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Jursits Hope to Understand Nature of Law

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Abstract

Four stages in the development of law with respect to morality and morals are generally recognized. First, is the stage of undifferentiated ethical customs, customs of popular action, religion, and law, what analytical jurists would call the pre-legal stage, Law is undifferentiated from morality. Second, is the stage of strict law, codified or crystallized custom, which in time is outstripped by morality and does not possess sufficient power of growth to keep abreast, Third, there is a stage of infusion of morality into the law and of reshaping it by morals; what I have called in another connection the stage of equity and natural law. Fourth, there is the stage of conscious law making, the maturity of law, in which it is said that morals and morality are for the lawmaker and that law alone is for the judge. As soon as law and morality are differentiated a progression begins from moral ideas to legal ideas, from morality to law. Thus in Roman law by the strict law manumission could only be made by a fictitious legal proceeding, by entry on the censor's register, or by a formal provision in a will. An irregular manumission was void.

Keywords: Morality to law; Equity; Roman law; Legislation; Potential law; Maturity of law

Introduction

The rise of ethical ideas as to slavery gave rise to equitable freedom in case of manumission by letter or by declaration before friends recognized and protected by the praetor. This was made a legal freedom by leIia. Again, in the common law, larceny was an offense against possession. Trespass de bonis and trover proceeded on taking from another's possession or converting to one's own use another's property which one had found. Moral ideas were taken up by equity and gave rise to the doctrine of constructive trusts [1]. Or, to take a modern example, at common law easements could only be created by grant or by adverse user. The equitable enforcement of covenants gave rise to equitable easements or servitudes. At length zoning laws made restrictions of the sort legal. This progress goes on in all periods. In the third stage, however, there is a wholesale taking over of purely moral notions under the idea that law and morals are identical. The historical jurist, therefore, considered that morality was potential law [2]. That which started as a moral idea became an equitable principle and then a rule of law, or later became a definite precept of morality and then a precept of law. In general, in the strict law the law is quite indifferent to morals; in the stage of equity and natural law it is sought to identify law with morals; in the maturity of law it is insisted that law and morals are to be kept apart sedulously. Morality and morals are conceived of as for the legislator or the student of legislation, the one making laws out of the raw materials of morality, the other studying how this is & loan and how it ought to be done; but it is considered that they are not matters for the judge or the jurist. It is held that the judge applies the rules which are given him, while the jurist studies these rules, analyses and systematizes them, and works out their logical content [3]. This assumes that law is a body of rules-Austin's first assumption, taken from Bentham. Maine was often much influenced by Austin.

Discussion

The analytical jurist insists vigorously on this separation of law and morals. He is zealous, in the maturity of law, to point out that a legal right is not necessarily right in the ethical sense-that it is not necessarily accordant to our feelings of what ought to be. He is zealous to show that a man may have a legal right which is morally wrong, and to refute the proposition that a legal right is not a right unless it is right. This is sound enough as an analysis of legal systems in the maturity of law. Only, as will be seen presently, the sharp line between making and finding the law and applying the law, which the analytical jurist draws, cannot be maintained in this connection. Whenever a legal precept has to be found in order to meet what used to be called a gap in the law it is found by choice of a starting point which is governed by considering how far application of the result reached from one or the other will comport with the received ideal [4]. Thus morals are a matter for judge and jurist as well as for legislator. Yet it is necessary to sound thinking to perceive that moral principles are not law simply because they are moral principles. On the other hand, the circumstance that a right, and law, and right were expressed by the same word in Latin, and that a right and what is right are expressed by the same word in English, has had not a little influence in the history of law in bringing rights and law into accord with ideas of right. In the nineteenth century, philosophical discussions of the relation of jurisprudence and ethics, of law to morality and morals, were much. Neither of these words translates exactly into a single English word. Recht here does not mean law as the precepts which the courts recognize and enforce but more nearly that which the courts are seeking to reach through judicial decision. So the question which German philosophers of the last century were debating came to this: Is what the courts are trying immediately to attain identical with morality or a portion of the broad field of morals, or is it something which may be set over against them? Philosophical jurisprudence arises in the stage of equity and natural law. It arises in the stage of legal development in which attempt is made to treat legal precepts and moral precepts as identical; to make moral precepts, as such, legal precepts. Hence at first philosophers of law assume that jurisprudence is a branch of ethics and those legal precepts are only -declaratory of moral precepts. They assume that a rule of decision in the courts cannot be a legal precept unless it is a moral precept; not merely that it ought not to be a legal precept if it runs counter to a moral precept. They assume also that moral precepts as such are legally obligatory [5]. This is connected with the treatment of jurisprudence

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as a part of theology prior to the Reformation. From the standpoint of seventeenth- and eighteenth-century jurisprudence, positive law gets its whole validity from being declaratory of natural law. But conceding that this theory that the validity of a legal precept as such is to be tested by its conformity to moral principles has done much service in the stage of equity and natural law in promoting liberalization through bringing law abreast of morality and seeking to conform it to ideals of morals, the theory is tolerable practically only at a time when absolute ideas of morals prevail. If all men or most men agree in their moral standards or agree in looking to some ultimate authority for decisive pronouncements on the content and application of moral principles, then the theory may be tolerable in practice. The eighteenth-century theory meant practically that each philosophical jurist made his own ethical views, largely an ideal form of the doctrines and institutions which he had been taught or with which he was familiar, and the test of the validity of legal precepts. The only real value of the theory was that it led each jurist to work out ideal standards which could serve for a critique. Bentham, speaking of natural-law exponents of ethics, said the fairest and openness of them all is that sort of man who speaks out and says, I am of the number of the elect; now God Himself takes care to inform the elect what is right, and that with so good effect they cannot help knowing it [6]. If, therefore, a man wants to know what is right, he has nothing to do but come to me. An eighteenth-century jurist laying down natural law and Bentham's man who claims to be one of the elect are in the same position; each is giving us his personal views and assuming that those views must be binding on everyone else. When and where there are absolute theories of morals upon the main features of which all are agree, it is possible to realize the condition of Bentham's man who was one of the elect. From such a source authoritative natural law may be drawn without impairing the general security. But when all astute theories are discarded and no authorities are recognized, when moreover, classes with -divergent interests hold diverse views on fundamental points, natural law in the eighteenth-century sense would mean that every man would be a law to himself [7]. Accordingly, the historical jurists threw over ideals of law entirely and nineteenth-century metaphysical jurists sought to deduce natural law from some fundamental conception of right or justice given us independently and having an independent validity. In the seventeenth and eighteenth centuries the relation of moral precepts and legal precepts was thought to be that the latter declared and promulgated the former [8]. In the nineteenth century, the metaphysical school thought that both were deductions from a fundamental conception of right or of justice, but that they differed in that in the case of morals our deductions gave us a subjective science while in law they gave us an objective science. In morals our deductions had reference to the motives of conduct while in law they had reference to the outward results of conduct [9]. This treated them as coordinate deductions. During the reign of natural law, coincident with the legislative movement and codifying tendency which led to an idea of positive law as an authoritatively imposed declaration of natural law by a superior reason and hence to an imperative theory of its obligation, Thomasius began to insist upon distinguishing law and morals. Kant begins with a proposition that man, in endeavouring to bring his animal self and his rational self into harmony, is presented to himself in two aspects, an inner and an outer, so that his acts have a two-fold aspect. On the one hand, they are external manifestations of his will. On the other hand, they are determinations of his will by motives. On the one hand, he is in relation to other beings like himself and to external things. On the other hand, he is alone with himself. The law has to do with his acts in the former aspect; morals have to do with them in the latter aspect [10].

Conclusion

The task of the law is to keep conscious free-willing beings from interference with each other. It is so to order their conduct that each shall exercise his freedom in a way consistent with the freedom of all others, since all others are to be regarded equally as ends in themselves. But law has to do with outward acts. Hence it reaches no further than the possibility of outward compulsion. There is a right in a legal sense only to the extent that others may be compelled to respect it.

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Conflict of Interest

None

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