Law as a Portal to Philosophy

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Plato’s observation that all philosophy begins in “wonder” has been illustrated from many fields in which some convenient rule of practice was found to involve the intellectual irritations of self-contradiction. Every science is, in its way, an enterprise to overcome such contradictions in the expression of common experience, and the philosopher is but the scientist pursuing such enterprise to the end. As F. H. Bradley put it, in his famous aphorism, “Metaphysics is just an unusually obstinate attempt to think consistently”.

In mathematics or in biology the spring of such far-reaching effort of the mind has often been found. Those in our time whose philosophical stimulant was provided by Henri Bergson may scarcely recognize those of an earlier period who owed all to Kant, and yet the identity is much deeper than the contrast. Least of all can many a Kantian, whose gateway was mathematics, or many a Bergsonian whose gateway was biology, discern his own intellectual kinship with a Scholastic such as Abelard, who moved towards the same goal by the route of the theologian. Yet the common reproach against Scholasticism, that it meant the denial of Reason, is the exact inverse of the truth: for it was in the effort to rationalize the inheritance of religious experience that the work of the Schoolmen began, and it was the opening of a now sadly familiar conflict when St. Bernard the Mystic shrieked his denunciation of Abelard the Rationalist.

In this paper I mean to discuss and to illustrate the manner in which legal studies have served for some as philosophical introduction. St. Paul said of the Law that it had been a school-master to guide pupils to the Christian Faith. Likewise, in centuries when few other such schools were yet available, it served as invaluable “propaedeutic” for the philosopher.
I

In A.D. 529 the Emperor Justinian, by decree, closed the schools of pagan philosophy. It was the sort of decree which might well be issued by a ruler so militant for orthodox Dogma; the Emperor who would wage such relentless war on Montanists and Arians, who would deal so sternly with crypto-pagans of his court at Constantinople as to produce among them at least a scrupulous outward conformity, and who would prosecute such robust evangelism in Asia Minor as could add to his missionary record the forcible baptism of no fewer than 70,000 "heathen". What chance had the free thought of a Greek philosophic teacher to remain free under such a regime as his?

Yet the same year which saw the issue of the edict closing the philosophic schools saw likewise promulgation by the same ruler of a legal codex through which philosophic thought was sure to be stimulated. During the five centuries that had elapsed since Augustus inaugurated the Empire, a vast heterogeneous mass of imperial decrees had governed Roman life, and many an Emperor had either gratified his personal caprice or served his immediate interests by a decision which took no account of the decisions of a predecessor. Roman jurists, advising clients in a difficulty, and bound to consider precedents for the problem submitted to them, might well be at their wits' end to interpret these ruling cases as illustrative of a single principle. Often indeed there was no single principle, and the search for it could but make confusion worse confounded. On the other hand, not even the frequency of exceptions could hide the fact that a guiding thread of reason ran through those centuries of legal evolution. Even the Emperors' caprices were but occasional, and a precious heritage had come down from five hundred years of adjudged cases — among a race which, as Anatole France once remarked, has produced supreme constructive work in two departments, masonry and law.

It was Justinian's resolve that the vast legal accumulations of that time should be collected, sifted, classified, interpreted, with contradictions and inconsistencies ruthlessly purged away, and that thus in manageable form a codex of the laws which Roman civilization had progressively given to the world should be made for the first time available. The process had some results which might well surprise its designer. It served not only to settle some old perplexities but also to start some new ones. Formulae were provided for quick and easy reference so that uniformity of
answer might be ensured, but many a contradiction unnoticed in separate systems of legal usage became obvious when the effort was made to think the systems together and to unify them. It was said of Hesiod's *Theogony* that, while apparently a devout religious poem, it had a secularist upshot, because "it was an attempt to make the pious myths systematic, and system is fatal to living myth". But the secularist upshot was little felt for centuries, while the *Theogony* served as a sacred scripture to determine the ritual of Olympian piety. Hesiod was thus long a guardian of popular worship, though he would prove later a provocative of philosophic scepticism. In like manner the Institutes of Justinian supplied an instrument for getting questions speedily and uniformly settled, but left in minds of speculative interest rather than practical zeal a doubt not before felt. This doubt was not dispelled, at times it was even intensified, by the plausible recommendation of uniformity and speed! The contrast is still familiar in law schools, between those who "can not be bothered with abstract Jurisprudence" and those for whom obviously it is as a basis for Jurisprudence that all case-law has interest.

II

This promotion of philosophic curiosity by legal studies was all the more valuable because in the centuries which followed the barbarian conquest of the Western Empire such studies enjoyed an immunity from interference—what would be called in the idiom of our day an "academic freedom"—denied to studies in other fields.

From the first the barbarian chiefs (with a timidity such as legend ascribed to a previous horde overawed by the stately figures of the Roman Senate in session) left untouched that monument of Roman legal ingenuity, the municipal constitution of the Italian cities. Changes were frequent elsewhere, but the municipal system was somehow treated as sacrosanct. In like manner, while the Christian Empire restricted freedom of thought and practice by Creed and by inhibition in other fields, it left legal inquiries alone. Scientists would be dragged before an inquisitorial tribunal for speculations about the stars which seemed to contradict Church Dogma, and anatomists who ventured to dissect the human body were directed to observe the Church's rule that knowledge of the structure of man must be limited to what can be reached without use of such sacrilegious method. But while at the University of Padua the physicists
had constantly to pause and take theological bearings, and while
at the University of Salerno dissection was still of lower animals
"with inference, analogically, to man", there was a delightful
freedom from such embarrassments at a centre like the University
of Bologna where the predominant study was of Law. A certain
naïvité in the censorship was there, intellectually, serviceable to
progress. In truth speculation about the origin and the manage-
ment of "rights", about what constitutes a "person", about
crimes and their fitting punishment, might well lead to sharply
different accounts of a Universe presenting such problems. It
was altogether conceivable that atheist conclusions might emerge
from the study which began in Law as well as from that which
began in Mathematics or Biology. Even a superficial survey of
mediaeval controversies about property, about the relation of
the code of one country to that of another, about personal rights
and obligations, is enough to show how it was lawyers who often
fixed for moral philosophy at least the form in which its problems
would be raised. Especially was this seen in the influence, so
long dominant and still by no means negligible, of what we know
as "Canon Law".

St. Thomas Aquinas was once described as projecting "a
Holy Roman Empire for the World of Thought", and under this
description there naturally falls his effort to fit all the partial
hypotheses, the fragmentary explanations (Greek, Roman, Mos-
lem) into the great speculative system of the Christian Empire.
But Aquinas, although the scale of his synthesis was thus
vaster than that of any which had preceded, did not originate
the conception of a theological Jurisprudence. Out of the decisions
and directions, the formulations of dogma, the restraints on
heresy, the incursions of the Holy See into international settle-
ment, the slowly developing fabric of penitential discipline, there
arose the need for Institutes of Canon Law side by side with
Institutes of Civil Law. Our LL.D. degree still serves to recall,
for those curious enough to inquire the significance of the initials,
how doctores in utroque iure thus combined the two sorts of learning
held in the Middle Ages to supplement each other. Canon Law
owes to Gratian what Civil Law owes to Tribonian, not merely
in respect of its temporary completeness, but in respect also of
the challenge it supplied by its audacious failures.

III

An example of aptitude for philosophic speculation finding its
first stimulant in the studies of a jurist was Nicholas of Cusa,
Cardinal-Archbishop, whose mind was undoubtedly the greatest of his time in speculative thought. His introduction to cosmic inquiry was through a lawyer's training and a lawyer's grappling with problems of administration. Every historian of mediaeval philosophy devotes close critical analysis to the *De Docta Ignorantia* — that first philosophic clarion call to the Renaissance. But in an earlier work by the same author, *De Concordantia Catholica*, there was shown how his mind was already moving through puzzles of minor to those of major significance. The first interest of Nicholas was in law, beginning at the University of Padua, where he graduated D.C.L. in 1423. It was the conflict of legal codes, so different and yet all somehow involving a single basis, that constituted his first intellectual challenge. From this, on ordination to the priesthood, he passed to the scrutiny of Catholic Dogma, in whose record of change and adjustment with the years he found a like problem of underlying unity. The precision and confidence of Thomistic doctrine on "Attributes of God" left him not merely unimpressed but repelled. He thought of these as Xenophanes of Colophon had thought of the qualities of Homer's Olympians, made in human likeness "as horses or oxen, if they had hands, would, no doubt, fashion their gods as oxen or horses".

What, then, of those minutely anthropomorphic ceremonies, plainly meant at every turn to interpret God in human terms to the worshipper, which, as a priest, Nicholas must have celebrated incessantly in the Office of the Mass? The spirit of those liturgies involves everywhere just the emphasis which, in his *De Visione Dei*, he was concerned to avoid. I have no space to consider here (nor would it be relevant to my thesis) just how he managed to justify, under appropriate qualifications, the symbolism of his Church, and to reconcile it with his own conception of God as "super-personal". My concern is simply to show how the inquiries whose origin lay in the task of a fifteenth-century ecclesiastical lawyer led to a constructive cosmic philosophy, and how the Theory of Knowledge set forth in the *De Docta Ignorantia* had its earliest foreshadowing in the *De Concordantia Catholica*, meant to bring together Pope and anti-Pope, East and West, perhaps even Catholic orthodoxy and Hussite heresies.

IV

Does the work of the jurist still, as in pagan and mediaeval centuries, serve as an intellectual provocative, bidding the thinker in its categories to pass beyond them?
We are familiar indeed with the effort to use a decision of the courts as a settlement of everything, and to treat as a tiresome if not dangerous idealist anyone who persists in meaning by the “solution” of a problem of conduct anything else than clear discernment of what would be inevitably decreed by “the Bench”. But, at least as vehemently as ever in the past, are the intellectual inadequacies of an answer recommended by its practical convenience being emphasized by the lawyers themselves. Sir Stafford Cripps arguing in the appeal court, with a skill in legal subtlety that was the despair of so many professional rivals, was very different from the Sir Stafford we know in parliament or on the platform, urging appeal to principles deeper and more coherent than any on which their Lordships’ decision can rest. To exclude this more profound reexamination of what, technically, is res iudicata, was what Carlyle had in mind when he coined his phrase “apotheosis of attorneyism, blackest of terrestrial curses”. Disraeli had a like contemptuous reference to confusion between what is morally and what is only legally binding. A Catholic, said Lothair, can turn in perplexity of conscience to his priest, while a Protestant in such trying circumstances can seek advice only from his solicitor!

Passage from feudalism to the social system of the free democratic countries was prompted in no slight degree by the exposure of contradictions — intellectual and moral — in the feudal conceptions of human relationship; an exposure which, paradoxically enough, might have been postponed far longer but for the attempt in the courts to restate and clarify legal requirements. Similarly the institutions and creeds of the mediaeval Church were brought by the resolute clarification of the Schoolmen to a state in which, far more readily than if the early protective mists had been undisturbed, they invited the drastic enterprise of Protestant Reformers.

Every historian of ethical theory notes how great was the debt to the Dutch international lawyer, Hugo Grotius, for stimulation in the seventeenth century of search after a basis in Nature for moral values, in view of the collapse of Church authority which had previously sustained them. The De Belli Iure ac Pacis no longer answers effectively questions now at least as urgent as when it appeared. But again in 1949, amid futile efforts to organize peace, as in 1625 when the Thirty Years War was at its height, the dispute of rival experts in international law should prompt to a quest for deeper than legal foundations of world settlement. Report of what Mr. Marshall contended and
of the denial his contentions drew from Mr. Gromyko or Mr. Vishinsky, regarding agreements at Yalta or Potsdam, may well start again, as the speculations of Grotius about "Law of Nature" started three centuries ago, a search of the most fundamental sort into philosophy of life. The futility revealed by actual trial was needed to convince those so obstinate in their inattention to warnings that more than a "misunderstanding" (which competent lawyers might "iron out" by contrivance of a "flexible formula") was keeping up the feud. Our jurists have thus proved, unconsciously for the most part, but not on that account the less serviceably, our teachers. It is indeed an educational benefit of the first order when the educator develops in the pupil a reflectiveness which not only appreciates the wisdom but also detects the limits of the instruction.

Lawyers and Philosophers

Soc. I mean to say, that those who have been trained in philosophy and liberal pursuits are as unlike those who from their youth upwards have been knocking about in the courts and such places, as a freeman is in breeding unlike a slave.

Theod. In what is the difference seen?

Soc. In the leisure spoken of by you, which a freeman can always command: he has his talk out in peace, and, like ourselves, he wanders at will from one subject to another, and from a second to a third, — if the fancy takes him, he begins again, as we are doing now, caring not whether his words are many or few; his only aim is to attain the truth. But the lawyer is always in a hurry; there is the water of the clepsydra driving him on, and not allowing him to expatiate at will: and there is his adversary standing over him enforcing his rights; the indictment, which in their phraseology is termed the affidavit, is recited at the time: and from this he must not deviate. He is a servant, and is continually disputing about a fellow-servant before his master, who is seated, and has the cause in his hands; the trial is never about some indifferent matter, but always concerns himself; and often the race is for his life. The consequence has been, that he has become keen and shrewd; he has learned how to flatter his master in word- and indulge him in deed; but his soul is small and unrighteous. His condition, which has been that of a slave from his youth upwards, has deprived him of growth and uprightness and independence; dangers and fears, which were too much for his truth and honesty, came upon him in early years, when the tenderness of youth was unequal to them, and he has been driven into crooked ways; from the first he has practised deception and retaliation, and has become stunted and warped. And so he has passed out of youth into manhood, having no soundness in him; and is now, as he thinks, a master in wisdom. Such is the lawyer, Theodorus. Will you have the companion picture of the philosopher, who is of our brotherhood; or shall we return to the argument? (Plato: Theaetetus 173. Jowett translation)