Sources of ancient and primitive law

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EVOLUTION OF LAW

VOLUME I

SOURCES OF
ANCIENT AND PRIMITIVE LAW
Evolution of Law
Select Readings on the Origin and Development of Legal Institutions

I. SOURCES OF ANCIENT AND PRIMITIVE LAW.
II. PRIMITIVE AND ANCIENT LEGAL INSTITUTIONS.
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EVOLUTION OF LAW:
SELECT READINGS ON THE ORIGIN AND DEVELOPMENT
OF LEGAL INSTITUTIONS

VOLUME I

SOURCES
OF
ANCIENT AND PRIMITIVE LAW

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"Thor
Es ist vorbei.

"Mephistopheles.
Vorbei! ein dummies Wort.
Warum vorbei?
Vorbei und reines Nichts, vollkommnes Einerlei!
Was soll uns denn das ew'ge Schaffen!
Geschaffenes zu nichts hinwegzuraffen!
'Da ist's vorbei!' Was ist daran zu lesen?
Es ist so gut, als wär' es nicht gewesen,
Und treibt sich doch im Kreis, als wenn es wäre."

— Goethe.

"If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself. The haste or the prejudice which has generally refused them all but the most superficial examination, must bear the blame of the unsatisfactory condition in which we find the science of jurisprudence."

— Maine.

"Nous en conclurons que la science du droit n'est pas une science déductive tirée d'axiomes et de principes nécessaires, que c'est une science inductive dont les principes sont des généralisations de l'expérience antérieure; que, par conséquent, ce n'est pas seulement du raisonnement pur, mais du développement historique des législations passées, en même temps que de la comparaison entre elles des législations actuelles, que doit s'inspirer le juriste pour expliquer, pour systématiser, et pour réformer au besoin le droit existant."

— Brissaud.

"Sodann ist schon die Verknüpfung mit dem Vergangenen darum wichtig, damit die ganze Kulturbildung nicht versechsetet und versendet; denn nur auf dem Boden der Geschichte kann sich eine Kultur gestalten."

— Josef Kohler.
PREFACE

The department of legal history deals with particulars, with the special and concrete details of a legal system; while the field of historical jurisprudence is universals, the general and abstract phases of legal evolution. This collection of readings does not aim to present the sequences of facts attached to the names of men, places, and things, necessary (as is now, perhaps, almost universally admitted) to an understanding of legal rules as they obtain here or there; but is intended as an exposition of the law (to use the language of Mr. Justice Holmes) "as a great anthropological document." Therefore these volumes properly will be classified on the side of what is thus, somewhat vaguely, called historical jurisprudence or legal ethnology.

We need not insist too much upon the claim that an acquaintance with the anthropology of the law has a direct, tangible, and quantitative bearing on the isolated manifestations of the law as expressed in the daily conflicts of practical life. Nor yet would we disparage the thought that a general survey of the course of legal evolution has a measurable qualitative relation to the complex, and, at times, discordant play of modern legal phenomena,—at least for those who looking into the vessel of life reflect that "the Eternal Sâki from that bowl has poured millions of bubbles like us, and will pour." Moreover, to advocate such study on the ground of the creation or discovery of a new discipline will fail to persuade; there are already disciplines enough. And, again, an appeal to the informative value of this learning, while the easiest method of justification for a prevailing curiosity into what is strange and bizarre, is not the claim which this undertaking prefers to support.

Not, therefore, as a positive instrument concretely applicable to the details of an existing legal technic,—not as a mental gymnastic,—not to satisfy a natural interest,—but rather as tending to chart in broad outline the march of humanity in its effort to govern itself and work out its destiny, is the conscious
purpose of these readings. They are offered in the belief that
the day is not far distant when the students of the law, the
teachers of the law, and the examiners in the law will be dis-
satisfied with an equipment of knowledge which attempts only
the dogmatic side, and neglects the universal, and even the
specific historical background of legal institutions.

It need hardly be said to any one whose vision has extended
to genetic and comparative knowledge of the institutions of
society, that the present is not understood without information
concerning the past, and that the future must remain a greater
enigma than it is, without an attempt to penetrate the course
of evolution. Historical knowledge must, and will, always
remain the one certain test of present expediency, and the sci-
entific tool for measuring the paths of the ages to come. It is
unmistakable that the law of all progressive countries is under-
going rapid changes, easily observable even within the span of
the last generation. Only the intolerant reactionary, or the
technical stickler whose sense of perspective is destroyed by
the details of his craft, can fail to observe the motion of the
stream. The revolutionary also may find much in the stolid
processes of history which defies the human will and carries
out purposes of its own. Every reader will interpret his own
philosophy of history, and construct his own generalizations.
But certain it is, that from the evidence of man’s struggle in
countless ages to achieve human society, there may be con-
structed philosophies and generalizations important enough in
a large sense, if not also in terms of immediate use, as instru-
ments of knowledge to be worthy of serious attention.

The philosophies will oscillate between the mechanical pan-
theism, on one side, of Post, and the view of Hegel, on the other,
that history is the “actualization of the universal spirit.” The
compilers have not sought here to solve any problems of their
own, or to ventilate any theories; and naturally they do not
offer in these volumes anything as a final solution of the prob-
lems involved. When a solution is presented, it is tendered
only as a basis of discussion, and a motive for further inquiry.
Especially it is sought to avoid any suggestion of espousal of
an ultimate metaphysical position as to the meaning and value
of history. Nevertheless an intermediate working thesis is
necessary to vindicate the very existence of this compilation.
It is found in the essential unity of human nature. This is
explanatory of the existence of a similarity of institutions
among a diversity of peoples where the principle of imitation
is inadmissible. It furnishes the distinguishing marks of the
phases and stages of legal evolution, and provides at least one
of the important tests of legislative policy. To go farther
would trespass on a privilege reserved for the reader.

The field of historical knowledge is to-day so extensive that
a great variety of rendering was possible in execution of the
purposes of this compilation. A collection of this nature, al-
though governed by a principle of unity, is still liable to be
charged with various sins of omission and commission. In this
respect, it is much like an anthology, where the personal choice
of the compiler as to the flowers of the garden to be plucked
will differ in one way and another from the judgment of every
other person in the world. The risk of displeasing every one
at some point is therefore inevitable.

Primarily these readings have been projected, as an intro-
duction to the study of specific legal systems, for use in law
schools which are now limited to the classic text of Maine's
"Ancient Law." Secondarily (only in intention, but equally
and perhaps greater in advantage) these readings may be em-
ployed by the lawyer who has completed the conventional
course of legal studies, and by the cultured general reader who
seeks to find in the history of legal institutions man's most
important effort to emerge from the night of savagery to the
light of civilization.

The plan of the present work dealing with Ancient and
Primitive Law involves three volumes. The first is a compi-
lation of sources selected from (i) ancient literatures, (ii) mod-
ern observations of retarded peoples, (iii) ancient laws, and
(iv) legal transactions, including trials and documents. The
second selects chapters from modern scholars expounding the
relation of law to general social institutions, and such specific
legal institutions as Family, Property, Contract, etc. The
third volume will select similar chapters interpreting the form-
ative influences which have governed the development of the
law. The present undertaking, therefore, aims to present an
outline, chiefly of the rudimentary and basic part of legal evolu-
tion, and incidentally, for purposes of comparison, ancient law.
Similar treatment of developed and modern institutions is
another distinct program.

The course of the work proceeds from the purely concrete
as shown in the first volume to the abstract as represented in
the third volume. As legal history has hitlerto been taught,
the student has been learnedly instructed in the meaning and
influence (let us say) of such laws as the Twelve Tables or the
Lex Salica without having read these laws themselves. This
we believe is a fundamental error. With the successful issue of the case method before our eyes, which is spreading to other fields from the law, we begin by placing in the hands of the reader the best evidence of ancient law, either the law itself, when there is written law, or an ancient record from general literature of customary law, when there is no written law. Primitive peoples are, in a similar way, made known by the record of trained observers. This method of presentation was regarded as indispensable.

With the exception of Mr. Henderson's compilation of the "Historical Documents of the Middle Ages" (which is comparable to the first volume) we believe that no similar undertaking has been attempted in English, and the indulgence of the learned critic will be presumed in this attempt to treat in a pioneer way the large field entered. Some harmless inconsistency of arrangement will be evident to the expert, but absolute logical symmetry was unattainable without necessary disadvantages. The combination of ancient and primitive law itself results, in fact, in inconsistency. Barring the controversy provoked by the term "primitive" (for what is the test of "primitive"?) there are examples of ancient law as modern in conception as anything seen in the world to-day. A "citizen of a modern city would probably feel more at home in ancient Babylon than in medieval Europe" (Johns, "Babylonian and Assyrian Laws," p. vii). Why, it may be asked, are such things combined with the legal mores of the Kaffirs, the red Indians, and the Eskimos?

The fact of this combination of conflicting elements within the same volume has developed the problem of space limitations, and for this reason original notes and bibliographies are omitted. Such notes of our own as were not to be avoided are put in square brackets.

Further explanation might appear to attach more importance to our part in assembling the writings of others, than we desire to assert. But it needs to be said that the present selections are substantially only an outline, and represent the irreducible minimum of what is to be compassed by the student who approaches this subject. In particular, it may be suggested, also, that what is here presented is only the external shell of legal evolution. The internal life of this development must be constructed by other agencies than history,—which is after all only the more or less satisfactory appearance of the reality within.

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