LAW and REVOLUTION

The Formation of the Western Legal Tradition

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Preface

THIS IS A STORY of origins, of "roots"—and also of "routes," the paths by which we have arrived where we are. The skeptic may read it with nostalgia, retracing in his mind the course by which he came to his alienation. The believer may hope to find in it some guidelines for the future. "The past has revealed to me how the future is built," wrote Teilhard de Chardin.

My own motivation is somewhat more desperate. It is said that a drowning man may see his whole life flash before him. That may be his unconscious effort to find within his experience the resources to extricate himself from impending doom. So I have had to view the Western tradition of law and legality, of order and justice, in a very long historical perspective, from its beginnings, in order to find a way out of our present predicament.

That we are at the end of an era is not something that can be proved scientifically. One senses it or one does not. One knows by intuition that the old images, as Archibald MacLeish says in *The Metaphor,* have lost their meaning.

> A world ends when its metaphor has died.
>
> An age becomes an age, all else beside,
> When sensuous poets in their pride invent
> Emblems for the soul's consent
> That speak the meanings men will never know
> But man-imagined images can show:
> It perishes when those images, though seen,
> No longer mean.

Because the age is ending, we are now able to discern its beginnings. In the middle of an era, when the end is not in sight, the beginning also is hidden from view. Then history does indeed give the appearance, in

Maitland's phrase, of a seamless web. But now that our entire civilization is stretched out before us we can uncover its origins because we know what origins we are seeking.

Similarly, it is because we are emerging from a revolutionary period that we are able more easily to identify the revolutionary eras of the past. Incremental history, "smooth" history, was characteristic of the historical writings of the Darwinian age. Catastrophic history, dominated by social conflict, has been characteristic of the historical writings of the early and middle parts of the twentieth century. Now for the first time we are also beginning to see not only evolution and not only revolution but the interaction of the two as a dominant theme of Western history.

It is impossible not to sense the social disintegration, the breakdown of communities, that has taken place in Europe, North America, and other parts of Western civilization in the twentieth century. Bonds of race, religion, soil, family, class, neighborhood, and work community have increasingly dissolved into abstract and superficial nationalisms. This is closely connected with the decline of unity and common purpose in Western civilization as a whole. Yet there are also some signs of buildup. Perhaps the most hopeful prospect is that of economic, scientific, and cultural interdependence on both a regional and worldwide basis.

What has this to do with law? A great deal. The traditional symbols of community in the West, the traditional images and metaphors, have been above all religious and legal. In the twentieth century, however, for the first time, religion has become largely a private affair, while law has become largely a matter of practical expediency. The connection between the religious metaphor and the legal metaphor has been broken. Neither expresses any longer the community's vision of its future and its past; neither commands any longer its passionate loyalty.

One need not bemoan these changes. They may be a good thing. They are no doubt inevitable. In any case, they mark the end of an era, and since there is no going back, the only question is, "How do we go forward?" Can we find in the group memory of our past experience the resources that may help us to overcome the obstacles that block our way to the future?

What those obstacles are may be learned indirectly from the story told in this book. Among them are a narrowness and a compartmentalization, both of thought and of action, in relation to law itself. We need to overcome the reduction of law to a set of technical devices for getting things done; the separation of law from history; the identification of all our law with national law and of all our legal history with national legal history; the fallacies of an exclusively political and analytical jurisprudence ("positivism"), or an exclusively philosophical and moral jurisprudence ("natural-law theory"), or an exclusively historical and social-economic jurisprudence ("the historical school," "the social theory

of law"). We need a jurisprudence that integrates the three traditional schools and goes beyond them. Such an integrative jurisprudence would emphasize that law has to be believed in or it will not work; it involves not only reason and will but also emotion, intuition, and faith. It involves a total social commitment.

In periods of crisis we need a larger vision. Oliver Wendell Holmes, Jr., once said to a class of law students: "Your business as lawyers is to see the relation between your particular fact and the whole frame of the universe." Behind that statement lay Holmes's tragic vision of life, born of the Civil War. He knew that without a universal context particular facts are wholly precarious.

The narrowness of our concepts of law blocks our vision not only of law but also of history. Today people think of law primarily as the mass of legislative, administrative, and judicial rules, procedures, and techniques in force in a given country. The vision of history that accompanies this view of law is severely limited to the more or less recent past and to a particular nation. Indeed, it may even be a vision of no history at all, but only of current policies and values. In contrast, consider the historical implications of concepts of law that prevailed in the past—for example, in eighteenth-century England, as expressed in Blackstone's *Commentaries on the Laws of England,* a book written not only for lawyers but also, and primarily, for all educated people. According to Blackstone, the following kinds of laws prevailed in England: natural law, divine law, the law of nations, the English common law, local customary law, Roman law, ecclesiastical law, the law merchant, statutory law, and equity. Implicit in this catalogue was a view of history not limited to the nation or to the recent past, but a view of overlapping histories—the history of Christianity and Judaism, the history of Greece, the history of Rome, the history of the church, local history, national history, international history, and more. Such a view, by linking Blackstone's readers with various past times, freed them from bondage to any single past as well as to the past as a whole, in some abstract Kantian sense. By the same token it enabled them to anticipate not one single future or some abstract future-in-general, but, once again, various future times. Blackstone himself was very "English" and in many respects quite conservative, but in recognizing the multiformity of the legal tradition in England he recognized the multiformity of history itself.

It has sometimes been noted that too narrow a view of law makes it impossible for scholars of other disciplines—historians, political scientists, sociologists, philosophers—to study it effectively. If law is treated merely as the prevailing rules, procedures, and techniques, it has little interest for social scientists or humanists. It should also be noted that those who lose by this are not only the lawyers but also the social scientists and humanists, who are thus deprived of one of the richest sources

of insight into their own disciplines. If our social sciences and humanities have become excessively behavioristic and fragmented, and if our historiography, in particular, has become excessively nationalistic and excessively bound to relatively short time periods, part of the reason is that our legal thought has also become so, and has consequently passed out of the general purview of the professional scholar and hence of the educated public.

It is easier, of course, to complain about the compartmentalization of knowledge than to do something constructive to overcome it. Any effort to reintegrate past times is likely to be understood and judged in terms of the prevailing categories and concepts. To present the history of law in the West as a metaphor of our age is to expect a great deal from readers who have been educated in quite different views of history, of law, and of the West. Yet without a reintegration of the past there is no way either to retrace our steps or to find guidelines for the future.

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Introduction

THIS BOOK TELLS the following story: that once there was a civilization called "Western"; that it developed distinctive "legal" institutions, values, and concepts; that these Western legal institutions, values, and concepts were consciously transmitted from generation to generation over centuries, and thus came to constitute a "tradition"; that the Western legal tradition was born of a "revolution" and thereafter, during the course of many centuries, has been periodically interrupted and transformed by revolutions; and that in the twentieth century the Western legal tradition is in a revolutionary crisis greater than any other in its history, one that some believe has brought it virtually to an end.

Not all people will want to listen to this story. Many will find the plot unacceptable; they will consider it a fantasy. Some will say that there never was a Western legal tradition. Others will say that the Western legal tradition is alive and well in the late twentieth century.

Even among those who will recognize that the story is true, and that it should be taken seriously, there will be wide differences of opinion concerning the meanings of the words *Western, legal, tradition,* and *revolution.* One purpose in telling the story is to uncover the meanings of those words in a narrative context, that is, in their time dimension. From that standpoint, to attempt to define them in advance would be self-defeating. As Friedrich Nietzsche once said, nothing that has a history can be defined. Nevertheless, an author of nonfiction has an obligation to disclose at the outset some of his prejudices. At the same time it may be useful to attempt, in a preliminary way, to dispel some of the misunderstandings—as I see them—of those who may prejudge the story to be unacceptable.

What is called "the West" in this book is a particular historical culture, or civilization, which can be characterized in many different ways, depending on the purposes of the characterization. It used to be called "the

Occident" and was taken to comprise all the cultures that succeeded to the heritage of ancient Greece and Rome, as contrasted with "the Orient," which consisted chiefly of Islam, India, and the "Far East." Since the end of World War II, "East" and "West" have often been used to distinguish Communist from non-Communist countries: in "East-West trade," a shipment of goods from Prague to Tokyo is a shipment from East to West.

There is another East-West distinction which is less well known today: the distinction between the eastern and western parts of the Christian church, which in the early centuries of the Christian era paralleled the distinction between the eastern and western parts of the Roman Empire. Although there were differences between the Eastern church and the Western church from an early time, it was only in 1054 that they finally split apart. That break coincided with the Western movement to make the Bishop of Rome the sole head of the church, to emancipate the clergy from the control of emperor, kings, and feudal lords, and sharply to differentiate the church as a political and legal entity from secular polities. This movement, culminating in what was called the Gregorian Reformation and the Investiture Struggle (1075-1122),[1] gave rise to the formation of the first modern Western legal system, the "new canon law" (*jus novum*) of the Roman Catholic Church, and eventually to new secular legal systems as well — royal, urban, and others. The term "Western," in the phrase "Western legal tradition," refers to the peoples whose legal tradition stems from these events. In the eleventh and twelfth centuries, these were the peoples of western Europe, from England to Hungary and from Denmark to Sicily; countries such as Russia and Greece, which remained in the Eastern Orthodox church, as well as large parts of Spain, which were Muslim, were excluded at that time. In later times not only were Russia and Greece and all of Spain westernized, but also North and South America and various other parts of the world as well.

The West, then, is not to be found by recourse to a compass. Geographical boundaries help to locate it, but they shift from time to time. The West is, rather, a cultural term, but with a very strong diachronic dimension. It is not, however, simply an idea; it is a community. It implies both a historical structure and a structured history. For many centuries it could be identified very simply as the people of Western Christendom. Indeed, from the eleventh to the fifteenth centuries the community of those people was manifested in their common allegiance to a single spiritual authority, the Church of Rome.

As a historical culture, a civilization, the West is to be distinguished not only from the East but also from "pre-Western" cultures to which it "returned" in various periods of "renaissance." Such returns and revivals are characteristics of the West. They are not to be confused with the

models on which they drew for inspiration. "Israel," "Greece," and "Rome" became spiritual ancestors of the West not primarily by a process of survival or succession but primarily by a process of adoption: the West adopted them as ancestors. Moreover, it adopted them selectively—different parts at different times. Cotton Mather was no Hebrew. Erasmus was no Greek. The Roman lawyers of the University of Bologna were no Romans.

Some Roman law, to be sure, survived in the Germanic folklaw and, more important, in the law of the church; some Greek philosophy also survived, also in the church; the Hebrew Bible, of course, survived as the Old Testament. But such survivals only account for a small part of their influence on Western law, Western philosophy, and Western theology. What accounted for the major part of their influence were the rediscoveries, reexaminations, and receptions of the ancient texts. Even to the extent that the ancient learning may be said to have survived without interruption, it was inevitably transformed. This point is especially important for an understanding of the rediscovery and revival of Roman law: by no stretch of the imagination can the legal system, say, of the twelfth-century free city of Pisa, which adopted many of the rules of Roman law found in the newly rediscovered texts of the Byzantine Emperor Justinian, be identified with the legal system of the empire over which Justinian reigned. The same formulas carried very different meanings.

The West, from this perspective, is not Greece and Rome and Israel but the peoples of Western Europe *turning* to the Greek and Roman and Hebrew texts for inspiration, and *transforming* those texts in ways that would have astonished their authors. Nor, of course, is Islam part of the West, although there were strong Arabic influences on Western philosophy and science—though not on Western legal institutions—especially in the period with which this study is concerned.

Indeed, each of the ancient ingredients of Western culture was transformed by being mixed with the others. The amazing thing is that such antagonistic elements could be brought together into a single world view. The Hebrew culture would not tolerate Greek philosophy or Roman law; the Greek culture would not tolerate Roman law or Hebrew theology; the Roman culture would not tolerate Hebrew theology, and it resisted large parts of Greek philosophy. Yet the West in the late eleventh and early twelfth centuries combined all three, and thereby transformed each one.

Somewhat more controversial is the distinction between the West and the culture of the Germanic and other tribal peoples of Europe before the eleventh century. If West were a geographical term, that earlier culture would have to be included; indeed, one would have to start, as most studies of European history do, with Caesar's Gallic wars, the invasion

of the Roman Empire by the Germanic peoples, the rise of the Frankish monarchy, and Charlemagne and Alfred the Great before coming to the Gregorian Reformation, the Investiture Struggle, and what is usually called the High Middle Ages or the Renaissance of the Twelfth Century (though it actually began in the latter half of the eleventh). To speak of the Germanic peoples of Europe as "pre-Western" may sound strange to some ears. Yet there was a radical discontinuity between the Europe of the period before the years 1050–1150 and the Europe of the period after the years 1050–1150.

Finally, it needs to be said in connection with the meaning of the word Western that, at least for the purpose of analyzing and explaining legal institutions, no sharp distinction should be made between Western and "modern"; and further, that modern should be differentiated from "contemporary" by applying modern to the period prior to the two World Wars and contemporary to the period since 1945. One of the purposes of this study is to show that in the West, modern times—not only modern legal institutions and modern legal values but also the modern state, the modern church, modern philosophy, the modern university, modern literature, and much else that is modern—have their origin in the period 1050–1150 *and not before.*

The term "legal," like the term Western, has a history. "Law" these days is usually defined as a "body of rules." The rules, in turn, are usually thought to derive from statutes and, where judicial lawmaking is recognized, from court decisions. From this point of view, however, there could be no such thing as "Western law," since there is no Western legislature or court. (By the same token there could be no such thing as "American law," but only the federal law of the United States and the state law of each of the fifty states.) Such a definition of law is entirely too narrow for any study that embraces the legal systems of all countries of the West in all the various periods of Western history, and which is concerned not only with the law in books but also with law in action. Law in action involves legal institutions and procedures, legal values, and legal concepts and ways of thought, as well as legal rules. It involves what is sometimes called "the legal process," or what in German is called *Rechtsverwirklichung,* the "realizing" of law.

Lon L. Fuller has defined law as "the enterprise of subjecting human conduct to the governance of rules."[2] This definition rightly stresses the primacy of legal activity over legal rules. Yet I would go further by adding to the purpose of the enterprise not just the making and applying of rules but also other modes of governance, including the casting of votes, the issuing of orders, the appointment of officials, and the handing down of judgments. Also the law has purposes other than governance, in the usual sense of that word: it is an enterprise for facilitating voluntary arrangements through the negotiation of transactions, the issuance of doc-

uments (for example, credit instruments or documents of title), and the performance of other acts of a legal nature. Law in action consists of people legislating, adjudicating, administering, negotiating, and carrying on other legal activities. It is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation.

Such a broad concept of law is needed in order to compare, within a single framework, the many specific legal systems that have existed in the West during many centuries. It is needed also in order to explore the interrelationships of these systems with other political, economic, and social institutions, values, and concepts.

I have taken the liberty of defining law in general terms, without reference to the particular legal institutions, values, and concepts that characterize the Western legal tradition. My purpose in doing so has been to answer those who, by defining law too narrowly, namely, as a body of rules, obstruct an understanding of the emergence of the Western legal tradition, of the impact on it of the great revolutions of Western history, and of its present predicament. The concept of law as a particular kind of enterprise, in which rules play only a part, becomes meaningful in the context of the actual historical development of the living law of a given culture.

To speak of a "tradition" of law in the West is to call attention to two major historical facts: first, that from the late eleventh and twelfth centuries on, except in certain periods of revolutionary change, legal institutions in the West developed continuously over generations and centuries, with each generation consciously building on the work of previous generations; and second, that this conscious process of continuous development is (or once was) conceived as a process not merely of change but of organic growth. Even the great national revolutions of the past—the Russian Revolution of 1917, the French and American Revolutions of 1789 and 1776, the English Revolution of 1640, the German Reformation of 1517—eventually made peace with the legal tradition that they or some of their leaders had set out to destroy.

The concept of conscious organic development was applied in the eleventh and twelfth centuries to institutions. In this context the term "institutions" means structured arrangements for performing specific social tasks. Universities, for example, are institutions for transmitting higher education and training professionals; the financial and judicial departments of government are institutions for administering taxation and justice, respectively; the legal system is a structured system of arrangements, one of whose primary purposes is to provide guidance to the various departments of government, as well as to people generally, concerning what is permitted and what is prohibited. In the West in the eleventh and twelfth centuries not only the newly created universities,

exchequers and courts, and legal systems were viewed as developing institutions, but even the church came to be so viewed. So also did secular structures such as urban and royal governments. These various institutions were conceived as having an *ongoing* character; they were expected gradually to adapt to new situations, to reform themselves, and to grow over long periods of time. In part, such growth was planned: many cathedrals, for example, were planned to be built over generations and centuries; they had budgets, literally, for a thousand years. In part, the growth was not so much planned as engineered: administrators and legislators revised the work of their predecessors, disciples set out to improve on the work of their masters, the "commentators" succeeded the "glossators." In part, growth seemed less to be planned or engineered than just to happen: for example, architects "combined" Romanesque with Norman, and out of that there "emerged" early Gothic, which "developed" into later Gothic, and so on.

As Robert Nisbet says, no one *sees* a society "grow" or "develop" or "decay" or "die."[3] These are all metaphors. Nevertheless, the belief of people living in a society in a given time that the society is, in fact, growing or developing, or decaying, or dying, is a very real thing. In the formative era of the Western legal tradition the older Augustinian belief that society, the "earthly city," is continually decaying was modified by a new belief that social institutions are capable of birth and growth and reproduction. Moreover, this process was conceived to be one in which successive generations consciously and actively participate. As Goethe said, a tradition cannot be inherited—it has to be earned.

The great English historian F. W. Maitland made use of the biological metaphor of growth to describe the changes that took place in the English law relating to the forms of action in the twelfth century and thereafter. He wrote:

> Our forms of action are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing materials. They are institutes of the law; they are—we say it without scruple—living things. Each of them lives its own life, has its own adventures, enjoys a longer or shorter day of vigour, usefulness, and popularity and then sinks perhaps into a decrepit and friendless old age. A few are still-born, some are sterile, others live to see their children and children's children in high places. The struggle for life is keen among them and only the fittest survive.[4]

Thus trespass, which Maitland called a "fertile mother of actions," is said to have "given birth to" or "given rise to" or "thrown off"—depending partly on one's taste in metaphors and partly on one's concept of organic