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Municipal Law

AND

ITS RELATIONS

TO THE

CONSTITUTION OF MAN.

By R. S. GUERNSEY,

OF THE NEW YORK BAR.

*Reprinted from Archives of Electrology and Neurology, for
November, 1874.*



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POSITIVE local municipal law is in itself an object merely of peculiar obligation and concern, and in its immediate application is a matter of confined and limited interest. But there is a general jurisprudence which has no local boundary, and as the administration of government and law is, as Blackstone says, greatly assisted by the other sciences, an extensive and familiar acquaintance with the general jurisprudence, institutions, and history of other countries must be had before an accurate distinction can be drawn between those great and fundamental principles which, being deduced from the general nature of man, will be found to be diffused over all mankind, and are not subject to substantial al-

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teration by any change of time or place, and with respect to which there is, as Sir William Jones says, "a striking uniformity among all nations, whatever seas or mountains may separate them, or how many ages soever may have elapsed between the periods of their existence."

Laws grow out of man's nature, and hence develop by friction and experience, which arise by contact with each other, and also in relation to external objects. We will, by observation, find that there is a *geographical distribution of law* as well as of animals and plants. This distribution is caused by the variation of the wants and impulses of the physical, mental, and moral nature of man, and by the density of population, occupation, etc., and all of them are affected by the geographical location, climate, soil, face of the country and productions of those inhabitants who make or influence the enforcement of Municipal Law.

Statute law may be considered as the reflection of the aggregate of men (a community or government) of the nature and the wants and needs of its parts, and its growth and use is a struggle for a harmonious adjustment of internal relations to external relations. It may be said of laws, as of constitutions of governments, that they grow but are not made. In law as in other natural sciences new rules are not originated and promulgated by mere absolute authority, but are *discovered*. All the laws of any one municipal system taken toge-

ther appear to be more of an *art* than a *science*, but when viewed relatively to each other they will show themselves to be based upon scientific foundations, dependent upon facts and their relations to each other.

As to what laws are common to all mankind, can only be accurately determined by comparative jurisprudence—by selecting and classifying those which are common to all nations, ancient and modern, under any and all circumstances of history, in all climates, and of every race of men. This is the proper mode of ascertaining what the law is when viewed as a science.

There are in the world now about six hundred separate legislative bodies or sources of statute law, being more now than at any previous period in the history of the world. All these laws have the elements of human nature in them. After deducting from all of them that which particularly concerns the manners of the people, their constitution of government, and their forms of procedure, there will remain the real principles of justice and injustice as applied to the various actions and relations necessarily arising in the intercourse of man, and upon which the foundations of human society must rest.

Municipal Laws relate to the casual varieties of circumstances as well as to the permanent attributes of the human character, and are evolved from both of them, and consequently may be as various as the wills, fancies,

and prejudices of those who enact them. But "the great system of jurisprudence, like that of the universe," says Sir William Jones, "consists of many subordinate systems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully persuaded myself, is reducible to a few plain elements."

The moral sense within us, however perverted it may be, is the origin of all law, and every government that has existed was instituted for the purpose of securing the real or imaginary rights of individuals. All municipal laws prescribe what is right and prohibit that which is wrong. All rights are divided into rights of persons and rights of property, and all wrongs are either public or private. Remedies are for the protection or enforcement of a right, or for the prevention or redress of a wrong. Punishment is for the prevention of wrong, and is thus distinguished from redress. Procedure is the means by which remedies are obtained and punishment meted out. All of these exist in principle wherever there is municipal law. The only difference in the laws of civilized and savage nations, in ancient and in modern times, is the variety and extent of the details of these principles according to the *idea of the law-making power as to what is right and what is wrong!* Civilized nations omit from their laws that which is purely religious, and only adopt the moral principle so far as it is deemed necessary to protect the rights of persons and to preserve

the community—the latter being considered as belonging to the rights of persons and the rights of property, for without it neither would be preserved. This is the science of government, and the ideal of civil and political liberty. Blackstone says: “That constitution or frame of government, that system of laws is alone calculated to maintain civil liberty which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.” Religious freedom must be consistent with this.

The utilitarian maxim of civil liberty is “the greatest good to the greatest number.”

When, for any reason, a law is enacted, and it is too odious to be enforced, or is deemed impracticable by the community, it is either repealed or annulled by non-user; and when a law is required by the wants or necessity of the community, it is either enacted by statute or adopted by custom, and upon this judicial decisions are founded, and thus laws grow in accordance to the manners and customs of a community. The two most notable examples to us of this rule are seen in the growth of the Roman Civil Law and the Common and Statute Law of England; though similar in many respects, they are two of the most stupendous and wonderful systems of jurisprudence that can be conceived. When the complete history of the common law is written, it will show that

the many parts of it which are similar to the civil law, were not borrowed from it, but are of independent growth.

The digests and codes of Justinian, comprising the *Corpus Juris Civilis* was the first attempt to reduce municipal law to a complete science, fully adapted to the highest state of civilization in all its details, and it was eminently successful, and is a remarkable vindication that Municipal Law is a science.* All the laws of Christian communities are founded upon one or the other of these two systems, the Common Law of England or the Roman Civil Law.

These laws and customs are or may be materially affected or changed by conquest, or by an inundation of foreign inhabitants or new ideas, and thus become differentiated.

The rules of "natural selection," and the "survival of the fittest," are, however, the main foundations of all Municipal Laws, however varied and inconsistent they may seem to a casual observer. But he who bestows on the subject the proper kind of consideration, to a somewhat comprehensive extent, will contemplate it as originating in the first principles of nature and society—that

* For an account of the Digests and Codes of Justinian and the method of their compilation, see Smith's Dictionary of Greek and Roman Antiquities, titles, Codex, Corpus Juris Civilis, Digesta, Institutiones and Pandectæ. For the subjects embraced in each book and the various titles, Bouvier's Law Dictionary, title Pandects.

is, man collectively—ever modified by circumstances, yet ever constant to certain principles; ever changing its particular direction, yet never swerving from its general and inevitable objects—the happiness and protection of the community and its members.

There is a striking similarity in the prohibitory portion of the penal or criminal law of all nations, ancient and modern. This may be regarded as the natural, moral law.

Morals are more intimately related to legislation than will at first view appear from modern law-makers. In all of the great religions that have had a marked influence upon the history and education of mankind, ancient and modern, will be found much which some modern Christian nations now regard as belonging only to legislation. Among these may be mentioned the marriage relations, and, in some instances, sanitary regulations. The latter is always found more or less as part of the religion of nations that inhabit torrid climates, and marriage still retains the religious *character* which it has from the beginning of history.

Max Muller says that the sacred books of the whole human race are founded upon and comprised in eight religions, to wit: Mosaism, Christianity, Mohammedanism, Brahmanism, Buddhism, Zoroastrianism, and the teachings of Laotze and Confucius; and in these (excepting Christianity, which was founded on Mosaism) we will find incorporated nearly all the Municipal Laws

that mainly govern the people where the particular religion prevails. Ancient law derives its very life and force from religion. But modern Municipal Law is fast becoming distinct as a science, from religion as a faith or a sentiment. In many of the Oriental countries, their laws are still, as formerly, united with their religion.

Auguste Comte was mistaken, however, in asserting that *duty*, and not *right*, should be the starting-point of all Municipal Law, and *all* be defined and regulated by legislation. This is peculiar to ancient religions and laws, and is a restriction upon civil liberty. Rights are direct and indirect duties, defined, and necessarily made absolute obligations by legislation, for the protection of the community; while duties, as such, are relative, and hence belong to religion, or the moral principle, and their explanation or enforcement should be left to the effects of civilization, and be defined by the Religion of Humanity, and be enforced by public opinion. Religious freedom should be consistent with with civil liberty.

Christianity has more of the elements of a high type of humanity in it than any other religion; therefore it is the truest religion, and its principles have been and will therefore be progressively understood in the direction of the needs and requirements of humanity in its various relations, and its principles must therefore be regarded in the foundation of the Municipal Law of all civilized nations.

The Roman civil law undoubtedly reached the nearest to perfection for the highest state of civilization of which mankind, in a community, is capable of reaching, so far as it relates to man and his relations to his fellows, in "the protection or enforcement of a right, or for the prevention or redress of a wrong."* As proof of this, its principles are now being more and more ingrafted into the Municipal Laws of all civilized nations,† and all Municipal Laws relating to civil rights and wrongs are approaching, in substance and effect, those of the Roman civil law, which is nearly perfect, because it has been the longest maturing in the most civilized nations.

So long as mankind are being born into the world, so long will there continue to be a variety of them in weakness and in strength. They lack experience and judgment, and consequently need direction and restraint, and will therefore require law and religion to regulate and protect them.

There always has been, and will always be, a continuous "irrepressible conflict" between the constitution

* It has been truly said that the Pandects or Roman Private Law is scarcely anything else than a system of general legal principles: since the whole law of *obligations and of the rights of things* is equally applicable in the relations between state and state and between citizen and state, as it is between citizen and citizen. (*Thibaut's Study of Jurisprudence*, translated by Lindley.)

† For a full account of the Roman Civil Law and the extent of its adoption in various countries, see *Meckeldy's Compendium of Modern Civil Law* by Kaufmann.

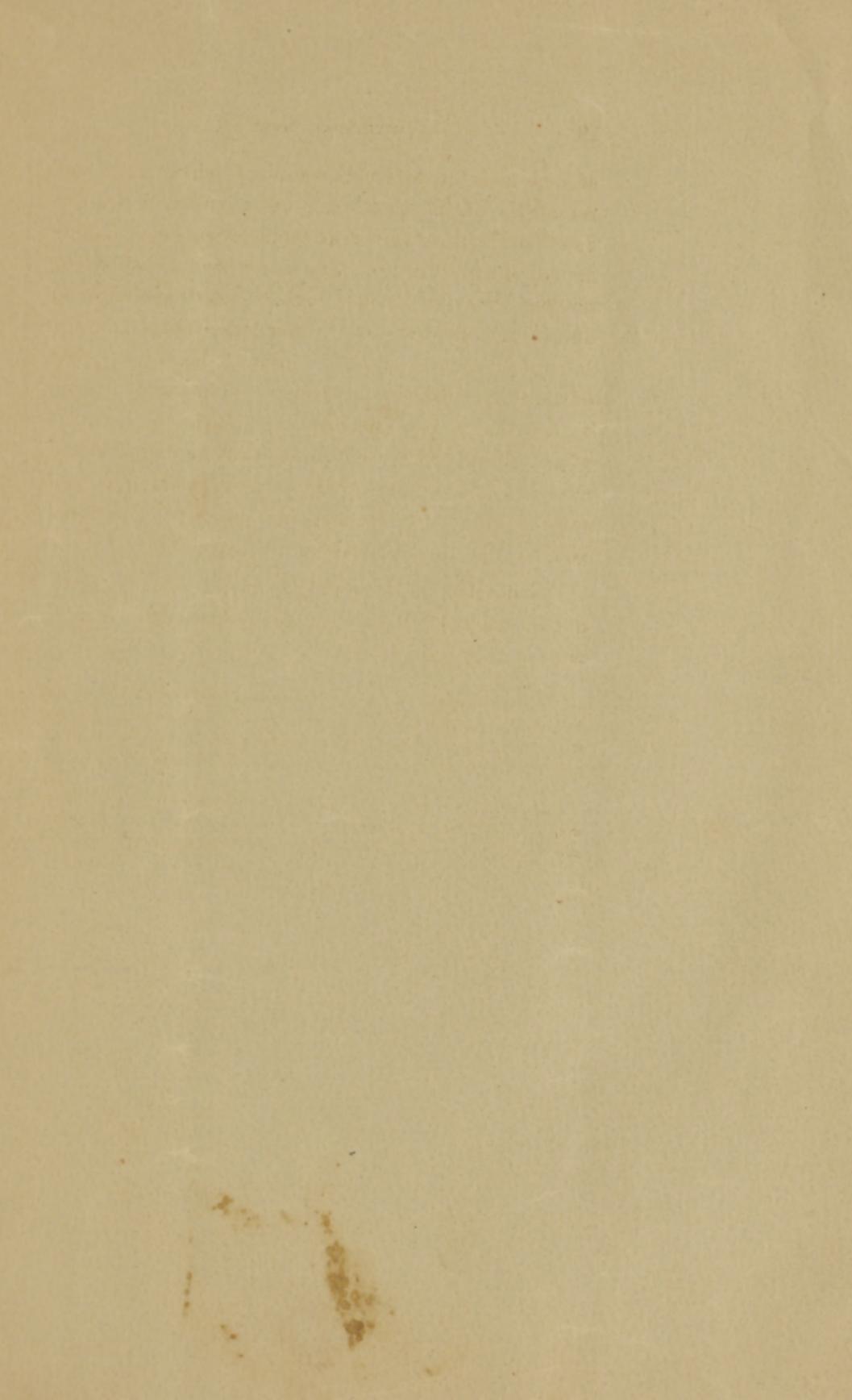


of man and the external objects by which he is surrounded. His physical wants are almost as difficult to determine with exactness as those which belong to his mental or moral nature. The senses have their illusions not less than the intellect and the heart, and there is almost as much controversy about the useful and the hurtful as there is about the just and the unjust. The advance in civilization is tending toward the Utilitarian hypothesis in Law, Hygiene, and Religion—the true object of all being that man may be happier and stronger, and nearer perfect in body and mind, and more worthy to be deemed the image of a personal God and the earthly abode of the Divine Spirit.*

I hope that, at some future day, I shall be better qualified and able to give a more luminous and extended view of this great subject.†

* Jeremy Bentham says that Priestly was the first, unless it was Beccaria in the introduction to his *Essay on Crimes and Punishments*, who taught his lips to pronounce the sacred truth—that the greatest happiness of the greatest number is the foundation of morals and legislation.

† There are systems or Schools of Jurisprudence, as well as of Philosophy, of Religion, and of Medicines. See an interesting article in *London Quarterly Review* for April, 1873, on "Schools of Jurisprudence."



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