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"Law is the perfection of human reason"

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THE PROGRESSIVENESS OF LAW

The desire for change is today everywhere manifest. The willingness to change, is quite commonly regarded as a virtue. Conservatism, opposition to change, the clinging to manners and ideas and institutions, of good standing for even only a few generations, is set down by popular judgment as a sign of incompetence if not of downright failure. Nothing is feared more than the label archaic, out of date, passe. The term "modern" is made to qualify not only what is more recent and mechanically more efficient, which is quite legitimate, but also to connote something more true and beneficial which, in matters related to social theory, organization or general welfare, is often quite absurd. So it is with the terms "progress" and "progressive," which are repeated uncritically on every side.

An instance of this tendency is the popular reaction to the recent appointment of a new Supreme Justice. Much, it is true, was mentioned, and rightly so, about his splendid qualifications,—his extraordinary knowledge of the law, naturally, his general scholarly attainments, his appreciation of classical literature, his simple habits of life and the integrity of his character. But the outstanding note in a journal that pretends to present a weekly synthesis of public opinion, the main reason listed for the rejoicing over his appoint-

ment was that, like his predecessor in office, he looked upon the law as a progressive science, as something that should be made to keep pace with the changing conditions of social life.

Of course no thoughtful person missed the implications of the praise bestowed on this gentleman by reason of his progressive or liberal views on the theory of law. By contrast, other members of the judiciary suffered in popular esteem, it would seem, for being more inclined to stress the stable elements in law, and to be rather chary of permitting legal theory to follow in the wake of the psychological, or sociological opinions that so rapidly succeed one another in the modern life. Conservatism, even on the Supreme Bench, seems to be irksome to the popular mood.

But however that may be, I have no mind to prejudice either the liberal or the conservative view. It is rather my purpose here to inquire briefly into the reasons for the former's obviously greater popularity, and then to consider the intriguing question of the law's stability with its apparently contradictory capacity simultaneously to undergo change and make progress.

The term "liberal" which, primarily conveys the notion of freedom from restraint imposed by others, as in the phrase, bond and free, has come also to mean a man who voluntarily frees himself from restraints which others feel bound to respect. The reason for this difference of tendency derives no doubt from difference of judgment, from conflicting opinions, convictions and beliefs,—in a word, the reason is a philosophical one. Liberalism, broadly speaking, corresponds to a philosophy of empiricism, while conservatism conforms more nearly to a philosophy that may rightly be called intellectualism.

Now the latter type is rarely popular, simply because the popular mind is unable to appreciate its true worth. Ab-

stract principles, however well grounded in the order of external things, and however securely anchored in sound logic, leaves John Public cold. He tells you frankly, and for the most part truly, that he cannot see that sort of thing. This of course does not mean that he cannot be made to see it, but since the explanation would make large demands on his patience, and frequently also on his good will, he is predisposed both to avoid the explanation and to reject the conclusions.

When on the other hand he finds a leader who eschews metaphysics, who has little faith in logic—which means small trust in intellect—who grows impatient with the established order of things, and the principles upon which it has been established, as soon as they begin to irritate a certain element of public opinion, and who consequently tends to call them in question or set them aside for utilitarian reasons,—then he has found a man according to his own heart, one to whom he believes he may look for escape from legal restraints heretofore considered necessary for the common weal. All of which evidently simmers down to this: In one case he finds a man who believes that there are some things in human nature and hence in human relations that never change, and so also some things in law that may never change; and on the other, a man who is convinced that human nature is really nothing more than a given set of human views or ideas, and that consequently law must continue to evolve as these ideas evolve.

Must we then admit that the alternative lies between a legal theory which subjects every principle to the necessity of change, and a legal theory which exempts all principles from the vicissitudes of variation? Or is there a *via media* which is able to maintain stability with change and progress? The history of jurisprudence reveals three distinct types of theory. I shall consider them in the reverse order

of their chronological appearance, and from this viewpoint of their attitude on the question of stability and change in law.

The first view grows out of the attempt to apply the methods of positive science to materials of the moral and social order. These materials, it is said, like the materials of physics and geology, lie about us in the open field of observation. As facts they do not differ from the facts of any other science. What are these facts? They are simply ways of acting, and as such, have been adjudged good, bad or indifferent at various times and on various levels of civilization. As moral facts they are characterized by a sense of duty or feeling of obligation, a desire for the good, which attracts us, but which cannot be obtained without effort or self-restraint. But the only desirable good for the individual is held to be society. This is true because society is necessary for his existence. And the individual ought to desire it, because society is superior to him, and he is dependent upon it for "all the intellectual goods that constitute civilization." [1]

Professor Cox holds that in a pluralistic world "we may be certain that there cannot be any universal rules of conduct, but that conduct will always have to be adapted to the special conditions under which men live." [2] Ethics as a science he defines as "ordered knowledge of natural phenomena and of the relations between them." [3] He insists that there can be no questions in any scientific study of the normative, no search for the "Why," no effort to determine an "Ought." One thing only should be sought, the "How" of human actions. If therefore Ethics,—and the same is held of law,—aims to become a science, it must cast off all metaphysical (i. e., philosophical) prepossessions, and emerge upon the higher level of positivism.

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1 *Cf. Some Types of Recent Ethical Theory,* by C. Miltner, Vol I, PROCEEDINGS OF AMER. CATH. PHIL. ASS'N., pp. 23-24.

2 COX, THE PUBLIC CONSCIENCE, p. 20.

3 *Op. cit. supra* note 2, at p. 17.

From this it is clear that positivistic jurisprudence, to quote a French writer, "has resolved to banish the very notion of nature, and consequently of natural right, as a stranger to science. It no longer wishes to know anything but facts—and human nature is not a fact; only the individual, concrete, and social man is perceived by the senses . . . and since there is a question of normative studies, it is still to facts—normative facts, this time—that one should go to find the true rule of conduct comformable to science. Thus we have, in place of Ethics, the 'science of customs,' then the 'science of moral facts,' or ethology; and among the sociological and positivistic jurists, the science of 'juridic facts,' or of a norm reduced to the simple fact of a reaction of the popular conscience." [4]

In other words, laws follow upon and are determined by the social or moral facts. Facts (that is, moral actions) are not determined by law. Whatever at any given time is approved by popular custom or convention, by popular conscience, the *mores* of the moment, must be taken as the norm of right conduct. "Formerly," says Vander Eycken, "men looked upon law as the product of the conscious will of the legislator. Today they see in it a natural force. . . . The same expression [Natural Law] ought to mean today that law springs from the relations of fact which exist between things. Like those relations themselves, natural law is in perpetual travail. It is no longer in texts or in systems derived from reason that we must look for the source of law; it is in social utility, in the necessity that certain consequences shall be attached to given hypotheses . . ." [5]

Obviously, this is the Ethics of Pragmatism, in which truth and justice, and hence also law and right, are never anything absolute and universal, but relative, contingent upon the factual relations of things which are in "perpetual trav-

4 J. Dabin, *La Notion du Droit Naturel,* in REVUE NEO-SCHOLASTIQUE (1928).
5 Apud CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, p. 121.

ail." In this theory then, which represents one extreme in juristic thought, there is no element in the law which is absolutely and universally stable and immutable. As Justice Holmes once wrote: "We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it. . . ."[6] True, the defenders of this position caution against too sudden or ill-advised changes in the law, for they of course recognize that if anyone is going to have any confidence in or respect for legal decisions, the law must be allowed some degree of stability. But the fact remains that the theory as such rules out all essential and immutable relations between things and therefore all possibility of any rule of law being absolutely and immutably right and just,—except of course their own absolute and universal rule that none can be absolutely and immutably true, an assertion which reveals the inherent contradictoriness of their position.

The second theory, the so-called *Naturrecht* of the Germans, or the *Ecole du Droit Naturel* of the French, can best be described as a 17th and 18th century caricature of the classical or ancient and mediaeval Natural Law theory. In the classical theory Natural Law fitted in with the general structure of morality, in which field also it found its fullest and richest development. But with the writers of the 17th and 18th centuries it was shifted over to the specifically juridical level. Natural Law was no longer looked to as a source of moral rules and standards for human conduct, but instead, it was set up simply as a model for positive juridical institutions, so that what previously had been the Natural Right of the moralists became simply the Ideal Right of the jurists.

Instead of finding in the Natural Law certain first principles of conduct, they "pretended to find in it a complete sys-

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[6] *Op. cit. supra* note 5, at p. 118.

tem of adequate rules, a type or model perfected even in every detail, a superior right, which it was only necessary to reduce to form and to translate into juridical language." [7] "Each institution thus has its prototype, of which it is only the more or less crude reproduction. The role of legislator consists therefore of removing little by little the difference between copy and model, of modifying, rearranging, correcting the copy, as a workman who reproduces in the marble the work of the artist." [8]

Nature therefore in this theory is viewed as presenting a fixed and unchangeable and universal plan which the legislator must ever keep before his mind as an ideal, and which in all his law making he must constantly strive to copy as closely as possible. The legislator need but hold the mirror up to nature in order to behold the ideal manner in which men should act, and then try to transform as many as possible of these ideals into positive laws. For man is but a part of nature, and nature, including human nature, is utterly immutable. And since nature does not change, reason which subjects nature to her scrutiny, cannot go astray.

The obvious difficulty with this view, aside from its complete lack of any confirmation by historical facts, is that it fails utterly to take into account the variable elements in human nature, and the contingency of a large number of relations in the moral and juridical order. "Permanent and universal truths or principles in the true sense of the word are one thing, the manifold and variable considerations of utility, or propriety, of timeliness which must be reckoned with in legislation are another. Who ever confuses these two aspects of the problem evidently falls into error." [9]

And this is precisely the error into which the authors of the view under discussion have fallen. Nature in the ab-

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[7] J. Dabin, *op. cit. supra* note 4, at p. 431.

[8] Apud J. Dabin, *op. cit. supra* note 4, quoted from OUDOT, PREMIERS ESSAIS DE PHILOSOPHIE DU DROIT.

[9] Apud J. Dabin, *op. cit. supra* note 4, at p. 432 quoted from C. Bendant.

stract, and hence as something universal and immutable, is taken as the exemplar of all human institutions, and as portraying the ideal of all the rules and regulations for human nature in the concrete. Thus from the positivistic and pragmatic view which excludes all real stability, this theory goes to the opposite extreme, and excludes all variability. Such a conception of natural law, I repeat, is but a caricature of the classical conception of it, and does not provide a basis for that progress and change which actual human life renders both rational and necessary.

The answer to the old Greek query: How reconcile the changing with the permanent? finds its most consistent formulation, it seems to me, in the speculative as in the practical order, in the classical conception of the Natural Law as held by the Greeks, adopted by the Romans, and developed by mediaeval social philosophers. Early Greek speculation found this problem an extremely baffling one. The Eleatics tried to solve it simply by declaring change illusory. For them, All is One and One is All, existing without change or variation. The later Ionians, on the contrary, denied all stability, and held that the only constant in the universe was the constancy of universal change itself. With Socrates, the only permanent reality lay in the depths of the mind, all else being subject to change and hence immune from exact analysis. Plato found stability only in his fanciful World of Ideas existing apart from the concrete world of sense which, being ever in the throes of becoming, offered no possibility of scientific knowledge. Aristotle was really the first among the Greeks to distinguish clearly between the stable and the permanent elements in reality. And this we find in his conception of the essential duality of the real.

In the ultimate analysis, all created reality is reducible, not to a number simply of minute individuals, but to two coefficient realities each needing the other in order to the

existence of a single complete thing. Thus things are actual, but these actualities include many potentialities capable of perfection through change. The actual man remaining the same is, however, the subject of changes, such as growth in body and development in mind and will. There are substances, but these remaining the same, are endowed with numerous qualities which may successively appear and disappear. Or again, there are substances, and though they do undergo such transformations as to become specifically different, there is necessarily a permanent substratum involved, for otherwise, contrary to all evidence, the reversal of the component elements to their original status would imply both annihilation and creation *ex nihilo.*

The specific natures of things, their essences, therefore, are what they are, universally and immutably. A man either is a man or not a man. A tree is either a tree or not a tree,—and so for each and every individual thing. This fixity of essences in the ontological order, in the order of real being, necessarily gives rise to certain fixed and fundamental and immutable relations among things. And these relations, perceived by a knowing mind, spontaneously give rise to certain fixed and universal and unchangeable logical principles or laws of thought, such, for example as that a thing cannot be and not be at the same time, or that nothing can be without a sufficient cause. Thus the edifice of human knowledge is erected on the firm and objective foundation of the natural order. Truth becomes a relationship between the mind and reality as it is. The necessary element in truth is not contributed by the mind, but discovered by it in the real objects of its investigations. And this applies as well to moral truths, to laws, as to speculative truths, to pure science. Thus the primary principles of morality and of jurisprudence spring also from the relations of things that are,—of man to God, to society or the state, to his fellowmen, of his powers to their respective objects. Man is essentially re-

lated to God as effect to cause, as subject to ruler, as possession to possessor; he is essentially related to society as moral and integral part to moral and integral whole, as moral and political end to moral and political means; to his fellowmen as to one specifically his equal. These and other essential relationships of man and of man's powers to the universe fix his place in it, determine how he should rightly deal with it, point out, in other words, the basic principles or laws upon which he may and ought to rear the superstructure of his moral and juridical order, and the permanent and stable element in the laws that should govern his conduct.

But this is only one side of the medal. For not all of the relationships involved in human conduct are essential relationships. Many, most even, are contingent, subject to considerations of circumstances of time and place and person and thing. "In the domain of morals," writes M. de Wulf, "and of social justice, the place accorded to change (of course change for the better) is much more important. The concern here is not with increase of moral or social judgments. . . . but real transformation, and adaptation, is involved, and the underlying reason for this is found in human liberty. Aside from the immutable principles (the point of departure and the standard of morality), scholasticism recognizes that there are applications of these principles more or less distinct and more or less variable. These principles govern the majority of cases but they admit of exceptions. Reason has to weigh the value of all the circumstances which envelop a concrete and practical application of moral law. The more numerous these circumstances become, the greater is the elasticity of the law." [10] And again in another lucid passage he says: "The law of nature, or of natural right, is that totality of regulations which rests upon the fundamental perfection of the human being; this

[10] DE WULF, PHILOSOPHY AND CIVILIZATION IN THE MIDDLE AGES, p. 269.

does not change and cannot change, because it abides in the mutual relationship between the essence of God and His creatures. Thomistic philosophy sums it all up in this formula: The natural law is a participation in the eternal law. . . . It follows, then, that each human individual bears in himself a totality of rights and of duties, which are the expression of his nature,—that is to say, of his status as a reasonable being. It also follows that the natural precepts of this law, the principles of social order, are the same for all men and for all time, and that to destroy them would mean the destruction of man himself. . . . The human law, indeed, draws its strength, its raison d'etre, only from natural law,—of which it is the echo, so to speak, the lengthening out, the fulfilling. . . . There are applications which *vary*, according to the concrete circumstances peculiar to each state. It rests with the government of particular groups, to determine these; and this is done under the form of positive law. . . . Thus, securely linked with the law of nature, all human law is bound up with reason, which is the basis of being human." [11]

Thus law, like man himself, is composed of a two-fold element, the immutable and the necessary, which provides a firm and lasting foundation for the social order everywhere, and the variable and the contingent, which allows for all the progress or change for the better that the constantly varying situations in social life render necessary and expedient. When law is considered in its natural source and fountain-head, it is seen to be fixed and unchangeable. When it is viewed in its application to contingent subjects, it is variable. "You cannot without the combination of these two opposite extremes conceive of law as it exists in human society. You have the right, e. g., to be obeyed by your son, served by the workman you have engaged, paid by your debtor. Now each of these rights . . .

[11] *Op. cit. supra* note 10, at p. 259.

arises from the conception of an eternal and unchangeable order, and is incarnated in a variable and contingent fact. Every son should depend upon his father, every workman upon him who pays his wages, every loan should be returned to him who has made it. Here are three ideas and universal principles of order which are rooted in the very nature of things, i. e., of father, of son, and of workman. Here are principles that are absolutely, everywhere and always true. But that such a one should be your son, or your servant or your debtor because you have loaned him money,—these are purely accidental and hypothetical facts; all might have been otherwise. And still, without these three facts, the three ideas of order just mentioned would subsist indestructible, because they are essential and necessary, but your three rights as father, employer and creditor would not exist at all. . . . Without absolute truth, right cannot exist, and without historical truth it cannot be yours. . . . When you have proved that certain rights belong to man by reason of his very nature, then presupposing that fact, you apply to each individual of the human race all the rights which pertain to the same nature. But when a right may be called in doubt, it is always necessary that you establish in your favor the value of two truths . . . the truth drawn from the essence of things which manifest order, and the truth of the fact which *incarnates* that order in reality." [12]

Thus the Scholastic theory of jurisprudence avoids at once the confusion and the uncertainties of Positivism and the rigidity of the rival natural law theory. It provides equally well for the equally necessary stable and variable elements in law, equally well for both conservatism and for progress. It can in all consistency extend a welcome to the new without irreverence for the old.

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[12] TARAPELLI, DE L'ORIGINE DU POUVOIR (French tr.), pp. 27-29.