is worthy of mention that eminent authority exists for the claim that intuitive judgment often prevails. Judge Hutchison observed that a judge, after canvassing all the available material and vainly cogitating thereon, permits his fancy to play a part, "and brooding over the cause, waits for the feeling, the 'hunch'—that intuitive flash of understanding that

makes the jump-spark connection between question and decision and at the point where the path is darkest for the judicial feet, sets its light along the way

In feeling or 'hunching' out his decisions, the judge acts not differently from but precisely as the lawyers do in working on their cases, with only this exception, that the lawyer, in having a predetermined destination in view, to win the law suit for his client—looks for and regards only those hunches which keep him in the path that he has chosen, while the judge, being merely on his way with a roving commission to find a just solution, will follow his hunch wherever it leads him. "

And Judge Hutchison adds

"I must premise that I speak now of the judgment or decision, the solution itself, as opposed to the apologia for that decision; the decree as opposed to the logomachy, the effusion of the judge by which that decree is explained or excused. The judge really decides by feeling and not by judgment, by hunching and not by ratiocination, such ratiocination appearing only in the opinion. The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case; and the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics. Accordingly, he passes in review all of the rules, principles, legal categories, and concepts 'which he may find useful, directly or by an analogy, so as to select from them those which in his opinion will justify his desired result' " [7]

"A century ago a great American judge, Chancellor Kent, in a personal letter explained his method of arriving at a decision." He first made himself 'master of the facts.' Then (he wrote) 'I saw where justice lay, and the moral sense decided the court half the time; I then sat down to search the authorities. I might once in a while be embarrassed by a technical rule, but *I almost always found principles suited to my view of the case.*' "[8]

Judge Cardozo formulated a fourfold division of the forces followed and the methods applied in the best judicial work.[9] These four methods he thus classified.

1. The method of philosophy.
2. The method of history, tradition and sociology.
3. The methods of sociology. The judge as a legislator.
4. Adherence to precedent. The subconscious element in the solution of social conflicts.

In his later work dealing with the growth of law, he referred to the classification he had adopted, and, notwithstanding some

[7] "The Judgment Intuitive; The Function of the 'Hunch' in Judicial Decisions", 14 Cornell Law Quarterly, 274.
[8] Law and the Modern Mind, by Jerome Frank.
[9] The Nature of the Judicial Process.

obvious overlapping, adhered to it as practically sufficient. He said.

"Our fourfold division separates the force of logic or analogy, which gives us the method of philosophy; the force of history, which gives us the historical method, or the method of evolution; and the force of justice, morals and social welfare, the *mores* of the day, with its outlet or expression in the method of sociology. No doubt there is ground for criticism when logic is represented as a method in opposition to the others. In reality, it is a tool that cannot be ignored by any of them. The thing that counts chiefly is the nature of the premises. We may take as our premise, some pre-established conception or principle or precedent, and work it up by an effort or pure reason to its ultimate development, the limit of its logic. We may supplement the conception or principle or precedent by reference to extrinsic sources, and apply the tool of our logic to the premise as thus modified or corrected. The difference between the function of logic in the one case and in the other is in reality a difference of emphasis. The tool is treated on the one hand as a sufficient instrument of growth, and on the other as an instrument to cooperate with others. The principle of division is a difference, not of kind, but of degree. With this reservation, the fourfold classification of methods has sufficient correspondence with realities to supply a basis of distinction. The judicial process will not be rationalized until these methods have been valued, their functions apportioned, their results appraised, until a standard has been established whereby choice may be directed to be such that the hope to rationalize it fully, at all events in our days, will have to be dismissed as futile. That is not a reason for refusing to do the best we can."[10]

The problem of the law is perpetual, and not soluble once for all. It arises with every new conflict of principle, albeit in a more complex form, or in a more complicated field. The effort to stabilize conduct and fix rights must not be allowed to hamper progress or to hamstring enterprise. The pool must not be permitted to become stagnant, or allowed to break its bounds. Neither the judicial nor the legislative mind can visualize in advance every variety of human action, or every phase of the conflict of interests, nor formulate with certainty a perfect rule to fit every exigency We must forever wait on experience, and bear the loss of that necessity On the checkerboard of events, all the moves cannot be foreseen. The eternal struggle of the law is to maintain certainty and yet to avoid static, to make advancement without producing violence or uncertainty Stability, without stagnation, and motion without destruction, are the horns of a dilemma between which the course of wisdom must be charted. The difficulty may not be denied, the struggle is insistent and inevitable, and constitutes the supreme task that vexes all judges. Any principle, to possess permanence, must

[10] Cardozo, The Growth of the Law, p. 62.

work only good. And even though good may appear in some situations to result from the operation of a rule, it may not do so under conditions more complex. A good illustration may be found in the history of the fellow-servant doctrine in damage cases growing out of the relationship of master and servant. In its origin it obtained wide acceptance as a fair and just rule. But as the conditions of its operation became more complicated, it encountered conflict with accepted conceptions of what was just, resulting first in its judicial modification, and finally in its legislative overthrow. The Supreme Court of the United States recently adverted to the subject in these words.

"Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are not uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which before the advent of automobile and rapid transit street railways would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."[11]

The changing circumstances in this changing world demand a vigilant study of the processes of justice and the operation of the rules formulated to promote it. And the study of adjustment is not avoided by the accumulated experience of the ages.

The problem of the lawyer is to predict the conclusion the court ought to reach, and to present the facts, arguments and authorities that tend to produce it. Indeed, a noted judge has declared that "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[12]

The definition is striking, but not entirely satisfactory, without many assumptions and numerous limitations. It tends to belittle the search for principle, supposed to permeate all things and transactions, and which ennobles and enriches the study and pursuit of the law. If it presupposes the presence of a principle, whose reasoned result on any given state of facts may be predicted, if the court itself be true to tradition, it may not be so far afield. But the theory of Judge Cooley and the older jurists that a decision upon a point arising in any given

[11] *Euclid* v. *Ambler Realty* Co., 272 U. S. 365.
[12] Holmes Collected Papers, p. 173.

case ought to be followed because it constitutes the *highest evidence* that we can have of the law applicable to that point,[13] is more consonant with our accepted conceptions. As evidence of the law, persuasive in every case, and conclusive when founded in sound reason and fortified by experience, the decisions of the Court afford a standard for the lawyer in his search for the intangible something that is understood to be the law. In one sense, although somewhat ironic in its suggestions, "A legal duty so called may be nothing but a prediction that if a man does or omits certain things, he will be made to suffer in this or that way by the judgment of a court", but in reality a legal duty is not so easily described, nor pendant upon a foundation so precarious. A legal right is one which the organized power of society may be employed to enforce and defend. But what will that power enforce or defend? Duty is determined by an innate and prevalent sense of fairness and right, or by a positive enactment springing from that source, and it depends upon the circumstances as well as the social attitude of the time.[14] Such duty, when sanctioned by the prevailing agencies of authority, will be enforced for the benefit of those to whom it is due. Undoubtedly there are social duties, moral duties, and legal duties, which have a higher sanctity than the mere supposition or expectation that a court will inflict certain compensation or suffering for a breach of them.

Edmund Burke wrote

> "For if there were not some principles of judgment as well as of sentiment common to all mankind, no hold could possibly be taken either on their reason or their passions sufficient to maintain the ordinary correspondence of life. It appears indeed to be generally acknowledged that with regard to truth and falsehood there is something fixed. We find people in their disputes continually appealing to certain tests and standards which are allowed on all sides, and are supposed to be established in our common nature."

If a court fails to act in favor of it, a legal right is not destroyed. It endures. It is the court, not the duty, that has failed. It is futile to predicate the existence of rights and duties upon the mere means designed to protect and promote them. If one means of protection fails, another will be found, if the right is still respected and the duty continues to be

[13] George Robertson, by Samuel M. Wilson, 4 Great American Lawyers, p. 398.

[14] *Taylor* v. *Westerfield*, 233 Ky. 619, 26 S. W. (2d) 557.

recognized. If the means of vindication are inadequate or feebly applied, the right itself may be impunged, but sound thinking will not surrender the substance because of a failure of the form designed for its preservation. New expedients will spring up spontaneously

The interest of the lawyer in the processes of the judges is a practical and continuing one. Naturally and necessarily the business of the lawyer is to win cases, and the impulse is to put forth the factors and the features of the case that seem to hold the greatest promise of achieving the result desired. That fact affords the very reason why the methods of judges must be appreciated by the lawyer. Mr. Choate said there were two kinds of lawyers—those that know the law, and those that know the judge. Mr. Tutt mentioned a third kind—those that know their fellow men. The lawyer must put himself in the position of the judge, and put forth the efforts that tend to produce in the mind of the judges the conviction the lawyer entertains. If there be a sound and controlling precedent, he need go no further than to show its applicability If one be cited against him perhaps it may be differentiated in its facts, or distinguished on principle. If he chances to be in direct opposition to an authority which must be overthrown in order that he may prevail, the sole hope is in demonstrating its fallacy It is then that he subjects it to all the tests of philosophy, history tradition, social justice and the tendency of it to conflict with other and more compelling precedents. It will not do merely to criticise it. It is essential that some substantial reason be advanced for its disregard. Here is the forum for the intellectual effort that distinguishes the real lawyer. Precedents are modified, and even overthrown, under the searching analysis and careful criticism of lawyers. It may be an infrequent thing, but the list of overruled cases in many states is an imposing one. If a case does not accord with the dictates of reason and justice, it will be subject to assault until it is brought into a harmonious relation with the system that must work justly, in order that it may endure.[15]

The variety of circumstances under which human conduct must be judged, and the multitude of cases that must arise,

[15] *Hayes* v. *Providence Citizens Bank & Trust Co.*, 218 Ky. 28, 290 S. W. 1028; *Williams* v. *Dearborn Truck Co.*, 218 Ky. 271, 291 S. W. 388.

require the skillful work of lawyers and judges to keep and maintain the proper adjustment with realities. We must have carpenters and machanics however perfect become tools and machinery The bar serves the bench and unless good work is done by the lawyers, but little may be expected of the judges. Webster's arguments at the bar were the forerunners of Marshall's opinions. The work is ceaseless as time. Models may be found, guides may be fashioned, but the burden of work remains. The multiplication of books does not lessen the obligations or burdens of the bench and bar—rather the reverse.

After all the factors of reason, logic, philosophy, experience, social aims and legal standards have served their offices, the final responsibility rests upon those who carry on, the perpetuity of the system depends upon the success they may attain. Our system of law at last rests upon the tacit understanding that the verdict of the jury and the judgment of the court constitute the law, because under them one man's property is taken and bestowed upon another, and men themselves are taken from their families and fellows and confined in durance vile. These judgments must be founded upon that innate sense of justice which is the intuitive gift of the great masters of our law.

Theorists may speculate, and philosophers may dispute, but in practical life it is the operation of principles upon people and their possessions that determine ultimately their justice and fix their durability

"Justice, sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness and the improvement and progress of our race."

"And whoever labors on this edifice, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the heavens, connects himself in name, and fame, and character, with that which is and must be as durable as the frame of human society."[16]

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[16] Daniel Webster, in his tribute to Mr. Justice Story.