Law: Nature, Source and Classification

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LAW

NATURE, SOURCE AND CLASSIFICATION

Lecture delivered by Dean Max Schoetz, Jr., of Marquette College of Law to The Citizenship Study Club, a Woman's Organization of Milwaukee.

A few months since I received from the officers of this club a request that I give a course of ten lectures on legal topics. My appreciation of this honor was such as to tempt me in spite of many engagements to accept the privilege.

The subject matter of the lectures being left to my judgment I have been not a little embarrassed in determining the character and scope of this brief course.

The object of lectures upon the law may be two-fold. First, with the primary view of imparting instruction. Second, to awaken and stimulate a real interest—to set the hearer thinking—to inspire enthusiasm in the study of law to the end that the hearer may be incited afterwards to pursue the subject upon his own motion. In the limited time allotted I have decided to adopt the latter course and to open the door so to speak to that vast field we designate as Law, and then to dwell particularly upon such subjects in the Law as will be of special interest to this club.

The importance of legal study cannot be overestimated. Sir William Blackstone in his introduction to his famous commentaries states that "the science of law should in some degree be the study of every free citizen." If this was true in his day and generation, how much more occasion is there for women in this country, and at this time, to seek some knowledge of the Law. Everywhere, and on every hand, women's rights are extended, so much so that women today have been given rights equal to those of men. They have been, so to speak, raised to the status of free citizens; that this occasion is being recognized by the women, is evidenced by the fact that in every Law School of this country a growing proportion of the student body is made up of women, who are taking up the law courses with such enthusiasm and strenuous application that the male student body is made to work all the harder in order to keep up with them.

My first lecture will be devoted to a discussion of Law in general. What do I mean by the expression "Law"? Simple
as it seems, this is a most important inquiry. It lies at the threshold—it is the very foundation of all legal studies scientifically conducted.

What is meant by "Law" will be made more clear by first stating negatively what is not meant. By the phrase "Law" is not meant the moral law, on the contrary I mean to exclude it so far as moral law stands distinguished from Civil or Municipal Law.

As soon as the development of man's intellect enables him to distinguish right from wrong, he inevitably comes under the sway of what is termed "Moral Law," and thenceforth it is impossible for him to do any act, however momentous or minute having a moral quality of which that Law does not take cognizance. Conscience is a universal judge sitting in judgment upon every act and every omission partaking of a moral quality to condemn or to approve.

Much confusion arises from failure to distinguish between what is called moral law and technical or positive law. If a rule of conduct is merely moral, either in the sense of being right according to generally accepted notions of what constitutes virtue or goodness, or because it is in harmony with the natural or revealed law, it differs from actual or positive law in that the power of the state cannot be appealed to in case it is disregarded. The phrases, law of nature, law of God, divine law, law of reason or right reason, natural justice and natural equity are sometimes used, but these phrases are employed to describe those rules or precepts which meet with the general approval of mankind, because they satisfy what we call the conscience or moral sense. All laws are either human or divine according as they have man or God for their author. Divine laws are of two kinds: Natural Law and Revealed Law. Natural Law or the Law of nature is the rule of human action prescribed by the Creator and discernible by the light of reason, or as it has been sometimes defined natural law is a rule which so necessarily agrees with nature and state of man, that without observing its maxims the peace and happiness of society cannot be preserved. Revealed law on the other hand is the law of nature imparted by God Himself. As heretofore stated we shall not enter into any discussion of this phase of the law. We are concerned only with the law in its technical or positive sense—the law of the courts and lawyers.
By the phrase "The Law" I do not mean to include what may be called the science of politics or government although this also stands closely related to law and in many points in direct contrast with it. Strictly speaking, the science of politics or of government falls within the domain of the statesmen or legislature.

By "Law" we mean what the Great Charter calls the law of the land—the law of the land as it actually exists in distinction from what in the view of the law reformer or of the legislature or of the jurist it is conceived or believed it ought to be. The work of consciously judging the law from what it is to what it ought to be is the work of the legislator.

One might think it were easy to define law. Whoever has studied this subject feels an overpowering sense of its difficulties—difficulties which seem to be beyond the reach of the most enlightened and trained intellects, and to overwhelm them with a consciousness of their own insufficiency. Volumes have been written upon this precise subject but no definition has as yet been formulated which is at once comprehensive and accurate.

As the student or lawyer has to deal with it, "Law" is concerned only with legal rights and by "legal rights" are meant only such rights as are recognized and enforced by the state. For all purposes, therefore, save that of strictly philosophical inquiry, the "law" may be taken to be the sum of rules administered by courts of justice, or to use the words of Professor Thayer of Harvard Law School, by "law" we mean "a rule or standard which it is the duty of a judicial tribunal to apply and enforce." Professor Holland defined "law" as "a general rule of external human action, enforced by a sovereign political authority." Blackstone's definition of "law" as "a rule of action prescribed by the supreme power of a state commanding what is right and forbidding what is wrong" is familiar. There are numerous other definitions, but as said by Professor Woodruff of Cornell these definitions obviously refer only to Municipal Law, which regulates the intercourse of a state with its subjects and the intercourse of those subjects with each other.

The thing to remember is that coercion by the state is the essential quality of law distinguishing it from morality or ethics. Nothing is a legal right, unless it implies a capacity residing in one person of controlling, with the assent and assistance of the
state, the actions of others; and that which gives validity, or at least effect if not existence to a legal right, is in every case the force which is lent to it by the state. Duty is the correlative of right, and duty in a legal sense implies a sanction which is the function of the judicial tribunals to apply and enforce. Whatever rights and duties they thus recognize and enforce are legal rights and duties and for practical purposes none others fall within the domain of law so far as lawyers and courts are concerned. A moral right, if disregarded, will be viewed with public censure or disapprobation but that is all; a legal right, however, if disregarded will be enforced by the public will of the organized society which is called "the state."

From the distinctions drawn we must not understand that the law in its technical sense has no ethical or moral basis. It is largely the reflection of popular convictions, not only of what appears morally just and proper but of what seems reasonable, convenient and expedient in view of circumstances of climate, habit, occupation and surroundings. The positive law, however, does not define and enforce all moral duties, both because they are often very difficult to ascertain and because of the practical impossibility of their enforcement by state authority. Thus, the moral law requires us to be charitable, the positive or municipal law does not; the moral law demands that he who promises shall perform, but the municipal law enforces only such promises as are based upon a consideration and thus I might illustrate the distinguishing elements.

We may, therefore, say for our purpose "Law" is a rule of civil conduct prescribed and enforced by the supreme power in a state regulating the intercourse of the state with its inhabitants, and of those inhabitants with each other.

Law in this sense is either international or municipal. International Law is described as law only by courtesy, since the rights with which it is concerned cannot properly be described as legal. It has sometimes been denied to be positive law at all, because there is no international tribunal to which a nation may appeal if its rights are invaded by another. This may be all changed with the establishment of the League of Nations. Municipal law, on the other hand, is not prescribed by the common consent of nations, but by the supreme power in a particular state or nation. It is without binding force outside its territorial limits except so far
as other states or nations see fit in exceptional cases to recognize and apply it.

Considered with reference to its sources, the law as thus defined falls into two general classes: the written or statute law, and the unwritten or common law. The use of the terms written and unwritten to describe the two classes of the law is, however, more or less inaccurate, while it is probably true that at one period the common law was actually unwritten, since the time of the yearbooks (1292) the common law administered by the courts has been to a greater or less extent written law. The written or statute law has its origin in legislative enactments and with us consists of (1) constitution, (2) statutes, (3) treaties. The unwritten or common law, on the other hand, has its origin in ancient customs, expressive of legal rights, which have been transmitted into positive law by decisions of courts of justice. This law—the common law—was transplanted in the United States by the English colonists. Custom was the earliest form of law making, and a large share of the law which governs us today had its origin in usage, or the general and long continued observance of a certain course of conduct among the English. The customs out of which the common law originated were founded largely in reasons of expediency and convenience, and in popular conceptions of justice and moral and religious truth and propriety. Originally enforced by public opinion or private vengeance, the state finally by its judges recognized these customs and assumed them to be law, and they thus acquired the free or positive law, the same as statutes or express acts of the legislature.

The Wisconsin Constitution provides that the common law of England up to the time of the revolution, except in so far as the same has not been changed by the legislature of Wisconsin, shall be the law of this state.

The process of finding out what is meant by the term “law” would be incomplete unless we also marked out what is meant by the word “jurisprudence.” Law, as I have shown, is the collective and appropriate name for the entire body or system of rules, regulations, principles and enactments which are recognized and protected by the state and which the state will compulsorily enforce when required. Jurisprudence is concerned with the whole body of the law and signifies the science of law, or the scientific knowledge of jural relations and the legal principles, doctrines and rules which govern such relation.
By the phrase "The Law" I have referred always to the English and American system of law as distinguished from all other legal systems, and particularly from the Roman or Civil Law. It is a most remarkable fact that if one casts his eyes over the map of the enlightened world he will find but two systems of law or jurisprudence—the one of England, the other of Rome. The legal systems of the nations of the continent of Europe and of the South American States are based upon the Roman Law; but the Roman Law never obtained controlling authority in or among any people who speak the tongue of England. None of the great nations founded on the continent of Western Europe, after the fall of the Roman Empire, has constructed an independent legal system of its own. France, Italy, Austria, Germany, Holland, and Spain have every one of them adopted the Roman Law as a very general or common law and have only departed from it so far as particular occasions might require. Every gap not filled up by special legislation or special recognized custom has been supplied from the Roman Law and even modern codes to a very large extent only contain the ideas of the Corpus Juris in the twentieth century dress.

From the storm floods that made wreck of the Roman Empire there emerged defaced, but not broken, the solid fabric of Roman Law not by any command or ordinances of princes but by the inherent powers of its name and traditions. The Roman Law rose again to supremacy among the ruins of Roman dominion and seemed for a time supreme in the civilized world.

In only one corner of Europe it failed, this was in England where the Roman Law was unobserved and despised and a home-grown stock of laws and a home-grown type of legal institutions sprang up. Roman conceptions, Roman classification, the Roman understanding of legal reason and authority found no place in England, and it was there in England that the common law which was planted in this country by the colonists began slowly to be formulated. This common law of England is the basis of our law in America. The existing body of the English common law has been mainly the work of judges and lawyers extending in almost unbroken reach through several hundred years. It is not the work of any single brain. It is not the product of any determinate number of minds but it has been the slow work of ages constantly growing and ever changing. The English com-
mon law, therefore, in the shape in which we have it is thus essentially a growth, and of historical development.

These fundamental principles which we call the English Common Law have been inherited or adopted in this country and we have in our constitutions, federal and state, placed them beyond the range of legislative power, beyond the courts, beyond Congress, beyond the states, thus giving them a scope, a legal security, a solidity, theoretically at least, greater than they have in England.