

## CHAPTER III

### THE ORIGIN AND GROWTH OF LAW

ONE more proof must be given to show that human rights are not derived from the State, but are inherent, the State merely recognising their existence as a necessary condition of its own existence and continuation. This proof is furnished by the history of human law.

If rights are not natural, *i.e.* arising from the conditions under which life must be carried on in the social state ; if they are arbitrary gifts conferred on its members by the State,—they must be conferred through laws enacted by the State. Even if it could be shown that in every society, past and present, there existed a legal enactment corresponding to each recognised right, which manifestly is not the case even in our societies, the conclusion would not be justified that the right emanated from the law ; that it had no existence before the law granted it. For it is obviously possible that the law, instead of creating new rights, has merely recorded rights previously recognised, for the purpose that fixed scales of punishment for the infraction of such rights should ensure their more uniform recognition.<sup>1</sup> But if it can be shown that till a comparatively late period the State made no laws, and that,

<sup>1</sup> "The Common Law, which had its origin with the Judges, made the following presumptions in all actions between the State and the subject :—First, that all privileges, such as personal liberty, freedom of speech, liberty to trade, right of public meeting, were the property of the subject and not the gift of the State " (p. 10).

"Those charters of our liberties, Magna Charta, the Petition of Rights, and the Bill of Rights, are merely declaratory of the existence of these rights. . . . Hence, to the State British subjects owe none of the fundamental rights which some call natural " (p. 14).

*Attacks on Liberty*, an address by Thomas J. Smyth, LL.B.; Dublin University Press, 1890.

nevertheless, human rights were recognised, nay, that such rights were recognised before there was any State and any law of the State, then it is obvious that human rights are natural, *i.e.* that they antedate the State and are derived otherwise than from the State.

The historical proofs that customs recognising rights to life and property are antecedent to the formation of the State, and that, till a comparatively late period, men failed to entertain even the conception that laws could be made by the State or any other human agency, have been furnished by a host of modern writers.<sup>1</sup> The present chapter, dealing for the sake of brevity with European States only, is mainly founded on Professor Edward Jenks' valuable and interesting work, *Law and Politics in the Middle Ages*.

The first records of Teutonic law consist of the compilations known as *Leges Barbarorum* of the sixth century. Several of these codes contain an account of their origin. *Lex Salica*, the code of the Franks, contains a prologue which describes the collection of its enactments by four chosen men (whose names and abodes are stated) after lengthy discussions with presidents of local assemblies. It also contains the following general observations on the manner of their origin: "Custom is a long habit founded upon manners; it is founded upon antiquity, and an old custom passes for law."<sup>2</sup>

*Lex Gundobada*, the code of the Burgundians, describes itself as a definition, and bears the seals of thirty-one Counts as witnesses, and the oldest code of the Alemanni is known as a *Pactus* or Agreement.

These codes, therefore, are not laws newly made and imposed by some authority, but a collection of ancient tribal customs. This view, now generally admitted, is confirmed by the fact that they are not territorial laws, but laws of peoples. They show us the provincials of Gaul living under the Roman law, of which the conquerors made no attempt to deprive them. The Salic law specially

<sup>1</sup> "Thus the comparative study of law showed that rights arise historically in the collective or 'folk mind.'"—Ludwig Gumplowicz, *The Outlines of Sociology*, p. 91.

<sup>2</sup> Alexander Sutherland, *Origin and Growth of the Moral Sense*, volume ii.

refers to "men who live under the Salic law"; and the oldest part of *Lex Ribuaria* contains the following passage: "A Frank, a Burgundian, an Alemann, or in whatever nation he shall have dwelt, shall answer according to the law of the place where he was born. And if he be condemned, he shall bear the loss, not according to Ribuarian law, but according to his own law."<sup>1</sup>

The time and circumstances which gave rise to these compilations are also not without bearing on the question of their character. Most of them are the outcome of the Teutonic emigration to Gaul, and coincide in date with the conquests of Charles Martel, Pepin the Short, and Charles the Great.

The probable cause of their origin may, therefore, be found in the inevitable conflict between the desire of the conquerors to modify the laws of the conquered by the introduction of some of their own customs, and the resistance of the latter, as also in the necessity of reconciling conflicting practices and providing for new conditions. Such conflicts and new conditions would make the precise formulation of claims obligatory, and would thus naturally lead to the compilation of the customs upon which the latter were founded.

It is, therefore, an absolute certainty that these codes are not a collection of new edicts, but a collection of old tribal customs. The question, however, arises, How did these customs come into being? were they the conscious invention of any governing authority, or the outcome of an unconscious growth, corresponding with the growth of the tribal society? A short exposition of the organisation of Teutonic tribal societies will establish the truth of the latter conception, which, moreover, corresponds with the wider truth, fully established, that all primitive customs originate in the necessities of social life under the supposed sanction or command of tribal deities.

At the beginning of our era the Teutonic peoples, as described by Cæsar and Tacitus, were living in clans. The unit of the clan was the household, consisting not of one family, but of a cluster of families, the males and

<sup>1</sup> *Law and Politics*, p. 9.

unmarried females of which were descended from the same ancestor. All the households constituting the clan also are descended, or believe that they are descended, from a common ultimate ancestor. Within the household the housefather, generally the eldest male in direct descent, holds despotic sway, modified by ancient customs. The other members and the common property of the household are in his trust (*mund*), and he alone speaks and acts for them. Within the household every member bears the responsibility for his individual acts, but to the outside world the members of the household are jointly responsible for the acts of each of its members. The injury of one is the injury of all, as the wrong done by one is considered a wrong done by all. The household acts and is acted upon as a corporate whole.

In this limitation of the right of vengeance and liability for revenge to the members of the household, the blood-feud appears the first manifestation of public law. Anterior to it, the murder or other injury of one would be avenged by all who were interested in the victim, upon all who were in any way connected with the aggressor. General slaughter, destructive of the fighting strength of the clan, was the result. In time there arose the custom of limitation to the members of the households to which both parties to the injury belonged, and this same idea is subsequently extended to offences against property. The area of revenge and re-revenge is thus limited, and the consequences of feuds are made less disastrous to the community.

Nevertheless, the responsibility of the household is heavy; for if one is injured and vengeance is taken, the feud is carried on by the household of the original aggressor as a sacred duty. Gradually the idea must have arisen that some real advantage received by the household in compensation for the loss or injury of one of its members would lessen the responsibility of each household and redound to the advantage of the clan. For the blood-feud weakens both households and the clan, while compensation enriches one of the households and prevents further weakening of the clan. Thus cases arise where

compensation is offered and accepted. At first no doubt rare and applying to slight injuries only, these cases gradually multiply and extend to graver offences, until finally they harden into custom, and the payment of blood-money or "wer" habitually takes the place of the blood-feud. The housefathers, as elders of the clan, are the repositories of its customs. They, therefore, decide in each case what the compensation shall be, taking into account the nature of the offence as well as the status of the injured person. But there is no power to enforce their finding. If either the plaintiff or defendant refuses to acquiesce in their judgment the blood-feud takes its course.

This is the stage of development at which Teutonic customs had arrived when the *Leges Barbarorum* were being compiled. They are principally concerned with minute and careful regulations of the compensation to be paid for offences. But they also make it quite clear that compliance is voluntary, and that the clan has neither executive nor legislative machinery.

These facts prove the tribal customs, embodied in the *Leges Barbarorum*, to have grown and established themselves independent of any official authority. The immediate successors of these compilations are the *Capitularies* or royal and imperial edicts issued by the Karolingian rulers and others. They mostly deal with comparatively unimportant matters, and it is doubtful whether their validity extended beyond the life of the ruler who issued them. In some rare cases "capitula" became true additions to the law of the time, but it must be remembered that they were a foreign importation imbibed by the rulers from the Roman law.

During the gradual decay of the Frank Empire a new law grew up: the law of the fief or feudal law. The feudal lord administered the law of the fief—generally by deputy; a law made by no legislator, but which during these troublous times had arisen through the mutual needs of the men of the fief and their lord. It is purely local, for any dispute as to what is the law of a given fief is settled by reference to the "greffe" or register of the court, and

if this is silent, the men of the fief are called together and decide what the law is (*enquête par tourbe*). Certain general principles, nevertheless, run through the customs developed in each fief, and the right of appeal to overlords tends to produce a certain uniformity. Still the general truth is, that the court of each fief has its own home-made law.

As the fief-law applied to men of the fief alone, other laws had to evolve for men who were not of the fief, such as priests and merchants. These laws also do not emanate from the State.

The canon law originates in resolutions of general councils of the Church and papal decretals, considered as binding by the clergy, and which, supposed to embody the divine will, harmonise with primitive conceptions of the origin of custom and law. To these must be added ecclesiastical capitularies, issued by the Karolingian and other rulers, and similar regulations in which secular authority endeavours to restrict or enforce ecclesiastical claims.

In time, however, the Church emancipates itself even from this slight interference of the secular power. The forgeries of Isidorus Mercator are followed three centuries later by the *Decretum Gratiani*, likewise a private work to which full authority is accorded, and is completed by the papal compilations beginning in the thirteenth century. The canon law, the binding force of which was not disputed, is thus, like the laws already considered, neither made nor administered by the State.

It is similar with the law of merchants. The rise of more settled conditions during the eleventh century, and, still more, the Crusades, greatly stimulated commercial intercourse, which had almost disappeared during the preceding period of anarchy. Neither the law of fiefs nor the elder folk-law contained provisions applicable to larger trade transactions. A new body of law had, therefore, to be evolved, and was again evolved by those whom it concerned. The usages of merchants gradually hardened into principles of conduct having the force of law. Though frequently at variance with the principles of local laws, the

merchant-law was nevertheless universally acquiesced in and administered by courts of the highest eminence, such as those of the Hanseatic League and the Parloir aux Bourgeois at Paris. This, then, is another body of laws, having cosmopolitan validity like the canon law, which arises independent of the State, and receives obedience without any special sanction from the State.

The separate development of law in the three kingdoms of England, France, and Germany, which have become definitely established by the end of the tenth century, must now be followed.

England under Saxon rule had remained largely uninfluenced by the events which moulded the fortunes of the Continent. Such rudiments of the feudal system as had established themselves had given rise to a similarly rudimental state of feudal law. On the whole, however, the old folk-laws held sway within their several areas. This arrested development greatly facilitated the work of legal unification to which the Norman kings devoted themselves. In this endeavour they were largely aided by the fact that England, as a conquered land, was a single fief in the hands of the king. They succeeded in little more than a century in creating a "common law" of the realm, the law of the royal court.

This law, however, is by no means a collection of State enactments; it is the law of a court. At first the kings send their ministers round the country to administer local law in local courts, and to look after the financial and administrative interests of the king. Gradually differentiation takes place and is accompanied by greater coherence. Before the end of the twelfth century there has evolved a royal court with purely judicial attributes, making regular visitations through the counties, but having its headquarters at the residence of the king. It devises regular forms of procedure and keeps strict record of all the cases which come before it. In their decisions the judges unify and modify old folk-laws; precedent is followed by precedent; and by the end of Henry III.'s reign, the law declared in the king's court has superseded local law and has become the Common Law of England. No one gave

the judges power to declare law, or enacted that their decisions should become the law of the realm. Nevertheless, it is the law of the realm, and all bend before its authority.

Accompanying this spontaneous growth there is, however, another development which bears some likeness to the conscious law-making of our time. England, owing to the conquest, is the domain of the king; all that he has not expressly given away belongs to him. Hence he gives charters in great numbers, which become part of the general law. Further, as the lord of a domain, he may, within certain customary limits, make rules for its management, and as all England is a royal domain, the king assumes this power over all England. Hence arise royal assizes and ordinances, which come very near to modern ideas of law.

There thus existed in Norman England various bodies of law, severally declared by kings, judges, landowners, custom, merchants, and ecclesiastics. Their unification through the establishment of one law-declaring agency would be a manifest advantage. This result flowed from the Great Parliament, where, for the first time, the representatives of the several sections of the people came together in one body. It gave to England a far more efficient law-declaring agency than any other which then existed or for centuries arose in other Teutonic countries, in spite of the fact that the canon law continued to be a rival of the national law. But even Parliament was not a law-making body at first. For two centuries it confined itself to the enforcement of old customs, or of such new customs as had met with general observance without its sanction. Not till the time of the Reformation is the modern idea of law, made by the State and imposed upon its members, realised.

The development of English law in one other direction, that of equity, has yet to be mentioned. When, in the thirteenth century, as already stated, Parliament had become the sole law-declaring agency, it still refrained from enacting new laws. Yet the rapid development of industry urgently required new laws. Suitors, therefore,



petitioned the Crown whenever the common law failed to provide a remedy. When the matter was one for legislative declaration, the king, acting through his council, brought it before Parliament. When the matter was one for the king's grace, he referred it to his chancellor, who, as ecclesiastic and president of the king's chancery, could pronounce on the remedy which conscience would dictate in the absence of positive law. Gradually this practice assumed regular shape. Records being kept, successive chancellors follow the rules laid down by their predecessors, and failing such, declare rules of their own, which guide their successors. Thus the Court of Chancery also becomes a law-declaring court, adding its own laws, based purely on the perception of natural rights, to those declared by Parliament.

The peculiar feature in the development of English law, here briefly sketched, is, that in several directions it anticipates analogous developments in continental countries by many centuries. Earlier than elsewhere there arises a true law of the realm, though other laws also have local or sectional currency; earlier also there arises a central law-declaring agency, though other law-declaring bodies continue to exist. But—and this is the fact which shatters the contention that rights are created by the State—the law throughout grows and develops independent of the State. It is the creation mostly of the men who must obey it, and is mostly formulated by persons having no authority from the State to do so. Even when at last a parliament arises, possessing powers of legislation, it, for a long time, abstains from making laws, confining itself mainly to declarations of what the actual law is. Even this power it shares with an unauthorised body. The laws have been made, if they can be said to have been made, by the common people, merchants, ecclesiastics, and lawyers, and only to some slight extent by the king. Not a majority but a consensus of public opinion has evolved them, and it is this general consensus which has given recognition to individual rights, and not the State.

The absence of State-law and the recognition of individual rights through laws arising from other sources is

a feature which stands out still more boldly in the legal development of Germany and France. Down to the sixteenth century there is in neither country any national law, but a medley of feudal, local, municipal, and royal law, besides the canon law and the law of merchants.

The feudal and local laws of Germany were compiled for the first time in the thirteenth century by private compilers. The *German Mirror*, the *Saxon Mirror*, the *Swabian Mirror*, and the *Little Kaiser's Law*, are such compilations, and were accepted as actual law in spite of their private origin. Even when, a century later, official compilations were made (*Landrechte*), they were little more than new editions of the *Mirrors*.

In the fifteenth century, however, a new development takes place. Germany is invaded by the Roman law, and German law ceases to develop on its own lines. The *Corpus Juris Civilis* of Justinian, as expanded by Italian commentators and glossarists, becomes the common law of Germany. This usurpation, however, is in nowise the work of the State. Once more it is the work of private persons: teachers and writers at the universities, as well as learned doctors practising at the various courts, declare the law, and the people accept it.

The Roman law, however, did not displace local laws. On the contrary, the latter remain supreme. It is only when other sources fail that the Roman law is appealed to. The German maxim is: "Town's law breaks land's law; land's law breaks common law."<sup>1</sup>

These town laws, again, though based on charter privileges and local customs, are the creation of local courts (*Schoeffen-Gerichte*) and not of any legislative authority.

After the Reformation, however, royal legislation also begins to play a part. The great feudatories of the empire, having become independent potentates, aspire to being law-givers as well. New spheres of legislation, such as aliens, marine, literature, and others, fall exclusively into their hands, and in many directions they modify local laws. But their influence is far smaller than that of the Parliament of England, for the issue of their laws did not

<sup>1</sup> Jenks, *Law and Politics*, p. 53.

interfere with the fullest obedience being paid to older laws.

Legal development has been closely analogous in France. Here also the first compilations of existing law are made in the thirteenth century, such as the *Très ancien Coutumier* of Normandy, the *Conseil* for the Vermandois, the *Livre de Justice et Plet* for the Orléanais and others. But, differing from the German practice, these text-books are not regarded as actual law. This, in disputed cases, is still ascertained by searches in the register of the court of the district, or by an *enquête par tourbe*.

The first official attempt to ascertain what the laws are, was made by the French kings in the fifteenth century. Continued through four reigns (from Charles VII. to Louis XII.) these researches resulted in the compilation of the official *Coutumiers*. These show that each district had its own laws, administered by its feudal seigneur, who had right of pit and gallows, of toll and forfeiture. Of national law not a trace can be found; complete anarchy prevails.

These *Coutumiers*, though they henceforth are authoritative declarations of what the law is, are mere compilations. No new laws enter into them. The sole intention is to do away with the necessity for *enquêtes par tourbe*. Therefore, a final *enquête par tourbe* is held. Representatives of every order and rank in the district are called together; these discuss and alter the compilation, and finally declare it to be a true exposition of the ancient customs of their district.

Other laws, however, co-exist with the *Coutumiers*. In Southern France, the *pays de droit écrit*, a modification of the Roman law, continues to prevail; cities and towns have each developed their own law through their local courts, *cours d'échevins*; there is the law of merchants and the canon law, and, finally, royal law also appears as an important factor somewhat earlier than in Germany. As, by conquest, province after province is added to the domain of the Crown, royal ordinances are extended to them. The new spheres of legislation also fall into the hands of the king, who, from time to time, also succeeds in encroaching

on the domain of older laws. But, in the main, the condition is the same as in Germany. Older laws remain intact, and the royal laws mostly cover but a comparatively small area, and cover that incompletely. The revolution at last makes *tabula rasa* of this anarchic condition, imposes a national law, and, for the first time in France, realises the modern idea of uniform law made by the State.

This necessarily much abridged and hasty survey of the evolution of modern law reveals the following facts :—

Law, till comparatively recent times, is not made by any legislative authority. Originating in customs, the result of experience confirmed by the actual or supposed commands of ancestors, its sole authority, for a long time, is its antiquity or supposed antiquity. Even when, at last, law is recorded and loses its previous flexibility, alterations of previous law as well as new laws, required by social necessities, are not imposed by the State. They develop and grow, and when general approbation has been given to them, they are finally declared by various authorities, the last comer among which is the State. Finally, there arises the questionable notion that the State can make laws instead of merely declaring what the law is. It is clear, therefore, that, during by far the greater part of our era, the State made no laws, and that the human rights recognised during this period and transmitted to the present time were not and are not granted by the State or any other governing authority, and that, therefore, they are natural rights. Whatever test is applied to the socialistic view of human rights, shows it to be erroneous, and, therefore, the system which is based upon that view must be a false system.