Canon Law

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The thesis of this article is that the evolution of law, not only in Europe but also in the newer countries across the ocean which Europeans settled, has been affected much more than is commonly supposed by ecclesiastical custom, even where the secularist spirit has been most loudly proclaimed, and that there is much still to be learned in jurisprudence by study of the canonists.

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Elaboration of canon law into a system might easily have been predicted. It was plain that when Christianity became the official religion of the Roman Empire, and the Council of Nicaea, over which the Emperor Constantine presided, had defined the Creed in rigorous detail, Church courts would by their decisions — especially by their exercise of penitential discipline — set precedents for the future like the precedents set by courts of the State. The distinction, later so familiar, separating both *torts* and *crimes* from *sins* would be slow to emerge. Blasphemy laws are the most obvious example of the two systems overlapping; but when the State claimed divine authority and the Church demanded protection of "the Truth" by the sword, it must have been hard to distinguish between the things which were and the things which were not Caesar's. For example, in the theocratic regime of the Theodosian Code. The stray survival in modern systems of some requirement or some veto whose origin was in religious ideas long since obsolete suggests how extensively Church law and State law must in the early and middle centuries have coincided. Especially on such matters as the inheritance of land.

There was need, then, as time went on, for codification of the principles implied in countless decisions of ecclesiastical courts. Gratian has been called "the Tribonian of the Church": he was

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confronted with contradictions, incoherences, inconsistencies which required in things sacred as in things secular a frequent use of "legal fiction". His work was, however, but the climax of what had been in process century after century before, very much as the work carried out to the order of Justinian was but a formal systematizing of what had been done by a succession of civil lawyers especially in the Antonine Age. Gratian had many predecessors, from those of the late third and early fourth centuries in Syria whose digests had the imposing title, *The Teaching of the Apostles*, to the compilers of Decretals, which were issued five hundred years later under the name of Bishop Isidore of Seville. In the generations which followed, the strife of Empire with Papacy and the effort at a settlement of their boundaries of jurisdiction sharpened a contrast between elements whose coincidence and mutual reinforcement a previous age had taken for granted. When the great offices of State, such as that of the English Chancellor, were held habitually by prelates, and while the Church was an enormous feudal landowner, there were plainly present in germ difficulties such as Gladstone would set forth in his pamphlet of 1874 entitled "The Vatican Decrees and Civil Allegiance".

Savigny's famous reply to those who, under Napoleonic fascination, wanted to extend the *Code Napoléon* to Germany contains the central principle by which study of the canon law is still justified. "I regard", he wrote, "the law of each country as a member of its body, not as a garment merely which has been made to please the fancy, and can be taken off at pleasure and exchanged for another". As we endeavour in various fields of legislation or of policy to amend the system into which we were born, we need to examine its past, just as we need in medicine to become familiar with the biological and biochemical antecedents of the human constitution, and there are numerous survivals in custom (with the practical strength of law) whose meaning we can find only in the *Corpus Iuris Canonici*. It is one example of the service rendered by that historical school in jurisprudence of which Savigny has good right to be remembered as the father. Eager "codifiers", in such hurry, and ever quick with explanation by someone's deliberate imposture where the truth lies in a natural development they have not taken the trouble to explore, would often make short work of surviving vestiges of canon law. But as they put forward their own hard and fast regulations, whether in domestic affairs about property in land and its succession, or in international affairs about a "Law of Nature" to

which all framers of national systems owe the same allegiance, they should surely take account of the situation as they find it, and this they can never understand apart from the conceptions of human nature, its obligations and its rights, which the canonists centuries ago made the basis of many a rule now prevailing. It is a commonplace to recognize the debt of system after system of law in European countries to the *ius civile* of the Roman Empire, with whose disruption those countries began, but whose legal tradition they were wise enough (or timid enough) in notable principles to preserve. What is less clearly realized is the importance of the system of the Universal Church through which such pontiffs as Hildebrand or Innocent III, themselves inheriting Roman jural conceptions, translated these into Christian application, and thus taught the conflicting new nationalities allegiance to a Power beyond any earthly sovereignty.

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During the centuries whose legal development would be systematized and clarified under Justinian, immense influence had been exerted by the idea "Law of Nature" whose origin was in the thought of the Stoic philosophers. As Renan wrote, "It was the triumph of the Greek over the Latin spirit. . . . Thus it was that the great Stoic School which, in the second century, essayed the reformation of the world, after having to all appearance failed miserably, in reality won a complete victory."[1] But how long would this victory of Stoicism have endured, and have expressed itself in effective rules of life, if "Nature" had not acquired (as it certainly did acquire in the Middle Ages) the sense of a divine purpose working out an ideal? Apart from this, what Renan called its previous apparently miserable failure might well, after a brief interval of radiant promise (like that of the League of Nations in our recent experience), have recurred. Without a genuinely theistic postulate such as that of the mediaevalists, "Nature" might soon have passed into the same derisive neglect as "Universe" so adored in many a devout meditation of the Stoic Emperor, Marcus Aurelius. A passage in Herbert Spencer's *Social Statics* may well be read with sombre amusement by those who reflect on the suggestiveness of events since it was written:

> Always towards perfection is the mighty movement, towards a complete development and a more unmixed good; subordinating in its universality all petty irregularities and fallings-back, as the curvature of

[1] Marcus Aurelius, p. 12 (translation of W. G. Hutchison).

> the earth subordinates mountains and valleys. . . . And now, in the midst of his admiration and his awe, the student shall suddenly see some flippant red-tapist get upon his legs and tell the world that he is going to put a patch upon Nature. . . . These meddlers, these self-appointed nurses to the Universe, have so little faith in the laws of things and so much faith in themselves that, were it possible, they would chain earth and sun together lest centripetal force should fail.[2]

After our experience of what H. G. Wells called "a world staggering from misery to misery", comment on this optimism is as needless as it would be painful.

The idea of Progress is of religious origin, and when it appears in the argument of those who no longer admit religious values, its plausibility comes from subtle misuse of the conceptions of a religious past. Readers of Herbert Spencer (fewer now than they should be, for his books have many a valuable unintended warning) must be struck by the quasi-devotional ring of passages such as the one I have just quoted. For instance, his confidence that the "internal amity" which citizens show in mutual co-operation and the "external enmity" of their mood towards foreigners are being progressively harmonized, and that only the impatient — only some "flippant red-tapist" — will find fault with "Nature" for having still incompletely unified mankind. T. H. Green used to dwell on the "higher synthesis" in which elements separately discordant were shown to be aspects of a unity: but this was urged in his *Prolegomena to Ethics* as dependent on the "spiritual principle in Nature". What happens to effort at vindication of Nature's ways when the phrases of optimism are still used after the convictions which make them intelligible have been repudiated, should be apparent to any reader of *Social Statics* now.

Almost contemporaneously with the issue of that so hopeful but now so unintelligible Spencerian monograph, there began to circulate two other publications, the *Communist Manifesto* by Marx and Engels, and *Duties of Man* by Mazzini. The *Communist Manifesto* by no means called for social reconciliation; it called for Class-War, and from its materialist interpretation of history the need for this was a plain logical inference. That the Class-War should in it be not merely predicted as inevitable but urged as a duty, was but another sample of forms of bygone thought persisting after they have ceased to mean anything, and there is thus point in the satiric epigram that "The last of the Schoolmen was Karl Marx": he had so much of what in the Schoolmen was least to be admired. In *Duties of Man*, on the other hand, Mazzini

[2] Social Statics (1850) p. 293.

urged exactly the principle of which those men of the middle nineteenth century were so disastrously forgetful, that the idea of social progress had religious origin and would have a short life in a purely secular "ideology". Writing a century ago, when the name (though not the purpose) of "Sociology" had just been introduced by Auguste Comte, he emphasized the self-evolving powers of "Humanity" almost with Comtist rapture. But he emphasized no less the need for a theistic postulate, if the social changes for whose "laws" the social scientist is in more or less successful search are to be optimistically regarded. The word "Progress", he reminded his readers, had been unknown to antiquity; the idea for which it stands was implicit, though of slow development, in the Christian religion and in it alone.

It is recognized that much in our still unchanged legal system regarding the family, marriage and divorce, inheritance, ownership, contract, preserves the principle though varying the detail of mediaeval courts in which personality — with its rights and obligations — was conceived in a manner very different from that of pre-Christian civilization in Greece or Rome. The notion of a divine Plan, of an ever-increasing purpose that through the Ages runs, underlay — amid much awkward and long since obsolete detail — the legal fabric we have inherited.

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International law is often said to have originated in Canon law, and though the differences became far more conspicuous than the similarities, there is good ground for finding the first incentive to a scheme of peaceful order among nations in the mediaeval ordering of private interests by the law of the Church. A reader of *De Iure Belli ac Pacis*, which is commonly acknowledged to have been the first treatise on modern international law, must be impressed by the new form which the Stoic motto "Live according to Nature" there assumed. Axioms prescribing human conduct, unprovable but also indubitable like the axioms of geometry, neither require nor admit legislative support: they are conceived as the underlying assumptions of all statute-making, even as a rational cosmic system is assumed in every scientific advance. What Aristotle called the purpose intrinsically desirable, by conduciveness to which all objects of desire are justified, was what Plato called "the Idea of the Good", by which all other Ideas were wrought into an harmonious system. Herein was plainly implied a universe of design, not one of mechanical necessity.

On this implication Aquinas, in his "Christianizing of Aristotle",

concentrated his argument. "Life according to Nature" represented human choices as like the working of organs of the body, normal or deranged in function. But the choice of "good" as against "evil" in conduct is far from being as plain as the proper action of physical organs. There is no more difficulty in the conception of a healthy body than in that of a well-made automobile, running smoothly when new and correctly adjusted, but gradually wearing out. The physician, with his preparation in anatomy, physiology, biochemistry, is like the expert at the service station, knowing what to do and able for a time to do it, but ultimately forced to say that the human body (like the car) is beyond repairing. In the field of moral choices, however, as Aquinas so clearly indicated, unless there is a Divine Plan ahead, there is no "normal" in contrast with "deranged" fulfilment of function. What is the health of mind and spirit corresponding to health of physique that can be so readily identified? There had been dreams of a primitive "Golden Age", and under the best of the early Roman Emperors hope of improvement had the motto *Redeunt Saturnia Regna.* But no one believed there had been such a Paradise in the past, nor was there any thought in the pagan world of a Paradise to come. Nothing like that of the Christian saints. What Aquinas saw, and wrought into the texture of his *Summa Theologiae,* was the impossibility of making "Nature" an intelligible basis for either individual or international relations except on a theistic postulate.

Henry Sidgwick used to challenge the statement that "The historical method has invaded and transformed all departments of thought". He would ask how, for instance, it could be said to have made any such difference to mathematics.[3] There is antiquarian curiosity about the first discernment of relations in quantity or space, but a textbook on the differential calculus would not be improved by a chapter of prolegomena on such anthropological discoveries. Sidgwick's protest against the delusion of assuming that a later mental process is just earlier processes in new combination (which he called illicit transfer of methods of chemical analysis to psychology) was opportune when "historians of culture" were making outlandish claims for what they had to reveal. But the reaction against such extravagances can, in turn, go too far. Not in all, but in some, departments of thought history is invaluable. To understand social institutions it is often of the utmost importance to examine how mankind came to think in the categories of their origin: so often the traces

[3] Cf. especially the chapter on the Historical Method, in Sidgwick's Philosophy, Its Scope and Relations.

of this still persisting are the clue to what is otherwise now unintelligible. But for some reason, part of that history has been neglected even by those most diligent in other parts.

It has been the purpose of this article to urge that lawyers, who have spared no pains to trace the sequence of the civil law of many centuries ago (because its concepts and often even its technical terms still so influence our jurisprudence) should search much further than they commonly do in the records of the canonists who left on that civil system so deep a mark. How much is understood about the work of Gregory the Great by those who spend so much time and effort upon Justinian? What attention is given by students of feudal tenure to the record of the courts of the mediaeval Church? To a great deal in the modern inheritance of matrimonial law and custom the key is to be found there. In these days when price control is so strenuously advocated and so stubbornly opposed, how much in the conceptions and even the language of the present may be seen forecast in argument before bishops of the Middle Ages about *iustum pretium!* Often, I fear, our lawyers, deriving what they know of the canonists from implication by the civilians, are inverting the real order. The canon law illuminates the civil rather than *vice versa.* John of Salisbury, St. Thomas Aquinas, the records of fifteenth and sixteenth century Church Councils are copious in suggestiveness on many a dispute of the present. That "LL.D.", now so recklessly bestowed for honorific purposes (and not without ulterior design) on those equally ignorant of both sorts of law to which it refers, had the right significance at first. Those worthy to be called *doctores in utroque iure* are the very sort of experts that could help with many a puzzle about our social institutions, now so often argued chiefly in interchange of sterile platitudes and truisms.

The Law the Lawyers Know About

The law the lawyers know about
  Is property and land;
But why the leaves are on the trees,
And why the winds disturb the seas,
Why honey is the food of bees,
Why horses have such tender knees,
Why winters come and rivers freeze,
Why Faith is more than what one sees,
And Hope survives the worst disease,
And Charity is more than these,
  They do not understand.

(H. D. C. Peplar, in Walters, *An Anthology of Recent Poetry*, 1920)