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THE IDEA OF LAW AMONG CIVILIZED PEOPLES*

The general system of Roman law is dominated by a great antithesis, which has exercised in the life of the law and in the theorizing of jurists and philosophers a most powerful influence, both of good and of bad, namely, the opposition between the civil law and the natural law, jus civile and jus naturale.

This distinction among the Romans was the fruit of observation and of experience. The good fortune and superior political organization of the Romans made them able to dominate all the nations living on the shores of the Mediterranean and to unify the ancient world. Barbarous and semi-civilized peoples of the west and in the countries of the north, and people of diverse civilization, but all superior to and much more advanced than their conquerors (the Punic, Greek, Hellenistic, and Oriental civilizations), were all gathered under the Roman scepter and constituted such a varied mixture that not even the Anglo-Saxon Empire of today has its equal. In the laws of all these peoples, or tribes, the Romans observed a combination of corresponding institutions which seemed to constitute a common basis, so not alone in their own laws but in all the laws of the peoples they distinguished two groups, a complex number of particular precepts and a complex number of common precepts. The jurist Gaius expresses it in this form:

"omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur."

*Translated by Signorina Yone Galletti Cambiagi, Foreign Office, Rome.
The designation of the common category of rules was sometimes the jus gentium and sometimes the jus naturale. The first designation belongs wholly to the Romans. It is related to their observation and expresses their universal recognition. The Romans inherited the designation of jus naturale from the Greek philosophy, but they infused into it a more positive spirit. The essential idea of the words, natura, naturalis, naturaliter, is what exists, happens or comes to pass independently of man's active agency, but through the work of other forces and especially through a general power of movement, nature, and the mysterious force which creates these facts and these effects.

So therefore, to consider some examples taken from these same Roman jurists, in matters not related to law, we notice that they say, "naturalis agger," the barrier not made by man, or in other words not artificial or manufactured; "motus naturalis arboris," a natural movement of a tree; the water coming down from the sky has a natural cause, "naturalis causa": the river, a "naturalis alveus," etc. In these instances the most general contrast is with everything produced by man, or whatever a man causes, provokes, or, in fact, makes. Lex naturae or natura rerum signifies in these instances what the natural sciences call natural law or nature. Now transported to the field of law, the word does not express a different thought nor assume a mystical appearance. The antithesis is above all related to the forms of legal action which constitute the part most visibly in contrast between different peoples and in which the mutual relations make the contrast most noticeable. There are rules in which are seen the will of the legislator and other rules which correspond exactly in their scope to the social conscience. The first are the work of legislators: they have been discussed in the Senate and approved by the Council; the second represent an ancient and sacred inheritance, an obscure elaboration whose origin it is not possible to trace. We can say that natural law has not been established by civilization, which has not invented it nor shaped it of its own will, but has discovered it in the social conscience, and by no other recognition, as a rule of law.

But in this way it is easily understood how we reach the conclusion that this jus, responding always to duty and conforming always to justice (that is to say, what the Romans called equitas), has been established not by man but by a Being, above man, which will be the personification of the same thing—Nature. Gaius defines the jus naturale or the jus gentium as the law
"quod naturalis ratio inter omnes homines constituit," that is to say, the law which nature and the natural order of things (and not natural reason) has established among all mankind.

The prevailing opinion holds that the last of the jurists, as Ulpian, Trifoninus, and Hermogenian, have made a further distinction between jus naturale and jus gentium. Modern criticism, with which I agree, holds to a contrary opinion. There is reason to believe that not a single one of the Roman lawyers (Hermogenian does not belong to the classical Roman school of jurisprudence) ever made the distinction between jus gentium and jus naturale. This distinction belongs to the Christian Emperor Justinian or to the Roman-Christian epoch. Norms which pertain to the body of natural law have no reason to change in order to assume a form more adapted to the aim of the norms of the jus civile. They only change when the social surroundings are completely transformed and the reason for them disappears, a thing which man by instinct cannot believe possible. Therefore it is obvious that this law comes to be conceived of as an eternal law, unchangeable in time as well as in space.

Nevertheless given the positive character of natural law among the Romans and given the empirical method of establishing the principles of natural law, the idea that this right would be absolute and unchangeable could not cause any harm to the Romans. Not so harmless, however, was a similar conception in modern times, especially in the 18th century just on the eve of the French Revolution when the philosophers and jurists and the so-called "natural rights" school, the historians and literary men approving the doctrine, pretended to fix a priori a natural law of pure fancy, without taking into consideration the men and society in which they lived. The naturalis ratio of the Romans, which was only used to mean the natural order of things, a pure synonym for Nature, was converted by a curious mistake and the school of natural law was called by some philosophers the school of rational law.

At the beginning of the nineteenth century this idea of natural law, which during so many centuries dominated the ancient and the modern civilization, was combated by the works of the German historical school.

In truth, this idea had already been combated since the year 600. But the word pronounced too soon by our Vico in the full glory of rationalism and under the unfavorable conditions of Italy was a voice crying out in the wilderness. Even a few
years before Savigny, the eloquent voice of Burke was heard in the English Parliament combating the principles of natural law on which were founded the principles of the French constitution, but without any immediate result. The historical school raised in opposition to the school of natural law was based on two postulates, each of them in opposition to the idea of the school of natural law, juridical evolution and the national conscience. There is nothing unchangeable in law, nor may we create a priori a system of ideal law, because law, as well as morality, habits, art, is subject to a perpetual evolution, nor can there be a law common to all people, because each race has its own national conscience by which the law is inspired. Thus the idea of evolution, which was to renew so many sciences and to create new ones (if the nineteenth century is the especially scientific century), made its first appearance largely and strongly in the domain of law, since its applications to comparative philology, to geology, and to psychology are all later, and even its application to biology is later or at least dates from about the same time. Vico recalls the seventeenth century; the declaration of Burke, the end of the eighteenth; as also the celebrated pamphlet of Savigny, published in 1814, follows closely with greater developments the biological communications of Geoffroy St. Hilaire and of Lamarck. Before the philosopher of evolution, Herbert Spencer, began to synthesize the various applications of the doctrine of evolution, very often in opposition to one another (it is known how Lyell, and not he alone, remade geology on the basis of evolution, but was nevertheless one of the strongest adversaries of biological evolution), the science of law for nearly half a century had been based on the same ideas.

Nevertheless, the two postulates of the historical school did not represent in the least all the truth, and together they have brought, with some good benefits, both aberration and harm. A notable confusion in the mind has produced the doubtful expression and hence the epithet "slow and gradual" added to the concept of evolution. Above all, this epithet, which arose perhaps as an effect of the age when the concept was born, transformed it into a political instrument which would necessarily injure its scientific value.

In the writings of Savigny, in the words of Burke, and in the works of the historical school the concept was used as a weapon against the dreams of the French Revolution and even against the most useful innovations produced by that great event.
Instead of being an instrument of progress, as it was in the idea which inspired it, it was used at the beginning as a help to restore and in course of time also to reinforce the conservative tendencies and to weaken the progressive ideas. This worship of history and of historical continuity became fetishism. Really the study of past ages, the sentimental passion, the idyllic coloration of the different past stages of national life, helped to chain the mind to the most obsolete institutions. History and romanticism ran together. The historical justification of everything that exists nowadays inspired a resistance to any change; anything which lives has a reason to live. Any innovation was banished as contrary to the slow and gradual evolution, the contribution of men came to be nearly eliminated, and progress was represented as a movement of things which, in their course, carried men away from their voluntary liberty, from their own activity.

But the true scientific harm of that concession was exactly this: for the sake of the principal, the accessory was forgotten and the research of organic law was neglected, that is, the development of law as against the slow and gradual character of the movement which seemed to assume the entire concept of evolution. And this expression in which the common opinion used to sum up the concept is probably untrue. Latest studies have contributed to destroy these pretended bases of evolution in the field of biology, but above all in the field of social sciences it is observed how peoples pass through periods of slow movement and sometimes of stagnation, followed by sudden crises in which everything changes, and, if the institutions of the past are not abolished, there is injected into them the germs of a profound alteration and of a great and sudden movement in a wholly new direction. The classical countries of evolution cannot escape from this law. The history of Roman law, which in the concept of the historical school was represented as a slow and gradual development from the first king of Rome to the great legislator of Constantinople, may be now considered as a story in which the conservative forces have suddenly twice undergone the effects of an immense crisis.

But the other concept which isolates law in the pales of the national mind is exaggerated. In the field of private law, if not completely, we can say that it is true as far as it relates to the family. This happens very few times in relation to the rights of succession, even though it might be desired to connect
these with the rights of the family. Still less is this seen in the realm of property, but the law of obligation and above all the commercial law could be made uniform with no difficulty for a large family of civilized peoples, without meeting obstacles in the national conscience. Before unifying the whole world under the norm of a common law, the Romans had succeeded in creating a common commercial law, the jus gentium. This practically fulfilled this function.

The higher value of law is the certainty of the norm, and the Romans had begun to unify it by making a unity of vast agglomerations of men. The form is indifferent. As in nature different organs fulfil the same function, so the most widely differing institutions can be used for the same purpose. To use a common but a very practical example, we may cite vehicles which play so great a part in modern life. It does not make any difference whether they keep the right or left side; the important thing is to have a rule for one side or the other. The ideal will be a rule common to all sorts of vehicles and for the largest zone. In the field of obligation, the unity among peoples could be established in obtaining the same advantage that we have in weights and measures and that we could have even for money. The propagation of our civilization in countries which have lived independent from it, as those of the Far East, has spread also the principles of the old Roman law, the most important element which formed the heritage of the ancient world. The general movement for codification, which took hold of all the continental countries of Europe, and Latin America, in the nineteenth century, seemed to break the approximate unity of the law which had been formed in former centuries under the aegis of the common Roman law, but ended in facilitating its progress and its enlargement with the Codes. Unnoticed, the Roman law has given a unity to the language and institutions of the legislation of civilized peoples and a common direction of thought and discipline of the mind. The compilation of a proposed Code of Obligations, confined as yet to France and Italy, is in progress as the work of willing French and Italian scholars, under the direction of the eminent lawyer Vittorio Scialoja. This movement is followed by every other country of the Entente, and we hope that even the lawyers who represent the great American people will join in these studies and ideas and will collaborate in reconstructing the Latin science of law so that, in course of time, the
basis of a common commercial law may be laid.

We are at the beginning of a new era for the world. Since so many human institutions have been overturned by the recent tempest, one may hope that worshipers of law in all of the most civilized countries will feel that the time is opportune to cooperate in a common effort to render more agreeable and more sympathetic the relations among peoples, breaking down at least many of the artificial barriers, that an evil inheritance of juridical traditions propagating itself ever like an eternal malady may have no stable foundation among men.

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