THE UNITY
OF
WESTERN CIVILIZATION

ESSAYS ARRANGED AND EDITED

BY

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UNITY AND DIVERSITY IN LAW

You know the story of Sophocles' *Antigone*: how, when two brothers disputed the throne of Thebes, one, Polynices, was driven out and brought a foreign host against the city. Both brothers fall in battle. Their uncle takes up the government and publishes an edict that no one shall give burial to the traitor who has borne arms against his native land. The obligation to give or allow decent burial, even to an enemy, was one which the Greeks held peculiarly sacred. Yet obedience to the orders of lawful authority is an obligation binding on every citizen. No one dares to disregard the king's order save the dead man's sister. She is caught in the act and brought before the king. 'And thou,' he says, 'didst indeed dare to transgress this law?' 'Yes,' answers Antigone, 'for it was not Zeus that published me that edict; not such are the laws set among men by the Justice who dwells with the Gods below; nor deemed I that thy decrees were of such force that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of to-day or yesterday but from all time, and no man knows when they were first put forth.'[1]

There you have the assertion of a law supreme and binding on all men, eternal, not to be set aside by human enactment.

And now turn to this passage from the traveller and historian Herodotus, an almost exact contemporary of Sophocles. He has been telling how Cambyses, king of

[1] Sophocles, *Antigone*, 449–57 (Jebb's translation).

the Persians, has been wantonly insulting the religion and customs of the Egyptians. 'The man must have been mad,' he says:

'For if one was to set men of all nations to make a choice of the best laws out of all the laws there are, each one upon consideration would choose those of his own country: so far do men go in thinking their own laws the best. Therefore it is not likely that any but a madman would cast ridicule on such things. And that all men do think thus about their laws may be shown by many proofs, and above all by this story. For when Darius was king he called to him the Greeks who were at his court and asked them, 'How much money would you take to eat your fathers when they die?' And they answered that they would not do this at any price. After this Darius called the men of an Indian tribe called the Kallatiai, who eat their parents, and asked them in the presence of the Greeks, who were told by an interpreter what was said, 'How much money would you take to burn with fire your fathers when they die?' And they cried with a great voice that he should speak no such blasphemy. Thus it is that men think, and I hold that Pindar spoke rightly in his poem when he said that law was king over all.'[1]

There you have law, king over men and gods, but a capricious monarch commanding here this, there that.

This capricious arbitrary aspect of law was a thing which much impressed the Greeks. They contrasted the varying, artificial arrangements made by mankind with the constancy and simplicity of nature. We speak of nature and convention; they contrasted things that are by nature with things that are by law. It was a contrast that bore fruit later on.

Now law, whose arbitrariness and variety so much impressed the Greeks was the law not so much of this place or that, as of this or that community and its members. This is a conception quite different from that of the modern

[1] Herodotus, iii. 38.

world. We may paraphrase 'English law' by saying the law of England, because it is the law which will be applied (with, it may be, some exceptions or modifications) by the English courts to all persons, be they English or aliens, who come before them. But Athenian law is not in this sense the law of Athens, nor, to begin with, is Roman law the law of Rome. What we find is a law of Athenian or Roman citizens. The stranger to the city is a stranger to its law. As a matter of principle he is without rights by that law. His life is not protected by the blood-feud which his family can pursue, or by the compensation with which it may be bought off. His marriage with a citizen will be no marriage, or at best a sort of half marriage. He can acquire no land within the city's territory, and what goods he brings with him are pretty much at the mercy of the first taker.

Such, at any rate, is the theory of the 'law of citizens'.

We need not, it is true, believe that it was logically formulated in primitive times and ruthlessly applied. Some of its applications were the result of positive legislation due to a growing consciousness of the self-sufficiency of the city state and of the privileges of citizenship, as when Athens passed a law excluding from citizenship the offspring of citizens who had married foreign wives. But in its broad outlines the principle is sufficiently borne out by the exceptions which were necessary to make human intercourse possible. The stranger within your gates is protected just because he is within your gates, and you throw your protection about him, as is indeed your duty, for suppliants and strangers come from Zeus. The foreigner, even at a distance, may have a citizen as representative who can and will defend his rights. A stranger may be allowed to take up a permanent residence in the city, and by the mediation of a patron or guardian enjoy private rights not much inferior to those of a citizen. His legal

position will not be very different from that of a woman citizen, who needs the like mediation. Cities may, again, by treaty confer on each other's citizens reciprocal rights of legal protection.

In the middle of the third century B. C., Rome, after its first successful war against Carthage, took special measures to deal with the problem of the alien litigant. The great and growing commerce which came from all parts of the Mediterranean called for something more than a mere admission to treaty privileges. A special officer was from henceforth appointed to deal with the law-suits to which foreigners were parties, and the judgement was given by a body (which we may compare with our jury) which might include fellow-citizens of the foreign suitor.

But here a difficulty arose : what law was to be applied to a transaction between a Roman and a foreigner, or between two foreigners ? The Roman law, the law of citizens, had been codified two centuries earlier, and its outline had been hardened by the practice of two centuries. The forms for a transfer of property, for instance, were rigid and solemn ; the foreigner would hardly know them, and if he did, his alien hand could not effectively do the prescribed acts nor his alien mouth speak the almost sacred words. The answer was that behind the forms of the law of this city or that, there was ' a law of the men of all nations '. The common elements in the ordinary transactions of life, in whatever form they were clothed, could be taken into account and given effect to. Thus, side by side with the ownership according to the law of Roman citizens, the solemn words of promise which only a Roman citizen could utter, the marriage which only a Roman citizen could enter into, there might be property, contract, marriage to which any one, citizen or alien, might be a party.

This ' law of the men of all nations ' (*ius gentium*) was

of course not an international law, it was a law administered by Roman officers, and it was coloured by Roman conceptions, however much it may have drawn from a comparison of foreign laws with which the Romans were brought into contact. In turn it reacted upon the more narrow law of Roman citizens (*ius civile*), broadening its conceptions and enabling it to free itself from primitive formalism. It also made easier the task of Roman governors who were called upon to administer the various laws of the different countries which came to form the Roman empire.

The gradual extension of the citizenship (completed at the end of the second century A. D.) to the whole of the inhabitants of the empire made possible, at least in outward appearance, the application of a uniform system of law throughout what was then the civilized world, though beneath an apparent uniformity local traditions and customs survived to the end, at any rate in the east. The 'civil law', as the Roman law in its final form has been called down to the present day, consists of elements of the narrowly Roman and the more universal law inextricably interlaced.

This Roman solution of the problem of the foreign litigant is of much more than merely practical importance. The Stoic philosophy which grew up amid the decay of the old city life, whose adherents spoke of themselves as citizens of the world, had fastened upon the old antithesis of law (or convention) and nature, and formed the conception of a law of nature, which should have a reasonable basis and a validity superior to the arbitrariness of the city law. To this ideal conception the Roman law of the men of all nations gave a body and a reality. Stoicism became the 'established' philosophy of Rome, and Roman lawyers well-nigh identified the '*ius gentium*' with the ideal law of nature, describing it as that which natural reason has established among all men. Yet for

at least one of the great classical lawyers, whose words have been enshrined in Justinian's legislation, the identification was incomplete. By nature, it was said, all men are free, and mankind has departed from what natural reason requires, in permitting slavery. Thus the law of nature must be sought in something more universal than the practice of mankind. More than fifteen hundred years later in an English court an argument against the recognition of the rights of a slave-owner was successfully founded on the law of nature.

Before the Roman law had been put (at Constantinople) into the final shape in which it is preserved to us, the Roman empire in the west had already been broken up by barbarian invasions. The invaders brought with them their tribal laws and customs, rude, often cruel, narrow rather than simple, for simplicity is the work of civilization. They did not understand, and could not adopt, the law of the world into which they had come. Yet neither could they, if they would, force their laws upon the conquered inhabitants. Among these the old civilization lingered on in a degenerate form, and with it the Roman law. One of the first things that happened was that the conquerors drew up for their Roman subjects short codes of the Roman law as it survived in a debased form, as they drew up statements of their own law for their followers. For a long time each man, according to the community to which he belonged, had a 'personal' law. As late as A.D. 850 we hear that in France it might happen that five men met together and each would have a different law. Of course such a state of things means before very long that there must be at any rate one set of common legal rules which must be applied throughout a territory, namely rules to decide which kind of personal law is to be used when there is a dispute between two persons whose personal law is different.

Gradually the different populations within the same area coalesce, and law from being personal becomes local. But the local area will not be the same for all purposes. The law or custom which determines the rights of the small, often unfree or half-free tenant, whether as between him and his neighbour or as between him and his lord, may extend no further than a very small area, such as in England we call a manor. The law by which great men held their land from a king, though perhaps not uniform throughout the kingdom, will cover a much larger area. The fact that a great man may hold land in far distant places, it may be in different kingdoms, and that men of this class have connexions with different parts of Western Europe will lead to the formation of common notions of feudal law, which make possible even the scientific study of a law of feuds, though no complete uniformity was ever attained.

England was the first western country to attain political unity with a territory substantially the same as at the present day ; and the determination of the English kings that in the more important matters justice should be done throughout the land in the king's name, either by his courts at Westminster or by judges sent by him to the counties, secured the formation of an English Common Law which left comparatively little play for local custom, and which at an early time became strong enough to resist attempts to introduce foreign law. As early as the time of Henry III the barons proclaimed with one voice that they would not have the laws of England altered in favour of a rule—the legitimation of bastards by the subsequent marriage of their parents—which in one form or another has been adopted in Western Christendom, and even in the neighbouring kingdom of Scotland.

In France political unity was reached only later and bit by bit, and when it came the difference of law in the

various provinces was too firmly established to make uniformity possible until the time of the Revolution. In Germany the shadowy unity of the Holy Roman Empire was never enough to afford any effective central administration of justice. National law in the strict sense was impossible under such conditions: the most that can be expected is such a degree of unity as results from common traditions inherited from more primitive times, and a community of language and national feeling.

Amid local and national diversities of law there were at any rate two unifying influences, the Roman and the Canon law. In some parts of Europe, as in the South of France and Italy, the traditions of the Roman law had never died out, and in a debased form, with much admixture of the law of the invaders, it had come to form the basis of the local law. In others it was the barbarian law which formed the groundwork. But just as behind the new languages, whether in the main founded on Latin or on Teutonic, Latin remained the medium of intercourse between the countries of the West, and the instrument of thought and learning, so Roman law remained a tradition which was ever ready to exert an influence. It is not only in law courts that law is learnt and developed. Transactions have to be drawn up in writing, and will largely be made in Latin, and founded on precedents. The grants of land to and from ecclesiastical bodies especially will be in a form which borrows much from Roman or romanesque models; and they will form models for the transactions of others. Even the formulation of native law in the early codes will be carried out by men who know of no written law except the Roman. In the twelfth century Roman law becomes a subject of University study throughout Western Europe, in Italy, at Paris, even at Oxford, and forms a part of that international learning which scholars carry from land to land. Men

trained in the Roman law rise to high positions in the public service. As judges and administrators they will not forget what they have learnt as students or taught as doctors. Yet it would be easy to exaggerate its influence, great as it was. It was certainly more as a form and method of legal thought than as an actual source of legal rules that it made itself felt, for instance, in our own country, and the strength and cohesion which it helped to give to our law enabled that law later to resist its further advance.

The Canon law was the law of the Western Church, a truly international society. It was formed largely on the model of the Roman law, and it largely borrowed from it, though it is full of non-Roman elements. It governed not merely what we should call purely ecclesiastical matters, but dealt or attempted to deal with other things, such as marriage and the disposition of the goods of the deceased. Our own law of marriage and divorce, and of probate of wills, has a history which goes back to the ecclesiastical law of the Middle Ages. Like the Roman law it exercised an influence as a model and a repository of maxims, all the greater because in every country it was a law in actual force within a sphere of which the boundaries were constantly being disputed between the lay and the church powers.

The beginnings of modern Europe with which we associate such things as the revival of learning and the Reformation brought with them on the Continent the event which is known as the reception of Roman law. The traditions of the ancient world had been seen in mediaeval times through mediaeval eyes, and had been moulded to mediaeval needs. The new age insisted on going back direct to the classical tradition. It was the actual Roman law of Justinian, not the Roman law as interpreted by mediaeval commentators, that was to be

studied and applied. The break-up of the institutions of the Middle Ages, the growth of absolute monarchical power, the centralization of government, all favoured the tendency. Roman law contained doctrines eminently pleasing to an absolute ruler, e. g. 'the decision of the monarch has the force of law'. In Germany above all, where law was divided into countless local customs, the movement had its fullest effect. Roman law comes to be the law which is to be applied in the absence of positive enactment or justifiable custom. The native law finds itself driven to plead for its life, and is lucky if it can satisfy the conditions which are required to enable it to continue as a recognized custom. In every country of the West outside England, in greater or less degree, the Roman law comes in as something which will at least fill up the gaps, and will purge or remodel the native law. Even in Scotland texts of the Roman law may be quoted as authorities. The strength of our own law, and the successful resistance of our public institutions to monarchical power saved us alone from a 'reception', in the continental sense, of Roman law. And even our Blackstone will quote Roman law with respect where it tends to confirm our own rules.

If this reception was a movement which brought about a greater unity in the form and substance of the laws of Western Europe, there was another factor at work which tended in the opposite direction. The claims of the Empire to universal authority become more and more unreal: the claims of the Pope are either rejected entirely, or the ecclesiastical sphere is strictly delimited. The State becomes sovereign. For this purpose it makes no difference whether it is a High Court of Parliament or an absolute monarch which is the supreme authority: law comes to be thought of as the command of a sovereign person or assembly. 'No law', we are told, 'can be unjust',

for law is the standard of justice, and there is no other standard by which the justice of law can be measured. The fact that there is in every State a sovereign power which can make and unmake the law at its pleasure makes possible the creation of a uniform law for all the subjects of a State, and so far as the State coincides with the nation, makes for the creation of a national unity in law. Thus Frederick the Great gave a code to Prussia, thus Napoleon gave France a code which swept away the diversities of the provincial customs; yet it served more than merely national purposes, for it found its way not only into the countries conquered by him, where it survived his conquests, but even into lands where he never held sway. Our French fellow-citizens in Quebec use an adaptation of it as a statement of their law. It took longer before Germany as a whole obtained a uniformity of law. The very strength of the national aspirations roused by the war against Napoleon stood for a time in the way of codification. The great German lawyer of that time, Savigny, thought of national law as a half-unconscious product of the national feeling of right. The Code of Napoleon had been a revolutionary code, founded (imperfectly, no doubt) on the doctrines of the rights of man; codification for Germany would mean the adoption of something abstract, not specifically national. It was only a century of extraordinary fruitful learned activity, bringing with it at the same time a new and intense study of the Roman law, and a revival of the knowledge and application of the native conceptions of law, that made possible the German civil code which came into force fifteen years ago.

England has never seriously undertaken the work of codification, and its law, uniform and national already in the Middle Ages, has become in the modern world something far wider than a merely national law. The English settlers in the new world brought their law with them.

To-day English law, modified no doubt by State and Federal legislation, is the Common Law of the great republic of the United States. The colonies which still remain within our Empire are territories of the English law, save where, as in South Africa or Quebec, civilized settlers had already established and retained their own law. Throughout these lands, it matters little under which flag, an English lawyer finds the Courts speaking a language which he understands.

Thus it came about that the world, which derives its civilization from Western Europe, may be divided into lands of the English law, and lands where in outward form at least the law is Roman. And yet we must not make too much of this division. In the first place it cuts across national boundaries. It unites us with the United States of America, it separates us from some of our own colonies while it unites them with continental Europe. In the second place law is, like language, a form of thought; and diversity of form, though it hinders, does not prevent a unity of substance.

Among the forces which have made for unity something should be said of the conception of a law of nature. The phrase has been out of fashion in this country since the days of Bentham and Austin, who laid stress upon the positive, one might say arbitrary, character of the only law which they would recognize as law in the proper sense of the word. I am not concerned here to discuss its philosophical validity. But it has never been lost sight of. It is one of the inheritances of the Roman law tradition. Alike in the Middle Ages, and since their close, it has been the subject of speculation and an influence guiding the legislator, the thinker, and the administrator of law. There is a whole literature upon it on the Continent. It bulks pretty largely in Blackstone: you can see its influence on the judges of the eighteenth century in this

country; the founders of the American Republic put a good deal of it into their constitution, and American judges will still refer to it without shame. What it really means is a standard by which the law here and now may be judged, a standard founded on the needs of human nature. That the standard becomes a different one, as the needs and possibilities of humanity develop, has not prevented the seeking after such a standard.

It is perhaps only another way of putting the same thing to say that law has developed and is developing constantly by reference to the pursuit of ends more or less consciously arrived at by mankind. So far as these ends are common, and I take it that in the main, amid national and individual diversity and conflict they are common ends, law has been formed for their attainment. On the whole what men have asked law to do for them has been the same at any given stage in civilization. The eighteenth century asked for liberty, property, and happiness. We are putting a rather different meaning, or perhaps a different stress on the words, not only here but throughout the civilized world, and the main movements of legal change are in the same direction everywhere.

One word about the two kinds of law known as Public and Private International law.

The fact that the laws of different countries are different gives rise to problems whenever the Courts of one country have to deal with a set of facts where some foreign element is involved, for instance a citizen or an inhabitant of another country, or property which is in another country, or a contract or transaction which took place abroad. Now we have long got past the stage at which the Courts could simply disregard the foreign element, could say this man is a foreigner, therefore he has no rights; or this event took place abroad, and therefore we will treat it as if it had never happened. On the other hand

it will not do for the Court to apply simply its own law. Grave injustice would be done, for instance, if a transaction made on the faith of law which will give a certain effect to it, were treated as made under another law which will give it a different effect or no effect at all. For this reason the Courts of every country have formed rules (sometimes called Private International Law; sometimes, and as some hold, more properly, called 'Conflict of Laws') by which they determine how far, where a foreign element is involved, the foreign law is to be carried out rather than the law which the Court applies in ordinary cases. These rules are not the same in every country, because differences of opinion are possible as to what justice requires. But the very existence of such rules shows that the Courts hold that the world of law is one, however much diversified, and that no one territorial law can blindly go on its way without taking account of its neighbours.

International law in the more proper sense of the word, that is Public International Law, or the law which governs the relations between States, is a very different thing. Something of the kind was not unknown in the ancient world; the Greeks, for instance, had rules against the poisoning of wells, the proper treatment of envoys, and the making and keeping of treaties. But in its modern form it dates just from the time when States were waking up to the consciousness of sovereignty, and when the horrors of the wars which followed the Reformation showed that even sovereign powers ought to conform to some rules of conduct. It has been the work in its origin of writers and teachers of law, and has been built up more recently by agreement between States. Unlike the law between man and man, which modern states enforce by organized compulsion, there is no standing organization whose business it is to see that it is kept. It is not true

to say that for this reason it is not law at all, for in primitive times the recognized rules of private law were enforced not by State sanction but by the action of individuals, with the support of the opinions and at times the active help of their neighbours and friends. But a law which is defied with success and impunity is no law. The reality and strength of International Law has lain in the fact that its breach brought at least the risk of suffering, through the common disapprobation of civilized nations; its preservation and maintenance for the future must lie in a certainty of disaster, not greatly less than that which awaits the transgressor of private law.

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