LAWLESSNESS, LAW, AND SANCTION[1]

THE general contempt for law and the breakdown in the machinery for enforcing it suggest the need for a reconsideration of the principles which give to law its binding force. The very conditions which must prevail in organised society necessitate a social control which is exercised through law and upon which must rest an orderly arrangement as a groundwork of social peace. Peace in society is dependent on social unity.[2] All things naturally crave peace based on order,[3] and although man is by nature meek[4] lawlessness and inflamed passion are capable of making him the worst of brutes.[5] Hence reason dictates the necessity for rules of conduct to be followed by all. Individual inclination must sometimes be restricted and accommodated to the larger interests of society as a whole. St. Thomas therefore defines law as "a dictate of reason, given and promulgated for the common good by one who has charge of the community." There are, besides statutory law, properly recognised customs which in defect or written law retain their binding force. The obligatory character of law is derived from the power to legislate vested in the representatives of the people, whose charge it is to make provision for the common interests of the society over which they rule. It is by legislation that just relationship is established between members of the state; and as all legislation should be dictated by justice and gives rise to reciprocal rights and duties, every just law has an ethical value. But a law which is unjust is no law, and does not merit obedience. There seems no sufficient justification for supposing that St. Thomas would make any clear-cut division between law and ethics, indeed the placement of his treatise on law indicates the contrary. A

1 A dissertation by Mariam Theresa Rooney, LL.B., A.B., A.M. The Catholic University of America, Washington, D.C., 1937.
2 *De Reg. Princip.* I. 1, C.2.
3 *De divinis nominibus,* Dionysii, XI, *lect.* I; *cfr.* IIa IIae 29, II.
4 Ia IIae 46, v; IIa IIae 157.
5 Ia IIae, 95, I.

cleavage of this nature is likely to produce sooner or later a divergence between law and justice, as for instance when the evasion of taxation laws is sometimes regarded as morally defensible as long as it can be done with impunity. Because "the force of law depends on the extent of its justice,"[6] the things which come under the law, though once morally indifferent, fall at once within the range of ethics. The fact is that the juridical and moral orders are far from being two closed systems placed in juxtaposition; the one is an integral part of the other.

When properly drafted and promulgated by competent authority, a law carries its own sanction, inasmuch as inviolability renders it an obligatory rule of conduct, and imposes itself on the conscience. This is the first and fundamental notion of sanction, for "a thing is said to be sacred when it is ratified by law"[7] independent of a threatened penalty for non-fulfilment. For the lawgiver wields a power other than his own, since he is placed in the hierarchy of authority at the summit of which is Christ the King.[8]

As law is intended to be a system for securing justice it should represent the embodiment of rationally accepted standards of ethics. Owing to the shifting scale in ethical values among the nations it has been found impossible to arrive at any general agreement and as a result international law remains in a state of flux.

However determinist the outlook on life may be it is universally observed that the human will seeks licence, and cannot be coerced by any law. Hence sanctions are adopted in the shape of penalties as a means of enforcing the observance of law by external power. "The legislator must reckon with the possibility of refusal to obey on the part of some or of many. This would defeat the aim of legislation and set up individual preference above public

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6 *Summa* Ia IIae, 95, II.

7 IIa IIae, 81, VIII. We note with regret that on p. 57 of the dissertation a passage from the Supplement of the *Summa* is cited and attributed to Reginald of Piperno. But the text in question is taken from the *Commentary* of St. Thomas on the fourth book of Sentences.

8 *cfr.* Encyclical *Quas primas*, December 11th, 1925.

authority. To obviate such consequences, there usually is added to the prescriptive or prohibitive formula, a statement to the effect that failure to observe the law will entail, for the one so failing, a privation of some kind and amount proportioned to the violation—in other words, a penalty. This constitutes the *sanction.*"[9] But to require an implicit sanction in all law is to veer round to the position of Hobbes, who defined law as "a rule of conduct imposed and enforced by the sovereign." In fact, not every legal measure is enforceable nor carries the threat of punishment, as may be exemplified by the *"sanctiones canonicae"* of ecclesiastical law which are by no means always punitive. Moreover there are incidents of sanction which, properly speaking, are not penal, such as direct recovery, the allowance of damages, nullity and voidability.

However, granted the perversity of human nature, in order to secure the carrying out of law, it is found necessary that the power to coerce should be a concomitant of public authority. Thus a law may be implemented by a penalty attached to it for infringements, and the punitive measure or sanction is the guarantee of the inviolability of what the law commands. But it is important to insist that the external pressure which is brought to bear on the recalcitrant, is not simply the application of physical force, but is calculated to awaken a sense of social responsibility inasmuch as it involves the "deprivation of something desired by the will."[10]

The essential purpose of penal sanctions is "to punish for contempt of the legal order which they are designed to ensure."[11] Punishment therefore is an exceptional legal remedy to reduce lawlessness, which if it is to be salutary must be preventative, corrective, and just. Sanction then "is designed first to deter the would-be wrong-doer, by appealing to his senses through threatened deprivation of something he desires, when the appeal to his intelligence is

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[9] *Lawlessness, Law, and Sanction,* p. 13.
[10] *Lawlessness, Law, and Sanction,* p. 39.
[11] *Ibid.,* p. 16.

ineffective. If he is not deterred but acts contrary to law anyway, upon calculating what he will lose with what he will gain by his wrong-doing, the legal sanction acts as a preventative for his own good and for that of society, by making it physically impossible for him to repeat his act for as long a period as the seriousness of the act would justify. At the same time it is within the purpose of the sanction to re-educate or reform the wrong-doer into a normal law-abiding citizen through a new appeal to his intellect by the punishment of his senses. If the penalty is effective in this regard, it operates for the wrong-doer as a means of purification for his crime and assists to that extent in restoring him to his normal position in society."[12] There is also the consideration regarding the preservation of legal order in society, and of the compensation due when that order has been outraged by crime. On these principles may be justified such punishments as imprisonment, corporal punishment, and the death penalty. There are nowadays particular objections raised against certain forms of corporal punishment, and against the death penalty, largely based on sentimental or humanitarian considerations. Though the deepest of human instincts rightly revolts against the needless infliction of suffering when undertaken merely as a preventative measure or to gratify the popular desire for vengeance. But it may not be easily denied that the death penalty and other forms of afflictive punishment have quite evidently a sociological and psychological value, to the extent that they prevent the criminal from doing further harm, and check others from committing the same crime, and so justice is done. Moreover we are inclined to think that there is also a medicinal element in such penalties because of the moral worth to the delinquent in making expiation for his crime, although final retribution is in the hands of God alone. Further sanction exists not only for the amendment of the individual, but also in some measure to compensate for the lack of confidence and insecurity

12 *Ibid.*, p. 129.

which the perpetration of crime involves within the community.

The main contention in this study is summed up well by the writer in her own words, "that the revolt against Christian unity, the eventual rejection of all religion, and the rise of erratic philosophies consequent upon the denial of the authority of God, caused the decline in the strength of the sanction of law, which has resulted in the violence, injustice and lawlessness which afflicts us. The knowledge of the causes of the decline in sanction derived from this historical study indicates the character the cure should take."[13]

Legal history stands as witness to the deleterious influence of erratic philosophies on legal theory and practice, and more particularly with regard to sanction. False philosophical views gradually and easily penetrate in the course of time to ordinary members of society, because they are apt to receive their notions uncritically especially when ideas are propagated by insinuation and become eventually embodied in the laws of the land. Here again may be seen the tremendous influence of changed ethical standards on the making of law. Each member of the community is enabled to take a share in the formation of public opinion, and this latter has long been recognised as a potent factor in the making and modifying of legislation.[14]

The rationalization of legal institutions in the light of Scholastic philosophy in the thirteenth century was largely carried forward by the clerical-jurist Bracton. "A summary of Bracton's theory of law would include consent, authority, justice, and coercive power, as requisites, and besides, as conditions, that the law be addressed to rational beings, that it concern external acts having social bearing, and that it maintain equality of proportion in securing the peace of the community."[15]

Under the influence of Protestantism materialistic philo-

[13] *Ibid.*, p. 145.
[14] *Common Sense in Law*, by Paul Vinogradoff, p. 8.
[15] *Lawlessness, Law, and Sanction*, p. 75.

sophy as exemplified by Thomas Hobbes, offered a challenge to the Scholastic teaching, and amounted to a direct attack on the hitherto accepted doctrine on legal sanction. In this system law is little more than the enforcement of state absolutism, emptied of equity, honesty, and reason. By making statute law supported by force the universal source of every right and duty, Hobbes set himself up as the philosopher of violence and disorder.[16]

In general we may say that the philosophies of sensism, hedonism and utility have played a preponderating part in modifying and crystallizing current ideas about law and its sanction. Both Bentham and Austin in sponsoring the principle that might is right, are prominent in legal history as two advocates of force against reason. Bentham conceived the notions of right and duty as being derived from the idea of punishment which he defines as pain annexed to an act. This is his application of the criterion of pleasure to matters legal, and which he expresses in his own words, "that is my duty to do which I am liable to be punished, according to the law, if I do not do." In this respect he follows closely on the political absolutism of Hobbes in identifying law with force, and associating it with its results of pain and pleasure.

In applying the historical method imported from Germany, Maine takes up the assumptions of Bentham at the same time introducing the hypothesis of an inevitable evolutionary process, which had already received its formulation in Hegelianism and later on in dialectical materialism. As part of the evolutionary process are included instincts, feelings, emotions, desires, which are the material to be harnessed by law. Consequently law and legal sanctions are but devices for satisfying persistent instincts that they may be gratified in an orderly manner.

Beyond all doubt, the maintenance of a just social order is dependent on the reverence in which law is held, whether it be in national or international affairs. The evolutionary theory of force and of the struggle for existence without

16 *Ibid.*, p. 84.

antecedent recognition of moral obligation and personal responsibility founded on freedom, lead almost by necessity to violence and savage reaction. Law can only bring peace and repress disorder when it is a dictate of reason and expressive of justice. An unjust and an unprincipled law will defeat its own end, since it leaves behind it feelings of grievance and injustice, which sooner or later will express themselves in lawlessness unless repressed by force.

The affinity between law and justice imposes an obedience which makes a claim on both the private and public conscience. The infliction of sanctions in the form of penalties for breaches of law, can only be adopted as a precautionary measure. But the most effective sanction of all is that which conscience dictates in the light of sound philosophical and religious principles.

It is not easy to say how far we are justified in the expectancy of a return to the principles of legal justice. The public utterances of lawmakers are not reassuring. Only recently the Duce announced that the ability to fight was always a determining factor in international relations. And Goering in a propagandist speech makes no disguise of his belief in the doctrine of force when in repudiating law in favour of violence he says, "without power there is no right. We know what they say about the supremacy of law, but we have noticed that law was law only if might was might." But we may retort that there can be no right unless it is recognised that man is man, and that might when unrestrained by a higher law only engenders fear, the source of hatred and revenge.

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