

Man and His Laws

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INTRODUCTION

I shall deal with this topic under two headings:

- I. Define the scope of my discussion by looking at different kinds of rules that go by the name of law.
- II. Focus on human laws designed to control day-to-day conduct, their characteristics, why we need them, why we should obey them and how they are enforced.

SECTION I

Man has been both an intrepid discoverer of laws and an industrious inventor of laws.

The discoverer: e.g., the law of gravity (typical of scientific laws) finding uniformities of behaviour in nature, cause and effect). Some of these discoveries relate to man: economic laws, e.g., supply and demand. One topical instance of it; if you increase the supply of money and the quantity of goods remains the same, the price of the goods go up. This is the cause of inflation, not a conspiracy but an inexorable law.

This breed of law is self-enforcing; it doesn't require police, courts, judges, or gaols. Test out the law of gravity! When there are the laws of God, e.g., the Ten Commandments which man says he discovered by listening to God. They rule the universe as does the law of gravity. Are they self-enforcing? Not for sure in this world, perhaps in the next!

Some say that man makes God in his own image and that the voice of God speaking his commandments is really the voice of man, the ventriloquist. This, they say, is the reason that different nations and peoples believe that God is commanding them to do different things, and they end up slaughtering one another. God, they say, is a fraud. His laws are not revealed (discovered) but invented by man. I am not here to discuss religion and

theology but to try to explain law. To that end, I want to say only three things on this matter of God's law. First, the explanation just suggested is entirely too simple. If man invented the Ten Commandments, why did he invent rules for himself that require him to curb his strongest desires, and which he disobeys again and again? Is man so stupid that he keeps flogging himself with rules he can't honour and obey? Second, man is the inventor of another kind of law, the moral law; the golden rule (do to others as you would be done by). The iron rule (don't do to others what you don't want them to do to you). For example, if you want others to tell you the truth, you should always speak truth to them. If you don't want others to deceive you with lies, you should not tell lies to them. The moral law, like God's law, is always setting standards we find painful to observe. What does this tell us about man? He is racked by all sorts of selfish desires and passions, but he is haunted by a feeling that there is a moral order in the universe; and he gropes to discover it, either in divine law which he should accept without question or in the moral law which he tries to think out for himself, sometimes with the help of philosophers but always to appease his conscience.

My third point brings us close to the laws of man I want to talk about. Most of your speakers take you back to the beginnings. If all you know is what you see around you, you don't understand very much. I go back to primitive man for a few minutes. In this evolution as man, he became conscious of himself and began to think (very dangerous states). His instincts atrophied. His genes (his computer) no longer programmed his actions. He had to try to think. His thoughts made him a prey to never-ending anxieties. He lived in a hostile world where the only law he knew was the law of the jungle: eat or be eaten, swift revenging wild beasts, the terrors of thunder, lightning, and the dark, the disasters of flood, storm and drought that destroyed his food supply. He had no science to explain, no religion to console him.

The calamities that beset him he thought must be aimed at him by unseen powers. You should be able to understand this. Look around you. When things go wrong, e.g., inflation, we can't see why. Despite all our economic science and religion, we quickly decide that unseen forces are after us, a network of hidden conspiracies are pushing up prices. So don't be so superior to poor primitive man.

The unseen forces, let us just call them god's, for that is what they came to be known, were touchy, easily moved to swift and terrible anger. But what stirred them up to savage action? Something that one man or the village or the tribe did, or did not do. But what? Something had been done, or not done, just before the disaster struck. "So don't do that any more. It makes the gods angry. It is taboo."

On the other hand, many actions were taken and no disaster, e.g., starting on a hunt at full moon. They were repeated again and again. These actions were successful, fresh meat and no calamities. "The gods like this way of acting, or at least, it doesn't make them angry. We should always do it this way."

Now, what has all this to do with the laws of man? We would say the people of the village; and later, the people of the tribe, were establishing customs. It became customary to refrain from certain kinds of actions and to perform other actions in a particular way. This is the origin of man's laws in all primitive societies: always the first man-made laws are customary laws. But men did not think they were making these rules. They were discovering what the gods liked and disliked, finding out by this kind of revelation what the laws of the gods were. How do we know this? There weren't any anthropologists observing early primitive man and reporting back. We do know, as a fact that all early law was rooted in custom: there are historical records for this. But how do we know that they thought customary law had divine sanction? We know it by inference.

The tribal customs were thought to be unchangeable. The severest penalties were imposed on deviants who violated the customs. More than that, the customs were regarded with awe and reverence and imprinted on all minds by ceremonies and sacrifices, all clearly of a religious character. Gradually, over tens of centuries, great bodies of customary rules accumulated. When the technique of writing became an aid to memory and records began to be kept, the records of the laws were kept by the priests. They interpreted the customs, decided who had broken them and imposed the penalties. The first judges were the priests. It was almost impossible at this stage to disentangle the law from religion, or trials from religious ceremonies.

Early man did not think he made his laws. They came from the gods. Man discovered them; custom was thought to be a form of revelation. It was sacred, eternal. These were "The laws of the Medes and the Persians which altereth not." if the people disobeyed the customs, sooner or later the gods would punish them. Remember how the phophets of the Old Testament thundered against the Israelites, prophesying doom. In an attempt to placate the gods, turn aside their wrath, the priests and greybeards of the tribe imposed punishments on the law breakers. Men began to enforce their own laws, the customs.

As is often true, language is condensed history: e.g., the word "sanction," Latin *sanctio* to make sacred. What made an oath sacred; what is its sanction? The Ten Commandments. What makes a moral rule sacred or binding? What is the sanction? Reason and conscience, but behind that again, often religious feeling. What makes a man-made law binding? What is its sanction? Penalties imposed by a court, but behind that (a) influence of custom, something wrong about deviating from time-honoured practices; then still further back, (b) the sanctity of religion, fear of the wrath of God. But at some stage in this process, it was recognized that man was enforcing man-made laws, which he invented rather than discovered. Anyway, lawyers regularly ask what is the sanction for this or that rule, meaning what penalty will a court impose for breach of it. If the answer is that no penalty can be imposed by a court for breach of the rule, then they say this rule is not law. It may be a moral principle, it may be a revealed divine command. It is not a law of man, in the narrow sense I shall use it here.

Now at last I can define the law in the narrow sense in which lawyers use it and to which I shall confine myself. The law is the body of rules which the courts will enforce by compelling obedience or for breach of which courts will impose a penalty. I say no more of divine law or moral rules, or prevailing custom.

SECTION II

I focus now on the second heading: Nature and purpose of man-made laws. We move closer to home. A significant part of the law of the English-speaking provinces is called the Common Law, as distinguished from Civil Law in Quebec. What kind of law is this? It is the body of the law that settlers brought to Canada and to the states of the United States from England. They brought their language, and they brought their law. But why was it known as the Common Law?

After the Normans conquered Britain in 1066, William, Duke of Normandy, was still faced with a hostile population, a score of regions still quarrelling among themselves, the peace being broken by unruly fellows in the style of Robin Hood. William wanted to unite all of England under his rule; make it an orderly kingdom, maintain the peace, increase the productivity of the peasants so that he could tax them more severely for the support of his court and his enterprises. Domesday Book was an inventory made by his officials in 1086. He and his successors sent their "justices" (we would call them senior civil servants) periodically around the country. One of their functions was to catch those who broke the King's Peace, establish their guilt and punish them. Any stubborn dispute between individuals was likely to result in violence if not settled. So gradually these justices who went on regular circuits around the country became judges holding court and, if you like, enforcing the law.

But what law were they to enforce? (1) the King's Peace rested largely on the King's laws, harsh rules the Normans had made to bring the country under their control, e.g., savage penalties for killing deer in the Royal forests, for raising insurrections against Norman rule. (2) When the justices undertook to settle a dispute between the native Anglo-Saxons, their instructions were to settle it according to the customs observed by the people. As much as possible, the natives were to be ruled by their own native rules.

A subject people are easier to pacify, more likely to accept alien rule if you leave them alone. The Normans didn't require them to learn French or to live by the laws of Normandy. They were to be left with their Anglo-Saxon dialects and with their own local tribal customs as much as possible. Seeing that the natives, like all primitive peoples, revered their own customs, regarded these customs as expressing what was right and what was wrong, the judges could count on some local support for their decisions. They were, in effect, hitching themselves on to the community sense of right.

This should not be hard to understand. Haven't we seen in the last 25 years in Ontario much resistance to the consolidation of the school system, the closing of small local schools and transferring to larger more distant schools operating under rather different practices and rules?

However, what happened to local schools run under local rules when the Government in Toronto undertook to rationalize the school system also happened on the Norman administration of justice in England. (The Norman administration was centralized in London). Centralized administration is always in tension with local diversity and variety, always trying to make a tidier and more uniform system. The judges of the Norman Kings who went all over England found substantially different customs in every shire, every county. Keeping records of all these customs and knowing where such and such a custom was applicable, and where not, was both burdensome and confusing. At the same time, the judge noticed again and again many customs that were very similar in Kent, Devon, Yorkshire, Northumberland. So they compiled a body of custom that was the same or strikingly similar in most counties. They simplified their task by deciding to apply "The common custom of the realm", as they called it, and to brush aside the diverse local customs.

Three hundred years after the conquest, by 1400, this common custom was being regularly and consistently enforced all over the kingdom. In terms of my definition, this body of custom had become law. It became known as the Common Law of England.

It is one of the two great systems of law in the western world. Wherever English colonists went, North America, Australia, Pacific Islands or wherever, the Common Law went too. The other great and much older system of law is Roman Law. It grew out of custom in the city of Rome centuries before the Christian era. It was refined and systematized by a remarkable group of lawyers in the flourishing days of the Roman Empire, 50-250 A.D.

It became the law of the Roman Empire which covered all of Europe, and parts of Asia and Africa. It never lost its influence in Continental Europe, and was formally adopted as the basis of the law of the western European nations. It became known as the Civil Law, in Latin, juris civilis, the law of the citizen. From Europe, it spread outward with European colonization. France took it to Quebec and to Louisiana, Spain took it to Mexico, Central and South America, Portugal took it to Brazil. Holland took it to South Africa where the law is called Roman-Dutch law -- oddly enough, it went also to Scotland which lives under Civil Law rather than English Common Law. Notice here in the Common Law a parallel with the emergence of a common language (English) out of the diverse Anglo-Saxon dialects. Chaucer who wrote the Canterbury Tales is regarded as the first English poet. He died in 1400. The English language -- something new -- grew out of the dialects as an English nation took shape. It had some French words in it, and many Latin roots. In the same way, but over a longer period, the Common Law became a distinctive system of law shaped by lawyers and judges out of diverse customs, but containing some elements of Normal feudal law, some Roman law, and other rules derived from Canon Law, the law of the mediaeval church. Both language and law were organic growths over long periods. To go back to the opening paragraph, the Common Law was not a discovery; it was a man-made invention to serve social purposes, a social invention by the same kind of techniques as a language.

In Ontario, (and in the other provinces excepting Quebec, and in the states of the United States except Louisiana) it is correct to say that we live under the Common Law. But that is not the whole story. Much of the law we live under, an ever-increasing proportion of it, is made by legislatures (Parliaments) in the form of statutes. These statutes sometimes abolish rules of the Common Law. More often they add new rights and duties to the Common Law. Sometimes they create entirely new bodies of law, as when they set up systems of unemployment insurance and old age pensions.

Legislatures, federal or provincial, whether the Legislative Assembly of the Province of Ontario or the Parliament of Canada, are a distinct source of law. They are not like Moses, passing along divine revelation -- although sometimes they act as if they were. They are not declaring the customs we live by and reminding us that we must obey them: on the contrary they are often saying that the present customs, or laws, are bad, have to be made illegal and replaced by other rules. What entitles them so to act?

The constitution of our country, the supreme law under which we live gives the legislatures power to make laws which override any existing laws. It also imposes on the judges a duty to apply the statute to disputes, and to levy penalties on those who disobey the command of the statute.

"Command" is the word, and the distinguishing feature of statute law. It does not have its roots in custom, it is not made piecemeal by lawyers and judges over centuries, it does not grow out of the community sense of right. It is instant law. Barked out as a command. We are often surly in our response to the command. While we may be disposed to cheat a bit in our compliance, we have not engaged in large scale rebellion against statute laws which we dislike. We do not rebel because we remember that the legislature is made up of our elected representatives. The evidence nowadays suggests that we don't trust them very far or for very much. But we distrust them less than we distrust all alternative lawmakers such as kings, four-star generals or dictators. We sense instinctively that our elected representatives, with close links to the people, are not as likely to lose touch completely with the community sense of right as are kings, generals, or dictators.

Nowadays we have more awareness, more familiarity with law as command, than with any other kind of law. The laws that bear most heavily on us are statute laws, raising our taxes, lowering the speed limit. The next thing may be fixing our incomes and rationing sugar. Every day we obey most of the rules of the Common Law, without knowing it; we are always making contracts, and keeping the obligations they put on us except marriage vows, we normally show reasonable care and avoid injuring other persons or their property by negligence. We rarely question the rules that confirm X in the ownership of his car or his house. These are Common Law rights and duties. We obey most of them most of the time because they are in rough harmony with the community sense of right. It is mostly the laws in the form of command as made today by legislatures that annoy us, which we are tempted to break or try to evade.

Law as command, the ukase of a distant authority, has its dangers, and it has had a long and shocking history. It made its first appearance when one tribe conquered another neighbouring tribe, seized its lands and reduced its population to servile status. (Man has been a pugnacious, predatory animal). The chieftain of the conquering tribe wanted to hold the land, rule it and exploit the population. If he didn't strip this conquered tribe of its power, it might turn the tables at the next stage, attack his tribe and reduce them to servile status.

So he had to be tough and brutal with the conquered. He made harsh obligatory laws by command, and enforced these laws by the sheer power of his army. To show that he really meant business, he periodically slaughtered a portion of the conquered population. William the Conqueror is a good illustration, actually more humane than was the general practice. (as I told you, - he did not abolish the existing Anglo-Saxon laws and customs. He limited his commands to demonstrations on who was boss. But he was a late practitioner of these techniques.) For several thousand years, the whole process of consolidating great areas of the earth into duchies, kingdoms, and empires involved again and again war, conquest, repression, exploitation, and rule by savage command. It took the English people 700 years to wear down royal power and put law as command under the control of a representative legislature. That used to be regarded as a great achievement.

Why then are we so unhappy with the laws of the legislature made last year and so fearful of what they may do this year? The history of law gives the clue. Such law is generally, not always, crisis law, emergency law. Think of the conqueror and his subject population. The normal routine ways of living had been broken; the customary ways of both conquerors and conquered had been upset. Quick, summary action had to be taken to hold things together, and consolidate the new regime.

It doesn't require war and conquest to create an emergency, crisis: earthquakes, floods, droughts, above all, rapid social change will do it. (Rapid social change means break-up of routine ways of doing things, the jarring of customary relationships between persons and groups). Think of the upset caused by the shift from cottage industry in textiles, where spinning and weaving were done at home to great factories and power machinery. The law based on custom cannot change fast enough to cope. It is an emergency - law as command.

I come now to the main point about law as command. Ever since the Renaissance and Reformation in the 16th century, the western world has been undergoing massive and fairly rapid social change. It speeded up with the Industrial Revolution of the 18th - 19th centuries and has been accelerating at a dizzy rate all through the 20th century. So crisis laws are always having to be made in ever greater bulk and with walloping impact on our every day lives -- a veritable torrent of law -- by command. And it will continue in full flood until we slow the pace of social and economic change.

You can see now why we are unhappy about many of the laws made by our elected representatives in the legislatures. Change upsets our customary way of life, shakes us out of the well-worn ruts of habit and compels re-adjustment. Change often comes so quickly and has such far reaching effects that people are incapable of making an effective adjustment by themselves. The new shoe pinches and cripples us. Parliament has the power and the resources to do something but often it is not at all clear what should be done. Hence trial and error, often errors! A law fails of its purpose. Repeal it, amend it; try again. Sometimes, the law does achieve its main purpose. But -- it has side-effects that were not foreseen and causes mal-adjustment somewhere else. So there has to be still another law to handle the adverse side-effects. It really is crisis law, emergency law.

I don't want to give the impression that law as command, emergency law, is a stupid enterprise. In a complex society like ours undergoing very rapid changes, law by command is inevitable. It always involves some fumbling and groping for the right formula. While the fumbling is going on, it often looks stupid. However, after some groping, we often find a reasonably satisfactory solution. Many of the crisis laws brought into force 50 years ago are now fully accepted. Without them, we would have been in very serious trouble. I said, and I repeat, law by command is dangerous. It is an exercise of coercive power, always involving the danger that it will be wrongly and oppressively used.

This raises a very important question. If law-making is dangerous, why don't we stop it and get on without law altogether? Why do we need law; what does it do for us?

We live in society in endless and varied relationships with one another. From birth to death, we are dependent on others for the services they supply us with; just think of them. We know that if something gets out of kilter in society, some or all of these services are interrupted. If the interruption is widespread and prolonged, everything falls apart. What holds society together? In part, it is religion which can be divisive as well as unifying. In part, it is habit and custom, as we have seen. But there are always people who don't honour religious precepts and who break the custom, refuse to perform services, terrorize those who do provide services, disrupt public order. The main function of law is to maintain public order and general security.

But look at the ants and the bees. They live in societies all jammed together. As far as we know, order is invariably maintained, services are not interrupted. Have they got laws maintaining public order and arrangements for punishing those who break ranks? None as far as we can detect. Apparently they don't need laws; man does. Why?

Ants and bees live by custom, invariably observed, never broken. We used to call it instinct. Now we say they are programmed by their genes to perform their roles exactly and without question. Yes, but note the consequences; no individual freedom, no dissent, therefore no experimenting, no social change. We have some reason to believe that hives are constructed, honey made and stored exactly as it was endless ages ago.

Our societies in the western world have believed in individual freedom. Every person should be free to experiment with his life, embark on

adventures, try out his powers. In doing this, the individual from time to time collides with other individuals doing the same thing. To reduce confusion, conflict and disorder, each of us needs to know where his freedom ends and the freedom of others begins. We need to know what we are free to do and what behaviour we have a right to expect from others, and which we can hold them to if necessary.

The rules of the road, everybody keeps to the right, tells you a lot about the law. For us to be free to use the highway, there must be rules that everyone can be required to obey: without them, the highway would be a graveyard. The traffic rules (law) must be the same for everybody, and they create a network of rights and duties. I have a right to drive on the highway, but only insofar as I obey the laws. I have a duty to every other user of the highway to drive on the right in a vehicle that does not exceed a certain width and is equipped with standard lights,brakes, etc. and a duty to operate it with reasonable care. Every other user has the same rights and the same duties.

Now note carefully: The traffic laws limit my freedom -- and yours -- in many ways. But they are also an instrument of liberation. They make adventure possible on the highway, take us over vast distances quickly and in reasonable safety. There are hosts of other laws that serve the same function, firmly supporting public order so that everyone can go about his lawful occasions (as the lawyers say) do what he likes with his liberty as long as he observes the duties the law puts on him for the protection of others. Each enlarges his own liberty but always within the limits set by the law. Many of these laws we are discussing now are part of the Common Law, but some are statute law, e.g., many of the traffic laws, dealing with the emergency of dense, fast motor traffic.

The laws we are talking about have certain characteristics. They are laws that apply to the interrelationships of private persons -- private law. (Public law is another matter). They are general laws, equally applicable to nearly everybody. They are usually phrased in general terms, setting standards applicable to a great range of situations. It follows that they rule out privilege. Nobody can claim a right to be excused from obeying them. When disputes over them can't be settled amicably they go to the courts. The judges in these courts are independent, have taken an oath to apply the laws fairly and impartially to everybody. So it is commonly said everybody is equal before the law.

This last statement is also commonly denied and even ridiculed. Some one once said to an English judge what a great thing it was that the courts were open to everyone to test his rights. The judge said, "Yes, just like the Ritz Hotel." The point is that as long as persons are very unequal in incomes and resources, they are unequally equipped to defend their rights in the courts and elsewhere. Equality before the law is there in form but often lacks substance, and this is unjust.

In fact, the law is often attacked today on a much broader front. Far from being just in all its provisions, it protects and shelters a great range of injustices. The law is devoted to maintaining order, and that means protecting the status quo. It protects property which is at the heart

of the distinction between rich and poor. It protects individual liberty which means that the intelligent energetic, shrewd, health, self-control and the fortunate always do much better than those who lack these qualities. All this, it is said, is unjust and if the law was any good it would be stated in terms that forbade and punished such injustices. The argument is linked with a demand for equality as the essence of justice.

What can we say about the relation of law and justice? How far can we use law as an instrument to enforce justice? These questions are too big to settle at the end of a lecture. But something must be said because confidence in, and support of, the law has been declining steadily for a generation, largely because it fails to achieve justice, or protects injustices. I shall make four statements which I think I could defend against all comers. Then I shall raise four questions on which I have my own opinions. These opinions don't matter. But I do urge that these are the questions you should ask yourself and find answers for if you are going to have intelligent views about the relations of law and justice.

First, the job of the law is primarily the maintaining of some minimum of order in the society. When order breaks down, everyone lives in fear and can trust no one except himself. So the strong and powerful ride roughshod over everybody. Public order serves the weak more than the strong. When it breaks down, people will pay almost any price to restore it. Of course, if a society is riddled with injustice and oppression, that too, is likely to destroy public order. So law has to try to prevent gross injustice as part of its function of maintaining public order.

Second, one of the hopeful things about human nature is a perennial yearning for justice, not only for oneself but for others. There are always things going on in a society that outrage the sense of justice which nearly all of us share. In the western world, we have been fighting this kind of injustice for a long time. There is less of gross injustice among us now than at any earlier time in human history.

Third, when we try to refine our concepts of justice and to say exactly what would be justice for all the members of a numerous society, we find wide divergences of opinion, and bitter disagreement. We find then that one of the unhelpful things about human nature is envy. We conclude too easily that it is unjust for people who stand above us in the social scale to be getting more than we do of the good things in life. More serious, we think it would be unjust for those who are now below us in the social scale to be brought up to, or nearer to, our level. We are not seriously divided over what would be rough justice, but remain deeply divided over what would be exact justice. The debate on the latter issue has gone on for centuries without much advance.

Fourth, if, as some people urge, we should change the law to ensure comprehensive justice for everybody, it would have to be done by the legislatures composed of elected representatives of the people, because they are the only bodies we recognize as having the supreme power needed for such a task.

Now for my questions.

1. Are you ready to trust the Parliament in Ottawa, and the Legislative Assembly in Toronto, to say what your income and that of every other person should be year after year throughout your life?
2. If the legislature bolstered up its courage and enacted a statute called the Comprehensive Justice Act covering everybody, would you expect the electorate to be happy with the result. Or would you expect many to say, the legislature underestimated my merit and the merit of those I trust and admire (my friends) and exaggerated grossly the merit of those I distrust and dislike (my enemies")? Would you expect public order to be strengthened or weakened by such a law?
3. Would you expect people to regard the question of merit to be settled by this law or would you expect it to be a still bigger issue in the next election?
4. What prospects would there be of many people saying something like this, "I don't want members of parliament who never heard of me deciding on my merit. I prefer to be free to experiment with my talents, and to try to prove my merit by my actions, and am ready to take the risks of doing so. Oh, I support equality of opportunity, helping everybody to have a fair chance, if our laws make that possible. But for me, one of the ingredients of justice, not the whole of it by any means, but an essential part, is freedom to try out my powers"?

I have my own opinions what the answers to these questions would be, but as I told you, my opinions don't matter. What does matter for anyone thinking of using the law to enact comprehensive justice is to consider these questions carefully. As far as I can judge, they are on the agenda of this country for the future.

References

- Friedrich, C.J. The Philosophy of Law in Historical Perspective, Part II.
- Lesser, B.M. Custom, Law and Morality.
- Corry, J.A. and Hodgetts, J.E., Democratic Government and Politics Chapter on the Judiciary and the Law.
- Corry, J.A., The Power of the Law. Massey Lectures on the C.B.C., 1971.