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HISTORIC PERIODS IN THE DEVELOPMENT OF OUR LAW

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There are five historical periods in the development of Anglo-American law. Dean Roscoe Pound has named these periods: 1. The Period of Archaic Law; 2. The Period of Strict Law; 3. The Period of Equity, or Natural Law; 4. The Period of the Maturity of Our Law, and 5. The period of the Socialization of Our Law.

The Archaic, or Primitive, Period in our law succeeded the period of no law, in early English history. The object of the law in this period was to secure the peace. Prior to this period every man had been a law unto himself. Vengeance and self-help had been the order of the day. The consequence of such a policy was unsafety for everyone. Hence the first effort of society was to preserve the peace. It undertook to do this by regulating vengeance. Individuals and families, however, then considered vengeance and self-help as things which peculiarly belonged to them. For this reason the first effort was not to destroy them, but to regulate them. This was done by substituting a composition for vengeance. The avenger was bought off. Roman law and Hebrew law had this same period in the development of their law. In Hebrew law it was characterized by the institution of cities of refuge and by the provisions for buying off the avenger. This period did not contribute very much law, but it marks a great step in the historical development of our law because it made the other periods possible. It established the principle that law should be substituted for lawlessness in the government of human relations. Through the years this principle has been applied more and more, until today there is very little of the principle of self-help left in the relations of one individual with another. What civilization we have is very largely due to the application of this principle. Unfortunately the principle has been applied only in the settlement of disputes between individuals. So far as social classes are concerned and so far as the larger units of the nations are concerned the law of England and the United States (and of the world), is still in its Archaic, or Primitive period.

The Period of Strict Law followed the Archaic period. It began in Anglo-Saxon history and extended through Norman history as far as the sixteenth century. The purpose of law in this period also was security, but it attained this purpose, not by regulating primitive self-help, but by supplanting it so far as individuals were concerned and substituting therefor its own processes, or remedies. The law in this period was characterized by formality. When law was in the making people thought that their protection against tyrants lay in such formality. They sought this sort of protection before they would relinquish what they regarded as their right to obtain their own redress. But the consequence was that they created in their formality a greater tyrant than any against which they were trying to protect themselves, and that brought into existence the next or third period in our law. Most of the formality and technicality of the second period of our law has been ameliorated if not outgrown, especially in the field of substantive law; but in the field of adjective law, or procedure, at least in the United States, the law is to a large extent still where it was in this early period of Strict law, and some parts of our substantive law, like real property and consideration in contracts, still bear the marks of strict law.

The Third Period in the development of our law was Equity (or natural law in other systems). In this period, which extended from the sixteenth through the seventeenth and into the eighteenth century, the pendulum swung to the opposite extreme. There was such a revulsion against the law of the Strict Period that justice was administered for a time by a system of courts which sprang into existence, with almost no formal rules. The end of the law in this period was justice. There was a tendency to identify law and morals, and to emphasize duties rather than remedies. This was essentially a reform period, and after it has remedied the most glaring defects of the law as it emerged from the period of Strict law and as it had been administered by the common law courts, the pendulum again swung backward towards the period of Strict law, and as a consequence we got the period of the Maturity of our law.

The period of the Maturity of our law ran from the eighteenth through the nineteenth century. The end of law in this period was equality of opportunity and security of acquisitions. Security became an end of law again, as in the strict period, but the influence of equity was not entirely eliminated. The pendulum did not swing all the way back to Strict Law. However, the swing was far enough so that form and technicality again began to have a large place. Rights were emphasized rather than the correlative duties which Equity had emphasized. Property and contract became the all important considerations. Individualism and freedom of contract were the universal "cure-alls." The law would probably have taken this development if there had been no other outside factors contributing to this result, but the development was undoubtedly accelerated and given momentum by the philosophies and economic theories of the day. This was the period of the "natural rights of man," of "laissez faire," the "law of competition," the "law of supply and demand," and of "individualism." Our bills of rights, the Declaration of Independence and other immortal documents were written in this period, and that of course accounts for the philosophy and economic ideas embodied in them, although this fact is sometimes forgotten. The result was an over-emphasis of legal rights. Dissatisfaction, perhaps more unconscious than conscious, again arose; and just as the pendulum swung...
away from the second to the third period of our law, so it swung away from the fourth to the fifth and last period.

The present period in the historical development of our law, which Dean Pound has called the period of the Socialization of our law, began with the nineteenth century, but when it will end cannot at the present time be told. The chief characteristic of present law is the emphasis of interests. The natural result of the over-emphasis of rights in the period of the maturity of the law was to raise the question of why individuals had their rights. The answer was, because there was a social interest that they should have them. When this was discovered, people also discovered that there were other social interests than those which had been emphasized in the nineteenth century, and the consequence was a new period of development in the law. People saw that the historical order was not the natural order but that historically the natural and logical order had been reversed. Individuals had rights and duties because only thus could certain social interests be secured, and remedies were given as a means of enforcing such rights. In the realm of intellectual development, social interests have become the all important things. Unless rights and duties and remedies are furthering some social interest there is no sufficient reason for their existence. If one social interest is more important than another, the one of less importance must yield to the other. The end of the law has now become the satisfaction of as many human wants as possible; to make legal justice social justice; to give fair play between groups as well as between individuals. This has given us what has been called sociological jurisprudence, as the jurisprudence of the twentieth century. The chief exponents of this jurisprudence are von Jhering in Germany, Leon Duguit in France and Roscoe Pound in the United States. There is a close relation now, as in the nineteenth century, between law and the other social sciences and philosophy, but philosophies and economic theories have changed.

There are some people even in the legal profession who do not know that our law has had these five periods in its development. There are people teaching law, and practicing law, and administering law from the bench who think of the law as having only one period and that period as the one of strict law. If that happens to be the period of strict law, they want the law strict law; if the period of Equity they want the equity law, and so on. They can't realize that the first thing to do in accounting for a decision unless it was by a court like themselves is to find out the period in which it was decided. These men cannot realize that the law of the twentieth century is different from the law of the nineteenth. Yet that such is the fact is very easy of proof. Uses of property which were upheld as rights in the nineteenth century will not be tolerated today with its scheme of social interests. For example, a spite fence is no longer legal, property may be taken in the exercise of the police power for esthetic purposes, the right of a husband to dispose of his property is limited so that he must have his wife join in the conveyance, the powers of creditors and other injured parties are limited by the exemption laws, and things formerly classed as res communis and res nullius are now classed as res publicae. Freedom of contract is being limited by taking the law of insurance and the law of public calls out of the realm of contract, and by making more and more things illegal as the subject-matter of contract. Liability, as in the workman's compensation laws, is being imposed without fault. Society is taking an interest in the dependent members of the household. Taxation laws are not based now on the principle of equality but on the principle of ability to pay. If it was not for this change of theory our graduated income tax laws and our graduated inheritance tax laws would be unconstitutional. Important movements for the reform of legal procedure are being inaugurated. Yes. Our law has always been in process of change. Changes are now going on in it. This is right. To say that our law should remain what it was at the end of the nineteenth century would be as foolish as it would be to say that it should be what it was in the time of William the Conqueror. What it will be in the future, no one can say with authority. Its future will depend upon its best development and the desires of society. It goes without saying that it will be something different from what it now is or ever has been.

Newspaper Publicity and Crime

"Comment has been current of late in legal publications as to 'trial by newspaper,' meaning the tendency to give the press the subject-matter of criminal cases, and sensational publicity to a 'murder mystery.' Much there is in this phase of journalistic enterprise which is worthy of condemnation. Innocent people are given a disagreeable publicity, and suspicions are engendered on mere speculation which linger for years in the popular mind. Yet there is a consideration favoring such publications which is rarely adverted to. By the Statute of Winchester (13 Edw. I.) 'from henceforth every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be brought from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town and the towns near; and so hue and cry shall be made from town to town until they be taken and delivered to the sheriff.' The 'hue and cry' has gone out of existence. In its day, it was the only means of communicating the news to the people that they might be alert to capture a fleeing felon or communicate to the authorities evidence where the offender was unknown. The press has taken its place as an instrument of public intelligence, and so when a dead body is found in the public street or in a lonely field it but fulfills an ancient function when it cries 'Murder! Murder!' up and down the land. Local authorities may be supine, incompetent or even corrupt. Being unable or unwilling to apprehend the criminal they are all too willing to let the matter be hushed up and forgotten. But with that cry ringing daily in the land it cannot be forgotten; higher authorities are roused to ask why the criminal has not been found; oftentimes those bound by interest or favor to silence become afraid longer to keep silent. The criminal hearing the hue and cry ever behind him may by some rash act betray his guilt. Of course to the lawyer's mind the manner in which the press presents the matter is intolerably shallow and sensational, but such is the nature of our people that nothing less would arouse continued interest. It is open to argument whether the administration of law would not be better if the glaring calcium light of newspaper publicity rested on it more frequently and was not reserved for cases involving some morbid sex theme."—Law Notes, (Feb.)