Law: Its Origin Growth and Function

Being a Course of Lectures Prepared for Delivery before the Law School of Harvard University

By

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PREFATORY NOTE

THE origin and nature of law, both written and unwritten; its growth and development; its function in the social order; its powerful influence as an effective force in the progress and civilisation of mankind; the importance of distinguishing between the nature of written and unwritten law and, ascertaining the proper and legitimate province of each, were subjects which possessed for Mr. Carter an absorbing interest and to which he devoted much attention, particularly during the last few years of his life, when his retirement from active practice afforded him more opportunity for study and reflection.

The general field of inquiry was not new to him, for at a much earlier period, when still in the full tide of professional activity and burdened by the exacting demands of a large and important practice at the Bar, he had taken the principal part in opposing the adoption by the State of New York of the well known Civil Code, of which the late David Dudley Field was the author; and this task and the inquiries which it led him to make, were pursued by him with the keenest interest.

The arguments which he then framed and addressed to successive legislatures and governors, led to the final rejection of the proposed Code. His

views were published in a series of pamphlets, the first of which appeared in 1883 under the title *The Proposed Codification of our Common Law.* Five years later, he delivered an address before the Virginia State Bar Association, which was afterwards published under the title of *The Provinces of the Written and Unwritten Law,* and later, in 1890, an address before the American Bar Association upon *The Ideal and the Actual in the Law* embodied further views and reflections upon the same general topics. It was to the study devoted to these subjects in the somewhat brief periods of leisure permitted by the demands of his active professional work that Mr. Carter himself attributed the deep and absorbing interest which they possessed for him.

After his retirement from active practice, he determined to devote a portion of his leisure to writing a somewhat more important and complete expression of his views on these topics than had been contained in his former pamphlets and addresses but at the suggestion of President Eliot, of Harvard University, he substituted for this proposed work a series of lectures to be delivered before the Law School of that University. I find among his papers a brief memorandum in his handwriting, evidently written before this change of purpose and intended as a suggestion for a preface to the work which he at first designed to write. It is endorsed "By Way of a Possible Preface," and is as follows:

It happened to me many years ago to be appointed by the Association of the Bar of the City of New York upon a Com-

mittee charged with the duty of opposing a bill which had been introduced into the Legislature of that State, entitled "An Act to Establish a Civil Code."

This proposed Code purported to be the work of a Legislative Commission which had been created by an Act of the same Legislature, adopted many years before, and at the head of which was the late David Dudley Field; but it was in fact, as he often declared, entirely his own work. This eminent lawyer was a man of great intellectual audacity, the worthy disciple in that particular of Jeremy Bentham. He would not tolerate the suggestion that there was any unsurmountable difficulty in reducing into statutory form the entire body of the law which governs the private transactions of men. He insisted that the whole of it could be embraced in a volume of very moderate size and that its adoption would substantially supersede the necessity of consulting that prodigious record of judicial precedent which fills so many thousand volumes and has been hitherto deemed an essential part of the furniture of every complete law library. Moved by the high incitements of conferring upon society a benefit so prodigious, and, as we may suppose, of achieving for his own name a renown like that bestowed upon the great law-givers of mankind, he threw himself into the enterprise of procuring the enactment of his proposed code with the greatest energy and prosecuted it for years with the utmost persistency. This made the task of opposition extremely laborious and the chief burden happened to fall upon myself.

I was thus led into inquiries concerning the distinctions between written and unwritten law and was unable to find that these distinctions had ever been to any considerable extent pointed out.

I was, however, led to entertain much doubt concerning the correctness of the conceptions most widely accepted of the nature, scope, and authority, not only of the written, but of the unwritten law, and came to think that, notwithstanding the number of treatises upon the subject, the original sources and nature of what may be called jurisprudence had never

been sufficiently explored; in particular the definition of law as a *command*, laid down by Austin and carried out into all its logical consequences by him, resting as it does, so far as the unwritten law is concerned, upon a manifest fiction, and confounding, as it also does, the separate provinces of the written and unwritten law, seemed to me to be a fundamental error.

These defects, or errors, as they seem to me to be, in the current theories of our jurisprudence, I impute to an underestimate among the members of our profession of the importance of theoretical inquiries. The most distinguished of our lawyers and judges are prone to regard with a species of disdain any resort in forensic argument to elementary principles, and comparatively little attention is given in our schools of law to the scientific study of the foundations of our legal institutions.

This is very much to be regretted. To eulogise the law as one of the highest of human sciences and yet neglect to inquire what kind of a science it is, whether it rests upon *a priori* conceptions or is the fruit of an induction from the facts of human experience; whether it is the conscious command of a supreme authority or an unconscious growth in the life of human society, is an inconsistency of which professed students should not be guilty.

The interest aroused in me, in the manner above indicated, in the theoretic foundations of our law, and my sense of the importance of such studies, have moved me to publish some of the conclusions which seem to me well founded and the grounds upon which they may be supported. I am not so presumptuous as to think them in any way final or anything more than a contribution to a discussion, which, if sufficiently stimulated, must be fruitful in most important and serviceable truth.

Mr. Carter's sense of the importance of the inquiries which he thus describes, and the strong affection which he always entertained for his Alma

Mater and which led him to adopt for the expression of his ripened and mature views the form of lectures for delivery before its Law School, are touchingly shown by a provision of his will whereby he gave a large sum to the President and Fellows of Harvard College "which," he said, "I now wish may be applied to the establishment and maintenance in the Law School of the University of a professorship of General Jurisprudence for the special cultivation and teaching of the distinctions between the provinces of the written and unwritten law; but I do not intend to control the discretion of the donees in respect to the application of this fund. I mention my present preference." This was in addition to another large gift for the general purposes of the University.

It was Mr. Carter's intention to deliver the lectures in the spring of 1905, and the rough draft of the manuscript was completed only a few days before he was stricken with the brief illness which resulted in his death on February 14, 1905. When he realised that he could never deliver the lectures, he expressed a wish that they be published by his Executors.

The manuscript had never been finally revised by him; but it has been thought best to print this volume from it just as it left his hand, save the making of a few verbal corrections.

L. C. L.

New York, June, 1907.

LAW, ITS ORIGIN, GROWTH AND FUNCTION

LECTURE I

A COMPLETE study of the law would embrace three successive efforts. The first would be to acquire a knowledge of those rules which make up the law, as mere isolated rules; and this might be sufficient for a considerable degree of skill and proficiency in practice. The next would be to comprehend those rules as parts of a classified and orderly system exhibiting the law as a science; and whoever aspires to be a thoroughly accomplished lawyer must take this step. The third and final effort would be to explore the realms of science which lie beyond the immediate boundaries of the law, and ascertain its origin, its essential nature, the method of its development, the function it fills in human society, and the place it occupies in the general system of human knowledge; in other words, to learn what is termed the Philosophy of the Law.

The means for prosecuting the first two of these efforts have been, in a reasonable measure, already supplied. The decisions of a multitude of tribunals

sitting during successive ages, and diligently recorded, furnish abundant material from which to gain a knowledge of what the law at present is, and, besides these, we have numerous treatises, many of them thorough and admirable, together with codes both of ancient and modern states, all aiming to reduce the law into a scientific form.

In the third and last stage of legal study, however, comparatively little progress has been made. There are several reasons for this. In the first place, there is, in the economic sense, but little demand for this sort of knowledge. Courts are always eager to listen to intelligent discussion concerning particular rules, or the general heads in the law to which such rules should be referred; but their concern is mainly with practical affairs, and they are inclined to be impatient of discussions which have but a remote pertinency, and to them all mere philosophy is apt to seem remote. Lawyers, even the most accomplished, feel little inclination towards studies which seem to afford but a small measure of practical utility, and most efforts in the field of Legal Philosophy are characterised with a polite sneer as being *academic*. Moreover this branch of knowledge being part of the field, not strictly of Law, but of Sociology, has necessarily been kept in abeyance by the circumstance that Sociology itself is but a recent study. Add to this the intrinsic difficulty of the subject, and we need not wonder at the little progress made in its development.

The criticism that such studies are *academic* is true, but it should by no means discredit them. It

is their highest recommendation; for it means that they are such as are usually pursued in universities, and it is in such places, pre-eminently, that the highest and most useful knowledge is taught. All university teaching is or should be, scientific and philosophical; and never rests satisfied as long as a further step may be taken or a larger generalisation reached.

But if proof be needed of the immediate practical utility of such knowledge it may be found in abundance in the present condition of *legislation*. I speak of this country, but without meaning to imply that it is worse here than elsewhere. There are a vast number of laws on the statute-books of the several States which are never enforced, and generally for the reason that they are unacceptable to the people. There are great numbers of others the enforcement of which, or attempts to enforce which, are productive of bribery, perjury, subornation of perjury, animosity and hate among citizens, useless expenditure, and many other public evils. All these are fruits of the common notion, to correct which but little effort is anywhere made, that a legislative enactment is necessarily a *law*, and will certainly bring about, or help to bring about, the good intended by it, whereas such an enactment, when never enforced, does not deserve the name of law at all, and when the attempted enforcement of it is productive of the mischiefs above-mentioned, it is not so much law as it is tyranny. Among the evils which oppress society, there are few greater than that caused by legislative expedients undertaken

in ignorance of what the true nature and function of law are, and the effective remedy—at least there is no other—lies in an effort to correct this ignorance by knowledge.

This neglect of the problems underlying our legal systems has left important points in our judicial literature in much confusion, and this is very manifest in the multiform definitions which have been given of *Law*. It might be thought that the oldest and most necessary function of human society, and one which from the dawn of speculation has engaged the attention of the most superior and disciplined minds, would have received a final interpretation commanding general assent; but the case is quite otherwise. The various definitions exhibit the greatest diversity, both in expression and in substance. They are generally vague and uninstructive, sometimes conflicting and irreconcilable, and scarcely any will endure a close scrutiny.

I may illustrate this diversity by instances, most of which I gather from Prof. Holland's recent work on *The Elements of Jurisprudence*. Cicero, who, with other Roman jurists, was wont to regard what was termed the Law of Nature as the foundation of all law, in one place thus defines it[1]: "*Lex est recta ratio imperandi atque prohibendi*"; in another thus "*Lex nihil aliud nisi recta et a numine deorum tracta ratio, jubens honesta, prohibens contraria.*"[2] Such definitions can hardly be said to define anything. Assigning to the law a divine source and authority, and identifying it with "right reason," is but a con-

[1] *De Leg.*, i., 15. [2] *Phil.*, xi., 12.

fession of inability to define or explain it. It is but saying that law is so far the product of our highest reason that no human origin can be assigned to it, and therefore that its source and authority must be divine. And to say that the law is what commands the honest and just to be done is but moving in a circle, for if we were to inquire what is honest and just the only answer would be what the law commands. A definition by Hooker is very concisely expressed, but marked by the same vagueness: "That which reason in such sort defines to be good that it must be done."[1] What is this *reason* from which law thus proceeds, and where is it to be found, and how does it act in determining what is good? Men may have different conceptions of reason, and be led by them to very different conclusions concerning law. The German philosopher Kant defines law as "the sum total of the conditions under which the personal wishes of one man can be reconciled with the personal wishes of another man, in accordance with a general law of freedom."[2] But while this definition exhibits a profound insight into the purpose, or function, of law, it is otherwise vague and indefinite. What is the nature of the "conditions" here intended? Are they found in the nature of men and things, or imposed by some external human authority, and if the latter, by what authority? Savigny, the most accomplished philosophical jurist of his time, at once profound and practical, describes the law as "The rule whereby the invisible

[1] *Eccl. Pol.*, I. c. 3, c. 8.
[2] *Rechtslehre, Werke*, vii., p. 27.

border line is fixed within which the being and the activity of each individual obtains a secure and free space."[1] This language, however vague and obscure, describes law, or rather its function quite accurately, but it does not inform us of the origin of the rule, or the nature of its authority, matters quite necessary to a complete description.

These instances are not given by Prof. Holland as attempted definitions of any law actually administered; but of that general body of rules to which it is supposed that human conduct ought to conform, even though not enforced by the direct action of the State,—rules derived from what is called the Law of Nature, or from the general code of morality. He is a follower of the celebrated John Austin, and would restrict the name of Law to those rules which a fully organised State recognises and enforces, and which he, adopting the language of Mr. Austin, distinguishes by the term Positive Law. He cites many instances of what, in his view, are attempted definitions of this law, besides giving his own. Among them is that of Demosthenes: "This is Law, to which all men should yield obedience for many reasons, and especially because every law is a discovery and gift of God, and at the same time a decision of wise men, and a righting of transgressions, both voluntary and involuntary, and the common covenant of a State, in accordance with which it beseems all men in the State to lead their lives." This definition, however, seems limited to those rules which are formulated by learned jurists from

[1] *Systema des Rechts*, i., p. 332.

the precepts of morality, and scarcely embrace the edicts of a tyrant, or the arbitrary enactments of a legislative body however rigorously they may be enforced. Another is that of Xenophon: "Whatsoever the ruling part of the State, after deliberating as to what ought to be done, shall enact, is called a law." This defines well enough written or statutory law, but no other. Another is that of Hobbes, the champion of arbitrary power, which also defines nothing but statutory law: "The speech of him who by right commands something to be done or omitted." Another is that of Bentham, who believed that legislation should embrace the whole field of law: "A portion of discourse by which expression is given to an extensively applying and permanently enduring act or state of the will, of a person or persons in relation to others, in relation to whom he is, or they are, in a state of superiority." It requires no small amount of intellectual effort to understand what this means, but it is phrased with studied precision to express what the author thought law ought to be. John Austin, in his well-known work on *The Province of Jurisprudence Determined*, limits that province to what he designates as "Positive Law," which he defines thus: "Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme,"[1] and he denies that any other so-called laws fall within the scope of jurisprudence. He,

[1] John Austin, lecture vi., vol. i., p. 116.

like Bentham, whose disciple he was, thus makes the most important element of law, its authority, to proceed from the sovereign power, and pronounces the most profound judgment of an Eldon or a Marshall and the tyrannical decree of the most unscrupulous despot as equally entitled to the august name of law. And yet the theory of Austin has received, both in England and America, a wider acceptance and adoption among juridical writers than any other. There is in the other definitions I have referred to a basis of general truth, however insufficient they may be, but that of Austin seems to me to be radically and mischievously erroneous. This will clearly appear if the views I shall hereafter endeavour to maintain be at all well founded. The definition of a German jurist, Dernberg, is very concise. It is: "That ordering of the relations of life which is upheld by the general will." We would scarcely think that this writer was speaking of the same thing which Bentham and Austin sought to define. Austin, however, could cite Blackstone in his favour, whose definition is: "A rule of civil conduct prescribed by the supreme power in a State commanding what is right and prohibiting what is wrong"; but this, besides being open to much the same criticism as the definitions of Bentham and Austin, is subject to another, namely, that we are not told where we are to find the "right" and the "wrong" which the law enjoins or prohibits, except in the injunction or prohibition itself. Prof. Holland's own definition is, I think, while far from being perfect, one of the best: "A law, in the proper

sense of the term, is a general rule of human action, taking cognisance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society."

Sir Frederick Pollock, to whose disciplined mind and wide learning we might look with confidence for a satisfying definition, thinks one impossible at present, and says: "No tolerably prepared candidate in an English or American law school will hesitate to define an estate in fee simple; on the other hand, the greater a lawyer's opportunities of knowledge have been, and the more time he has given to the study of legal principles, the greater will be his hesitation in face of the apparently simple question, What is Law?"

In this diversity of view two opposing tendencies are discernible. One of them may be described generally as an ideal tendency seeking to enthrone over human affairs a rule of absolute Right.

The ancient jurists, the administrators and students of the law, recognised the sense of justice or right felt by all races and classes of men, and perceived that there were rules of human conduct constituting a rational system the enforcement of which satisfied this universal sentiment. Whence the sentiment came, or the rational precepts which accorded with it, they did not diligently inquire, but they perceived that a like order pervaded all the phenomena of the moral and physical world, that the heavenly bodies moved and the seasons succeeded each other in accordance with some un-