Sir Henri Maine

# Ancient Law. Its Connection with the Early History of Society [1861]

Ch. II, p. 20 ff. , Legal Fictions

4. American Ed., Based on 10. English ed., Notes by sir Frederick Pollock

https://oll.libertyfund.org/titles/maine-ancient-law

When primitive law has once been embodied in a Code, there is an end to what may be called its spontaneous development. Henceforward the changes effected in it, if effected at all, are effected deliberately and from without. It is impossible to suppose that the customs of any race or tribe remained unaltered during the whole of the long—in some instances the immense—interval between their declaration by a patriarchal monarch and their publication in writing. It would be unsafe too to affirm that no part of the alteration was effected deliberately. But from the little we know of the progress of law during this period, we are justified in assuming that set purpose had the very smallest share in producing change. Such innovations on the earliest usages as disclose themselves appear to have been dictated by feelings and modes of thought which, under our present mental conditions, we are unable to comprehend. A new era begins, however, [21] with the Codes. Wherever, after this epoch, we trace the course of legal modification we are able to attribute it to the conscious desire of improvement, or at all events of compassing objects other than those which were aimed at in the primitive times.

It may seem at first sight that no general propositions worth trusting can be elicited from the history of legal systems subsequent to the codes. The field is too vast. We cannot be sure that we have included a sufficient number of phenomena in our observations, or that we accurately understand those which we have observed. But the undertaking will be seen to be more feasible, if we consider that after the epoch of codes the distinction between stationary and progressive societies begins to make itself felt. It is only with the progressive societies that we are concerned, and nothing is more remarkable than their extreme fewness. In spite of overwhelming evidence, it is most difficult for a citizen of western Europe to bring thoroughly home to himself the truth that the civilisation which surrounds him is a rare exception in the history of the world. The tone of thought common among us, all our hopes, fears, and speculations, would be materially affected, if we had vividly before us the relation of the progressive races to the totality of human life. It is indisputable that much the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the [22] moment when external completeness was first given to them by their embodiment in some permanent record. One set of usages has occasionally been violently overthrown and superseded by another; here and there a primitive code, pretending to a supernatural origin, has been greatly extended, and distorted into the most surprising forms, by the perversity of sacerdotal commentators; but, except in a small section of the world, there has been nothing like the gradual amelioration of a legal system. There has been material civilisation, but, instead of the civilisation expanding the law, the law has limited the civilisation. The study of races in their primitive condition affords us some clue to the point at which the development of certain societies has stopped. We can see that Brahminical India has not passed beyond a stage which occurs in the history of all the families of mankind, the stage at which a rule of law is not yet discriminated from a rule of religion. The members of such a society consider that the transgression of a religious ordinance should be punished by civil penalties, and that the violation of a civil duty exposes the delinquent to divine correction. In China this point has been past, but progress seems to have been there arrested, because the civil laws are coextensive with all the ideas of which the race is capable. The difference between the stationary and progressive societies is, however, one of the great secrets which inquiry has yet to penetrate. Among partial explanations [23] of it I venture to place the considerations urged at the end of the last chapter. It may further be remarked that no one is likely to succeed in the investigation who does not clearly realise that the stationary condition of the human race is the rule, the progressive the exception. And another indispensable condition of success is an accurate knowledge of Roman law in all its principal stages. The Roman jurisprudence has the longest known history of any set of human institutions. The character of all the changes which it underwent is tolerably well ascertained. From its commencement to its close, it was progressively modified for the better, or for what the authors of the modification conceived to be the better, and the course of improvement was continued through periods at which all the rest of human thought and action materially slackened its space, and repeatedly threatened to settle down into stagnation.

I confine myself in what follows to the progressive societies. With respect to them it may be laid down that social necessities and social opinion are always more or less in advance of Law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.

A general proposition of some value may be advanced [24] with respect to the agencies by which Law is brought into harmony with society. These in strumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which the order of their appearance has been changed or inverted. The early history of one of them, Equity, is universally obscure, and hence it may be thought by some that certain isolated statutes, reformatory of the civil law, are older than any equitable jurisdiction. My own belief is that remedial Equity is everywhere older than remedial Legislation; but, should this be not strictly true, it would only be necessary to limit the proposition respecting their order of sequence to the periods at which they exercise a sustained and substantial influence in transforming the original law.

I employ the word “fiction” in a sense considerably wider than that in which English lawyers are accustomed to use it, and with a meaning much more extensive than that which belonged to the Roman “fictiones.” Fictio, in old Roman law, is properly a term of pleading, and signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse; such, for example, as an averment that the plaintiff was a Roman citizen [25] when in truth he was a foreigner. The object of these “fictiones” was, of course, to give jurisdiction, and they therefore strongly resembled the allegations in the writs of the English Queen’s Bench and Exchequer, by which those Courts contrived to usurp the jurisdiction of the Common Pleas:—the allegation that the defendant was in custody of the king’s marshal, or that the plaintiff was the king’s debtor, and could not pay his debt by reason of the defendant’s default. But now I employ the expression “Legal Fiction” to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. The words, therefore, include the instances of fictions which I have cited from the English and Roman law, but they embrace much more, for I should speak both of the English Case-law and of the Roman Responsa Prudentum as resting on fictions. Both these examples will be examined presently. The fact is in both cases that the law has been wholly changed; the fiction is that it remains what it always was. It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law [26] and, indeed, without one of them, the Fiction of Adoption which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from its swaddling-clothes, and taken its first steps towards civilisation. We must, therefore, not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law. But at the same time it would be equally foolish to agree with those theorists who, discerning that fictions have had their uses, argue that they ought to be stereotyped in our system. There are several Fictions still exercising powerful influence on English jurisprudence which could not be discarded without a severe shock to the ideas, and considerable change in the language, of English practitioners; but there can be no doubt of the general truth that it is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order. Now, among other disadvantages, legal fictions are the greatest of obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell. It has been long ago undermined, and a new rule hides itself under its cover. Hence there is at once a difficulty in [27] knowing whether the rule which is actually operative should be classed in its true or in its apparent place, and minds of different casts will differ as to the branch of the alternative which ought to be selected. If the English law is ever to assume an orderly distribution, it will be necessary to prune away the legal fictions which, in spite of some recent legislative improvements, are still abundant in it.

The next instrumentality by which the adaptation of law to social wants is carried on I call Equity, meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles. The Equity whether of the Roman Prætors or of the English Chancellors, differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed. On the other hand, it differs from Legislation, the agent of legal improvement which comes after it, in that its claim to authority is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform. The very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent of any external body, belongs to a much [28] more advanced stage of thought than that to which legal fictions originally suggested themselves.

Legislation, the enactments of a legislature which, whether it take the form of an autocratic prince or of a parliamentary assembly, is the assumed organ of the entire society, is the last of the ameliorating instrumentalities. It differs from Legal Fictions just as Equity differs from them, and it is also distinguished from Equity, as deriving its authority from an external body or person. Its obligatory force is independent of its principles. The legislature, whatever be the actual restraints imposed on it by public opinion, is in theory empowered to impose what obligations it pleases on the members of the community. There is nothing to prevent its legislating in the wantonness of caprice. Legislation may be dictated by equity, if that last word be used to indicate some standard of right and wrong to which its enactments happen to be adjusted; but then these enactments are indebted for their binding force to the authority of the legislature, and not to that of the principles on which the legislature acted; and thus they differ from rules of Equity, in the technical sense of the word, which pretend to a paramount sacredness entitling them at once to the recognition of the courts even without the concurrence of prince or parliamentary assembly. It is the more necessary to note these differences because a student of Bentham would be apt to confound Fictions, Equity, and Statute law under the single [29] head of legislation. They all, he would say, involve law-making; they differ only in respect of the machinery by which the new law is produced. That is perfectly true, and we must never forget it; but it furnishes no reason why we should deprive our selves of so convenient a term as Legislation in the special sense. Legislation and Equity are disjoined in the popular mind and in the minds of most lawyers; and it will never do to neglect the distinction between them, however conventional, when important practical consequences follow from it.

It would be easy to select from almost any regularly developed body of rules examples of legal fictions, which at once betray their true character to the modern observer. In the two instances which I proceed to consider, the nature of the expedient employed is not so readily detected. The first authors of these fictions did not perhaps intend to innovate, certainly did not wish to be suspected of innovating. There are, moreover, and always have been, persons who refuse to see any fiction in the process, and conventional language bears out their refusal. No examples, therefore, can be better calculated to illustrate the wide diffusion of legal fictions, and the efficiency with which they perform their two-fold office of transforming a system of laws and of concealing the transformation.

We in England are well accustomed to the extension, modification, and improvement of law by a machinery which, in theory, is incapable of altering [30] one jot or one line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language, and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before an English Court for adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge or acumen, is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision has modified the law. The rules applicable have, to use the very inaccurate expression sometimes employed, become more elastic. In fact they have been changed. A clear addition has been made to the precedents, and the canon of law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been [31] curtailed by a single example. The fact that the old rule has been repealed, and that a new one has replaced it, eludes us, because we are not in the habit of throwing into precise language the legal formulas which we derive from the precedents, so that a change in their tenor is not easily detected unless it is violent and glaring. I shall not now pause to consider at length the causes which have led English lawyers to acquiesce in these curious anomalies. Probably it will be found that originally it was the received doctrine that somewhere, in nubibus or in gremio magistratuum, there existed a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances. The theory was at first much more thoroughly believed in than it is now, and indeed it may have had a better foundation. The judges of the thirteenth century may have really had at their command a mine of law unrevealed to the bar and to the lay-public, for there is some reason for suspecting that in secret they borrowed freely, though not always wisely, from current compendia of the Roman and Canon laws. But that storehouse was closed as soon as the points decided at Westminster Hall became numerous enough to supply a basis for a substantive system of jurisprudence; and now for centuries English practitioners have so expressed themselves as to convey the paradoxical proposition that, except by Equity and Statute law, nothing has [32] been added to the basis since it was first constituted. We do not admit that our tribunals legislate; we imply that they have never legislated; and yet we maintain that the rules of the English common law, with some assistance from the Court of Chancery and from Parliament, are coextensive with the complicated interests of modern society.

A body of law bearing a very close and very instructive resemblance to our case-law in those particulars which I have noticed, was known to the Romans under the name of the Responsa Prudentum, the “answers of the learned in the law.” The form of these Responses varied a good deal at different periods of the Roman jurisprudence, but throughout its whole course they consisted of explanatory glosses on authoritative written documents, and at first they were exclusively collections of opinions interpretative of the Twelve Tables. As with us, all legal language adjusted itself to the assumption that the text of the old Code remained unchanged. There was the express rule. It overrode all glosses and comments, and no one openly admitted that any interpretation of it, however eminent the interpreter, was safe from revision on appeal to the venerable texts. Yet in point of fact, Books of Responses bearing the names of leading jurisconsults obtained an authority at least equal to that of our reported cases, and constantly modified, extended, limited or practically overruled the provisions of the Decemviral law. The authors of the [33] new jurisprudence during the whole progress of its formation professed the most sedulous respect for the letter of the Code. They were merely explaining it, deciphering it, bringing out its full meaning; but then, in the result, by piecing texts together, by adjusting the law to states of fact which actually presented themselves and by speculating on its possible application to others which might occur, by introducing principles of interpretation derived from the exegesis of other written documents which fell under their observation, they educed a vast variety of canons which had never been dreamed of by the compilers of the Twelve Tables and which were in truth rarely or never to be found there. All these treatises of the jurisconsults claimed respect on the ground of their assumed conformity with the Code, but their comparative authority depended on the reputation of the particular jurisconsults who gave them to the world. Any name of universally acknowledged greatness clothed a Book of Responses with a binding force hardly less than that which belonged to enactments of the legislature; and such a book in its turn constituted a new foundation on which a further body of jurisprudence might rest. The Responses of the early lawyers were not however published, in the modern sense, by their author. They were recorded and edited by his pupils, and were not therefore in all probability arranged according to any scheme of classification. The part of the students in these publications must be carefully [34] noted, because the service they rendered to their teacher seems to have been generally repaid by his sedulous attention to the pupils’ education. The educational treatises called Institutes or Commentaries, which are a later fruit of the duty then recognised, are among the most remarkable features of the Roman system. It was apparently in these Institutional works, and not in the books intended for trained lawyers, that the jurisconsults gave to the public their classifications and their proposals for modifying and improving the technical phraseology.

In comparing the Roman Responsa Prudentium with their nearest English counterpart, it must be carefully borne in mind that the authority by which this part of the Roman jurisprudence was expounded was not the bench, but the bar. The decision of a Roman tribunal, though conclusive in the particular case, had no ulterior authority except such as was given by the professional repute of the magistrate who happened to be in office for the time. Properly speaking, there was no institution at Rome during the republic analogous to the English Bench, the Chambers of Imperial Germany, or the Parliaments of Monarchical France. There were magistrates indeed, invested with momentous judicial functions in their several departments, but the tenure of the magistracies was but for a single year, so that they are much less aptly compared to a permanent judicature than to a cycle of offices briskly circulating [35] among the leaders of the bar. Much might be said on the origin of a condition of things which looks to us like a startling anomaly, but which was in fact much more congenial than our own system to the spirit of ancient societies, tending, as they always did, to split into distinct orders which, how ever exclusive themselves, tolerated no professional hierarchy above them.

It is remarkable that this system did not produce certain effects which might on the whole have been expected from it. It did not, for example, popularise the Roman law,—it did not, as in some of the Greek republics, lessen the effort of intellect required for the mastery of the science, although its diffusion and authoritative exposition were opposed by no artificial barriers. On the contrary, if it had not been for the operation of a separate set of causes, there were strong probabilities that the Roman jurisprudence would have become as minute, technical, and difficult as any system which has since prevailed. Again, a consequence which might still more naturally have been looked for, does not appear at any time to have exhibited itself. The jurisconsults, until the liberties of Rome were overthrown, formed a class which was quite undefined and must have fluctuated greatly in numbers; nevertheless, there does not seem to have existed a doubt as to the particular individuals whose opinion, in their generation, was conclusive on the cases submitted to them. The vivid pictures of a leading [36] jurisconsult’s daily practice which abound in Latin literature—the clients from the country flocking to his antechamber in the early morning, and the students standing round with their note-books to record the great lawyer’s replies—are seldom or never identified at any given period with more than one or two conspicuous names. Owing too to the direct contact of the client and the advocate, the Roman people itself seems to have been always alive to the rise and fall of professional reputation, and there is abundance of proof, more particularly in the well-known oration of Cicero, “Pro Muræna,” that the reverence of the commons for forensic success was apt to be excessive rather than deficient.

We cannot doubt that the peculiarities which have been noticed in the instrumentality by which the development of the Roman law was first effected, were the source of its characteristic excellence, its early wealth in principles. The growth and exuberance of principle was fostered, in part, by the competition among the expositors of the law, an influence wholly unknown where there exists a Bench, the depositaries instrusted by king or commonwealth with the prerogative of justice. But the chief agency, no doubt, was the uncontrolled multiplication of cases for legal decision. The state of facts which caused genuine perplexity to a country client was not a whit more entitled to form the basis of the jurisconsult’s Response, or legal decision, than a set of hypothetical circumstances propounded [37] by an ingenious pupil. All combinations of fact were on precisely the same footing, whether they were real or imaginary. It was nothing to the jurisconsult that his opinion was overruled for the moment by the magistrate who adjudicated on his client’s case, unless that magistrate happened to rank above him in legal knowledge or the esteem of his profession. I do not, indeed, mean it to be inferred that he would wholly omit to consider his client’s advantage, for the client was in earlier times the great lawyer’s constituent and at a later period his paymaster, but the main road to the rewards of ambition lay through the good opinion of his order, and it is obvious that under such a system as I have been describing this was much more likely to be secured by viewing each case as an illustration of a great principle, or an exemplification of a broad rule, than by merely shaping it for an insulated forensic triumph. It is evident that powerful influence must have been exercised by the want of any distinct check on the suggestion or invention of possible questions. Where the data can be multiplied at pleasure, the facilities for evolving a general rule are immensely increased. As the law is administered among ourselves, the judge cannot travel out of the sets of facts exhibited before him or before his predecessors. Accordingly each group of circumstances which is adjudicated upon receives, to employ a Gallicism, a sort of consecration. It acquires certain qualities which distinguish it from every [38] other case genuine or hypothetical. But at Rome as I have attempted to explain, there was nothing resembling a Bench or Chamber of judges; and therefore no combination of facts possessed any particular value more than another. When a difficulty came for opinion before the jurisconsult, there was nothing to prevent a person endowed with a nice perception of analogy from at once proceeding to adduce and consider an entire class of supposed questions with which a particular feature connected it. Whatever were the practical advice given to the client, the responsum treasured up in the notebooks of listening pupils would doubtless contemplate the circumstances as governed by a great principle, or included in a sweeping rule. Nothing like this has ever been possible among ourselves, and it should be acknowledged that in many criticisms passed on the English law the manner in which it has been enunciated seems to have been lost sight of. The hesitation of our courts in declaring principles may be much more reasonably attributed to the comparative scantiness of our precedents, voluminous as they appear to him who is acquainted with no other system, than to the temper of our judges. It is true that in the wealth of legal principle we are considerably poorer than several modern European nations. But they, it must be remembered, took the Roman jurisprudence for the foundation of their civil institutions. They built the débris of the Roman law into their walls; but in [39] the materials and workmanship of the residue there is not much which distinguishes it favourably from the structure erected by the English judicature.

The period of Roman freedom was the period during which the stamp of a distinctive character was impressed on the Roman jurisprudence; and through all the earlier part of it, it was by the Responses of the jurisconsults that the development of the law was mainly carried on. But as we approach the fall of the republic there are signs that the Responses are assuming a form which must have been fatal to their farther expansion. They are becoming systematised and reduced into compendia. Q. Mucius Scævola, the Pontifex, is said to have published a manual of the entire Civil Law, and there are traces in the writings of Cicero of growing disrelish for the old methods, as compared with the more active instruments of legal innovation. Other agencies had in fact by this time been brought to bear on the law. The Edict, or annual proclamation of the Prætor, had risen into credit as the principal engine of law reform, and L. Cornelius Sylla, by causing to be enacted the great group of statutes called the Leges Corneliœ, had shown what rapid and speedy improvements can be effected by direct legislation. The final blow to the Responses was dealt by Augustus, who limited to a few leading jurisconsults the right of giving binding opinions on cases submitted to them, a change which, though it brings us nearer the ideas of the modern [40] world, must obviously have altered fundamentally the characteristics of the legal profession and the nature of its influence on Roman law. At a later period another school of jurisconsults arose, the great lights of jurisprudence for all time. But Ulpian and Paulus, Gaius and Papinian, were not authors of Responses. Their works were regular treatises on particular departments of the law, more especially on the Prætor’s Edict.

The Equity of the Romans and the Prætorian Edict by which it was worked into their system, will be considered in the next chapter. Of the Statute Law it is only necessary to say that it was scanty during the republic, but became very voluminous under the empire. In the youth and infancy of a nation it is a rare thing for the legislature to be called into action for the general reform of private law. The cry of the people is not for change in the laws, which are usually valued above their real worth, but solely for their pure, complete and easy administration; and recourse to the legislative body is generally directed to the removal of some great abuse, or the decision of some incurable quarrel between classes or dynasties. There seems in the minds of the Romans to have been some association between the enactment of a large body of statutes and the settlement of society after a great civil commotion. Sylla signalised his reconstitution of the republic by the Leges Corneliæ; Julius Cæsar contemplated vast additions to the Statute Law; Augustus caused [41] to be passed the all-important group of Leges Juliæ and among later emperors the most active promulgators of constitutions are princes who, like Constantine, have the concerns of the world to readjust, The true period of Roman Statute Law does not begin till the establishment of the empire. The enactments of the emperors, clothed at first in the pretence of popular sanction, but afterwards emanating undisguisedly from the imperial prerogative, extend in increasing massiveness from the consolidation of Augustus’s power to the publication of the Code of Justinian. It will be seen that even in the reign of the second emperor a considerable approximation is made to that condition of the law and that mode of administering it with which we are all familiar. A statute law and a limited board of expositors have arisen into being; a permanent court of appeal and a collection of approved commentaries will very shortly be added; and thus we are brought close on the ideas of our own day.