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By WILSON D. WALLIS*

THE latter eighteenth century conception of English law as the "perfection of human reason" has given place to a more fruitful, and perhaps also more accurate, conception of law as a historical development. The historic beginnings of law and of legal interpretation do not, culturally speaking, go back very far. We know very little about laws and legal procedure in Western Europe previously to the last thousand years. Civil law can be traced back another thousand years, but of its origin in or beyond Rome little is known. Perhaps, all irony aside, law is the perfection of human reason. I would not suggest that any other phase of social life or any other social discipline shows a healthier glow by the cold flame of reason. Law, whether perfection or not, and whether reason or not, has been changing throughout the period of history. However we interpret its virtues, we do not attribute their existence entirely to a response to the stimulus of reason, on some fine day, in the vicinity of the English Channel. Human culture antedates history. Every fundamental phase of social life is present in each preliterate society known to ethnography. Historic forms of law and legal procedure had humbler beginnings in a prehistoric period, but in the very nature of the case their immediately prior expressions are not recoverable as historic facts. Are they recoverable by inference? This question has sometimes been answered affirmatively by citing procedures in preliterate societies. But a difficulty in discovering the prehistoric origin of a specified phase of law, punishment of homicide, for example, arises from the fact that not all preliterate peoples follow the same procedure or mete out the same punishment. If we seek the specific evolution of the methods of punishing homicide, we must, therefore, decide which one of many preliterate methods is the immediate precursor of the earliest recorded methods in historic civilization.

Some arrange in logical order the methods of punishment and assume that the logical order records the course of prehistoric development. The logical order sometimes assumes the principle of simple culture to complex, or proceeds from presumed simple

*Professor of Anthropology, University of Minnesota.

psychological conditions to more complex, or from crudely logical procedure to more soundly logical. This method, in whatever form, has, as empirical procedure, serious shortcomings, for it is impossible to test its validity. Observations of historic movements, that is, of known developments of culture processes, do not justify the assumption that a given phase of social life has developed logically, or that it has proceeded from simple to complex, or from lower motives to higher ones—whatever they may be. The assumption that change is always in the same direction begs the question. As modern warfare turns to medieval chain armor, hand grenades, steel helmets, and even to Homeric Trojan horses, so do social trends sometimes revert to earlier phases, or analogous ones. Law, too, has its ups and downs, moves forward and back. One who contemplates the pitfalls in so-called historic reconstruction of a prehistoric past, where, as we must again insist, in the nature of the case there can be nothing historic, hesitates to accept the fiction of an unknown past reconstructed out of imagined materials; for one cannot ascertain whether the fiction corresponds with fact. The reconstruction seems true if one prefers to believe it; but that is not, even in a court of law, the highest type of evidence, though, psychologically, it may be satisfying. Even so, inability to identify the specific law which preceded historic law does not diminish our conviction that such law existed. A good finger-print is better evidence that a human being made it than is the testimony of many eye-witnesses; it is more difficult for the former to lie than the latter, be they ever so honest and discriminating. One cannot believe that, for example, the historic Romans invented all of their law. Observation, whether of simple or of sophisticated cultures, demonstrates that not much which is essentially new appears in any given generation, however novel the new combinations of older elements may be. In culture as in the physical world, out of nothing, nothing develops. In the realm of non-material things the chronologically prehistoric is forever gone. Only the discovery of older documents can enlighten us regarding legal procedures in the prehistoric Mediterranean or Western European cultures. We do, however, know the cultures of many contemporary preliterate folk before they reaped the whirlwind which Western Europeans call the blessings of civilization. Their cultures do not enable us to trace the precise development of the various phases of law, but they suggest possible courses of development. The data are rele-

vant to the early history of law provided they reveal general tendencies which seem, because, in spite of great differences in culture, they are general, to be rooted either in a common psychology or in common conditions of social life. To the extent that human action and reaction are everywhere the same, or similar, there is a common human nature. If, further, there are common elements in law, one searches for an explanation of their existence. Universality, or approximation to it, rules out chance.

The existence of similar patterns of belief and behavior in practically all cultures justifies the inference that the bases of Western law and legal procedure are not sheer accident. Certainly they are not peculiar to Western peoples. Some of them seem to be inherent in the conditions of social life and in the psychological and social accommodation to them which is necessitated by the kind of world which is humanly possible.

Everywhere, for example, men live in social units—bands, hordes, tribes, or nations—in which they recognize as binding upon themselves and their fellows certain rules of conduct. Everywhere custom has a powerful hold on men and operates as a sanction. Everywhere tradition is a guide. Men wish to keep things as they were and are; and out of this predisposition grows the power of precedent. In many primitive tribes, when the old men meet in council to settle a matter under dispute, they search their memories for a record of what their "fathers" did in similar circumstances. The ways of the fathers is a well worn path, and men follow it easily. The sanction of use and wont is a powerful regulator of conduct. Zulu, of South Africa, distinguish between custom, as proper procedure for the violation of which no punishment is forthcoming from one's fellows, and law, as procedure which will be enforced tribally. Probably every people makes, in effect, a similar distinction and could verbalize it if called upon to do so. In many small preliterate groups, however, in the day to day life there is no occasion to make this verbal distinction. Everywhere individuals assert property rights. In every tribe known to the ethnologist a man owns the instrument of earning a livelihood—his bow and arrows, canoe, stone or metal implements, and so on. He lays claim to the immediate products of his labor or other efforts—the game which he kills, the vegetable food which he gathers, the harvest from the grain which he has planted. In many tribes, however, there are limitations upon such ownership. In some tribes it is incumbent upon the hunter to give a portion

of the killed animal to specified kin of himself or of his wife, or to the aged. In many agricultural areas a man controls a given plot of land as long as he tills it, but the land reverts to the community, or may be taken by another, if for one season he ceases to till it. Practically everywhere tribal rules govern the disposition of man's possessions at his death. In some tribes about everything which he owned is buried or burned at his death. Generally, however, if valuable property has been accumulated, it goes to a son or daughter of the deceased, or, especially in matrilineal societies, to the deceased's sister's son, that is, it passes in the female line. In several tribes, as notably in the northwest coast area of North America, and in Polynesia, sometimes a dying man designates the disposition of his property. Sometimes his requests are carried out; in many tribes, however, he may not thus dispose of his property. Such limitations upon one's right to dispose of one's property by testament are, it appears, more emphatic in regions in which personal possessions have acquired a relatively considerable dimension than in areas in which there is little personal wealth. If there is a considerable accumulation of property, the kin group insist that the property be kept within that group. Sometimes a man, to ensure that his property will go to the person whom he wishes to have it, disposes of it during his lifetime. The fundamental phases of the Western law of inheritance are, it is evident, present in many preliterate societies.

Most of the crimes known to our pre-industrial civilization, except such as could not exist in a preliterate group, for example, forgery, are found with varying frequency in some of the simpler tribal societies. Everywhere voluntary homicide of a member of the kin group is regarded as the most heinous crime, unless the exception be incest, which is likewise universally a heinous crime, though often the incest group differs radically from that of Western civilization, and is not always based on blood relationship. In the simpler societies, for example, most North American tribes, there is invariably a consideration of the circumstances of the crime of homicide before punishment is exacted. Sometimes no punishment is meted out; sometimes the life of the murderer is demanded. What will be done depends on the character of the victim, that of the offender, and upon circumstances. There are no hard and fast rules, no principle of an eye for an eye or a life for a life. Justice is not arrived at by a balancing of preadjusted scales with deeds neatly labeled and weighted. Only after a crime was

committed could the proper punishment be determined. Similarly in the case of involuntary homicide there is consideration of all circumstances and of the characters of the persons involved. In many regions there is compounding for the offense, at the option of the kin of the murdered man.

Most primitive peoples do not conduct trials. The guilt of the accused is known, and almost never does he deny it. Some peoples, however, have the institution of the trial, with judge and jury. In a few tribes witnesses are summoned, or voluntarily appear and give testimony. Practically wherever this is the case the headman, chief, or king, is the judge, and the men who in ordinary times constitute his council are the jury. Usually the judge, after hearing the opinions of the jurymen or council, pronounces judgment; and from this decision there is no appeal. He follows prevailing opinion; as is true likewise in tribal political and social matters. Some peoples have supernatural means of ascertaining or assuring the truth of statements of witnesses or of the parties to the dispute. The oath is found in many portions of the Old World, notably in East and West Africa, Polynesia, Idonesia, Indo-China, and in parts of the plains area of North America. Some tribes divine the guilt or innocence of the accused or compel him to take an ordeal. Practically always, when ordeal is used, it must be taken by accuser as well as by accused. The ordeal flourishes in most portions of Negro Africa, and in Polynesia, Idonesia, Indo-China, and India. If any of the above supernatural agencies are appealed to, their evidence is accepted as final.

The similarities in much basic law and legal procedure in preliterate societies and in Western civilization do not indicate the specific beginnings of Western European practices; but the fact that they are widely spread, or are found in several widely separated cultures, suggests that they are a response to real or presumed needs of social life, or of human nature, or of both.