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THE MOST ANCIENT LAW

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Mr. Herbert Spencer, in his "Principles of Sociology," dissents sharply from many of the conclusions of Sir Henry Maine regarding the earliest social states and legal conditions. Mr. Spencer is not a jurist. He has no great reverence for a law as a system of practical justice, he has no faith in law as a moralizing and improving influence, and he has little respect for law as the output of courts and parliaments. He is never more complacent than when he exhibits to the scorn of his readers the imperfections of law and lawyers.

Mr. Spencer is right in much of this. Law is imperfect, necessarily imperfect, and permanently imperfect. And here we speak of law, not in any vague and general sense as a rule of action, or rule of right reason, or formula of physics expressing a constant relation, but as a definite system of human legislation announced by courts and enforced by public authority. An ideal and faultless code must proceed from an infallible legislator, like the fabled systems of Oriental sacerdotalists. The appearance of such a body of law in the midst of our modern societies would be nothing short of a public calamity. It could never be fully enforced. It would not accord with the sense of right prevalent among the people. It would be universally condemned as visionary and utopian. If applied, it would be essentially unjust in its operation.

Mr. Spencer's first literary venture brought out his "Social Statics." He has lived to see the folly of many of the conclusions expressed in this work, and in his riper years has repudiated them without reserve. This book assumed to treat of the equilibrium of a perfect society and exhibits the author as contending for the right to ignore the state, attacking the law of private ownership in land, opposing sanitary regulations,

and advocating private coinage of money. The work has no place in the system of Synthetic Philosophy; it does not follow the scientific method but is full of metaphysical deduction. Now science knows nothing of so-called social statics and the equilibrium of a perfect society. All the world moves except what is dead. Perfection, when reached, cannot be preserved. Retrogression is as fully in accord with the philosophy of evolution as is progress towards better things. What is fittest to survive is ever tested by environment and not by an ideal and unyielding standard of excellence.

It is obvious that Spencer might have profited by an earnest study of philosophic jurisprudence. Lawyers, who have been fascinated by the Spencerian method of inquiry, are quick to recognize that legal institutions have had their genesis and development, and have come to their latest and most refined expression in practically the course of evolution so exhaustively illustrated in Mr. Spencer's books. In fact it is difficult to find in biological or other physical science more numerous and convincing proofs of the substantial accuracy of Mr. Spencer's all-embracing formula of evolutionary progress than are presented by the stories in our books of case-law of the germs, the advances and vicissitudes and ultimate crystallization of the now familiar doctrines of private municipal jurisprudence. Nothing is easier to understand than the passion for inductive study as exhibited in the case-system of legal instruction and in the laboratory method of psychological research. Facts first observed and then classified and generalized are more impressive than old theories revamped by new professors. The actual law of commercial paper is well-expressed, without doubt, in the "Negotiable Instruments Law," recently passed in several States; but the student who would master the principles of negotiability should seek his information in the adjudications which have developed this important department of the law. It cannot be wrong to ascribe the popularity of the inductive method of legal instruction very largely to the influence of Mr. Spencer.

Mr. Spencer, in common with many others of the laity, has been misled by the extravagant pretentions put forth by enthusiastic writers as to the nature and scope of the law. Our own legal system has been deliberately characterized as the perfection of human reason, and jurisprudence itself exalted as the knowledge of things divine and human. The mission of law has been stated to be the working out of the perfection of individual character. If it could effect this it would leave little scope for

the exercise of the religious and domestic virtues. The range of individual volition is certainly small when the State punishes offenses against God and religion as well as crimes against trade and manufacture. The conception of the state as *bonus paterfamilias*, and of statute as a panacea for social ills and the propagandist of an evangel which promises temporal and eternal salvation to all loyal citizens, has aroused the righteous wrath of Mr. Spencer and his school of philosophers.

We will not go far astray if we say that the law's scope is limited to external human conduct. The difficulties in the way of proof make this necessary. The traitor who imagines the king's death but who commits no overt act of felony stands uncondemned by any earthly tribunal by the side of the adulterer, who, by a lustful look, has committed sin in his heart. Many acts which are certainly prompted by revenge or inspired by malice often go unwhipped of justice, because the law cannot look upon the heart and learn its secrets. "Be pure in heart, or I'll flog you," said the master of Eton to his boys, announcing a rule which no discipline could enforce. The administration of justice must always remain imperfect in human societies, just as the law's expression of primary rights is at best only the aspiration and hope of weak, sinful and infirm humanity. This is not to be regretted. For human enactments are not to be regarded as the dreams of idealists, but as the stern dictates of political authority enforced by the police or military arm.

Sir Henry Maine was led to a life of scholarship through ill-health which incapacitated him for an active career in the practice of the law. He achieved the highest eminence as a publicist, jurist and man of letters. Sir Frederick Pollock, speaking of Maine, says: "I am bold to claim immortality for my master's work." Maine's literary style entitles him to rank with Addison and Macaulay as a writer of ornate and elegant English. There is nothing commonplace about him. Still it is not difficult to understand those who confess that they are unable to observe the profundity of his thoughts, who boldly arraign him for inaccuracy, or who see in his writings nothing but words. His generalizations are bold, his propositions suggestive and often purposely uncertain, and without doubt, many of his interpretations of Roman Law are fanciful and fallacious. One who undertook to examine all his works and put down in order the specific new propositions for which we are indebted to Sir Henry Maine would be grievously disappointed. Some

other writer has said, and I think with good judgment, that the lasting value and principal charm of Sir Henry Maine, is to be found in the marvellous suggestiveness of his style.

Maine's materials, too, were the most splendid monuments of human genius in legislation, the most refined and polished masterpieces in literature, and the noblest and most elevated expressions of moral sentiment that have been put forth by the leaders of the world's thought in politics, ethics, jurisprudence and philosophy. To elegant classic culture he added a good knowledge of the distinct systems of the civil, the canon and the English common law. Besides this, his official connection with the Supreme Council of India and long residence in the East furnished him with an opportunity to lay under tribute the wealth of Oriental learning in jurisprudence and politics. Jurisprudence, historical and comparative, has been introduced to English and American students and popularized by Maine, or at least illustrated and exhibited as a possible body of learning awaiting fuller development hereafter. The true method of the treatment of legal questions, namely, the historical method, has been indicated and emphasized. The student of Maine gets a panoramic view of law that is helpful and stimulating. By occasional glances at unfamiliar systems such as the Brehon Code and Hindoo jurisprudence, by a comparison of Indian, South Slavonian and Teutonic institutions, and by regular recurrence to the comprehensive rules of the Roman law, he is able to note the methods of legal evolution and discern the forces which have been making for change during the progess of centuries and millenniums. Nor is the advantage to be derived from such studies wholly ornamental. While historical studies exhibit law as a science and well-ordered body of doctrine, and connect jurisprudence with philosophy, ethics and even religion itself, they have the additional virtue of equipping the jurist and legislator for the duties that confront the law reformer of to-day. The very mass of legal literature is oppressive. No one can pretend to be familiar with it. It is obviously impossible to master the contents of fifteen thousand volumes. The student looks earnestly for every principle by which this mass of learning can be generalized. The official reviser of statutes labors long to secure the mastery of a legislative dialect, precise, certain, clear, uniform and unyielding. The codifier, now busier than ever in Europe and America, looks eagerly for rules of classification and scientific arrangement which only general jurisprudence can suggest.

The permanent value of Sir Henry Maine's work is, therefore, not doubted by any enthusiastic student of his books.

It is obviously impossible in a brief paragraph to set forth Mr. Spencer's fundamental principles as developed in the "Synthetic Philosophy," or even to indicate fairly what are his opinions and conclusions as stated in the "Principles of Sociology." He is the recognized apostle of evolution and argues for a theory that society is organic. His method is biological. He finds that social bodies have organs which carry on functions of sustenance, governance, reproduction and excretion. Society is an organism like an animal. Modifications wrought in social forms are through the influence of heredity and environment. Changes and progressive evolution are from an indefinite, incoherent, homogeneity to a definite, coherent heterogeneity through continuous differentiations and integrations. Life itself is the definite combination of heterogeneous changes both simultaneous and successive in correspondence with external coexistence and sequences.

Mr. Spencer is not unfamiliar with Maine's works. He has evidently studied them faithfully. Nor is he ignorant of English law, or Roman law, or ecclesiastical law, or the Pentateuchal jurisprudence, or the law of land and personal relations under the feudal *regime*. In fact one must contemplate with admiration and wonder the range and variety of his learning in the field of law, politics and economics. Spencer's method is strictly scientific, and has no high place for *a priori* speculation and metaphysical deduction. He is anxious to escape from inherited prejudices and prepossessions. To learn the natural and normal course of development he looks for man free from the dominion of modern civilization, and he therefore studies the untutored child of nature. The primitive man is of much interest to Mr. Spencer. He finds this primitive man among the most degraded savages at the uttermost ends of the earth and in the isles of the sea, among the Veddahs of Ceylon, the Andamanese, the Tasmanians, the Aleutian Islanders, the Bushmen of Africa, the Botocudos of Brazil, the native Australians, the North American redmen, and the Yakuts of Siberia. Spencer's studies are more anthropological than juristic. In absolute chronology he does not take us far back from our present generation. The savage institutions which form the main staple of his sociological work are gathered from the accounts of travellers mostly his own contemporaries. Many of these, not excepting some missionaries, are notorious liars, and have brought

back stories of the uncouth and the startling in order to interest their readers, and accounts of savage violence and atrocity in order to attract attention to their courage and resourcefulness, or increase their stipend from the subventions of philanthropic and religious societies. Human palæontology is as instructive to the sociologist as the psychology of the child-minded is to the professional pedagogist. The suggestion of religious theorists that savages of our day are degenerate and degraded specimens of races once civilized Mr. Spencer repudiates utterly. To the fables that there were giants in former days Mr. Spencer replies that man is taller, stronger, healthier and more long-lived now than ever before. This seems reasonable when we reflect that science has taught us to expel disease and ward it off by vaccination and various prophylactics; that sanitary engineering has provided for a generous flow of water, ample ventilation and prompt removal of waste, and that mankind is housed and fed as never before.

Nevertheless, Maine and Spencer have much in common. Each is preëminent in intellectual leadership. Each has marked excellences of style. Each is a student of institutions, believing that such knowledge is more valuable than dry details of personalities or idle words of hero-worship. Moreover, each has studied long and written much on domestic relations, parental authority and family life, so full of influence as these have been on legal development. Maine, indeed, while not adopting the technical speech of evolution, has nevertheless testified his practical acceptance of that theory, by illustrating its application to legal history. Nothing in this relation could be more impressive than the chapter in "Ancient Law" which shows how equity developed in England much as it did in Rome, and how fiction, equity and legislation have aided in legal evolution under the civil law and the common law alike.

In substance, these are the conclusions of Sir Henry Maine to which Mr. Spencer objects: That the patriarchal Estate is the earliest, and that implicit obedience to parents is a primary fact; that ancient societies regarded themselves as descended from one original stock, and that kinship in blood, rather than local contiguity, is the ground of their community in political functions; that in the infancy of society there were definite marital relations; that descent has always been in the male line; that the existence of government may be postulated from the beginning, and that political authority begins with patriarchal rule; that, originally, property is held by the family as a cor-

porate body, the patriarch holding his possessions in a representative rather than a proprietary character and exercising an unqualified dominion over his family; that perpetual tutelage of women characterizes the infancy of society; and that we need not take account of any stages in human progress earlier than the pastoral or agricultural.

Spencer is not an unreasonable critic of Sir Henry Maine, and expresses himself as "greatly valuing his works, and accepting as true within limits the views he has set forth respecting the family in its developed form, and respecting the part played by it in the evolution of European nations" ("Principles of Sociology," Vol. I, § 317). And again he says, in § 320: "Limiting our attention to the highest societies, we have to thank Sir Henry Maine for showing us the ways in which many of their ideas, customs, laws and arrangements, have been derived from those which characterized the patriarchal group."

Maine is criticized for not exploring a sufficiently wide area of induction, and Spencer proceeds with evidence discrediting some of Maine's conclusions, thus: The Brazilian Indian and young Bedouin are not habitually obedient to parents; the primitive relations of the sexes do not exhibit definite marital relations, but polyandry is found in Thibet, and promiscuity among the Andamanese; kinship is reckoned through females among the Tahitians and Kongans; some social groups have no governmental heads, as Fuegians and Eskimos; property is not held by the family as a corporate body in Dahomy and Congo, where kings, according to Spencer, have unlimited authority over the persons and property of their subjects; women are not in perpetual tutelage among the Karens, the Khasias, the Sea-Dyaks, the Nootkas, in Timbuctoo, and above the Yellala falls on the Congo; communities which have not reached the pastoral stage deserve study, but Spencer's observations regarding them are hypothetical and unsatisfactory.

We may safely accept Spencer's concession that all of Maine's generalizations which he criticizes are substantially safe and accurate so far as concerns the legal systems of the highest societies: and we may assume that Maine's scornful silence, only broken by a single reference in his "Village Communities," at page 17, to "the slippery testimony concerning savages which is gathered from travellers' tales" exhibits his indifference to the limitations of his doctrines which Mr. Spencer ventures to make. It is not difficult to see that the sociologist misunderstands the jurist; they are ages apart. It

is hard to conceive of law without a law-giver, of intestate succession before sexual jealousy enables us to ascertain paternity, of justice and mercy accorded to women and children by barbarians but long delayed by civilized Christians, of juristic science in the midst of savage troglodites, scattered over wide areas and without literature, history or traditions.

Spencer's discussion seems to be of law, but it is not. Yet no one can be named who has given to law a wider definition than Maine. Law is not always the creature of parliamentary wisdom, the finished product of legislative skill. Nor need we accept John Austin's analysis, which reveals a sanction in public force ever present, as applicable to the juristic philosophy of India and the Orient. Maine himself has suggested this limitation of the Austinian analysis in a criticism of the English positivist school which concedes the accuracy of their views as applied to the highly evolved legal systems of western Europe. When does law emerge from the chaos of prehistoric and shadowy institutions? What tests an observed institution and proves it juristic and not merely sociological? Who ever can answer these questions will understand both Sir Henry Maine and Herbert Spencer, and feel thankful to them both for their contributions to our instruction and enlightenment.

Isaac Franklin Russell.

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