The Uses Of History In Determining What The Law Ought To Be

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Introduction

This paper focuses on discussing a set of historical rationales developed by Adam Smith, Friedrich Savigny, Sir Henry Maine and Friedrich Hayek in their theoretical defences for explaining the nature of law and determining what the law ought to be. Since the works of these authors cover a so wide-range of social topics and provide many in-depth thoughts, for the purpose of this essay, just some of the most relevant substances are extracted from this rich source of materials.

As such, for Adam Smith’s Lectures on Jurisprudence, the idea that law rests on natural progress of human society is the foci of discussion. In Friedrich Savigny’s Of the Vocation of Our Age for Legislation and Jurisprudence, the central idea of Volksgeist is examined. In Sir Henry Main’s Ancient Law, the famous thesis of ‘movement from status to contract’ is addressed, and finally, in Friedrich Hayek’s Law, Legislation, and Liberty, the ‘cosmo and taxis’ thesis is also discussed.

I. Adam Smith and the idea of law as responses to social progress

Adam Smith argues that the study of law and its jurisprudences would generate a set of rules which guide the operation of governments in civil society, including: maintaining justice, promoting opulence, levying to collect revenue, and maintaining arm force. Along with the evolutionary changes of human society, law or social regulations evolve to adapt to these changes. In this sense, law reflects the needs of development of each historical stage. Central to Smith’s theory of jurisprudence is the idea that law is originated and directed by natural human progress, not as the result of plans projected by any particular body of humans as many writers imagine. This

5 Above n 1, 49.
6 Ibid 49-51.
7 Ibid 57.
8 Ibid 191.
means that historical instances can be used as rational justifications for explaining why the law ought to become what it has become. In developing this idea, Adam Smith examined how the law, in term of the four rules mentioned above, involved in a wide range of both European and non-European civilizations, covering a long period of time from hunting-based societies to modern commodity production/exchange-based ones. Out of this tremendous and multi-facet historical inquiry, and for the purpose of this essay, the following notions are of importance to understand how the law is determined by historical progresses.

First, as human society naturally developed into a stage in which there was a sharp division between the rich and the poor, and government and law arose to maintain the order of that status quo, hindering any possibility of using violence to redistribute the wealth\(^9\). As such, the law may be considered as a combination of rules directly responding to the requirement that the rich’s wealth and privilege over the poor have to be maintained. For instance, how do we explain the reasons leading to the emergence of the law regarding to the abolition of slavery in several feudal societies? For Adam Smith, two main historical rationales account for this:

a. it was the response to the need of a more productive cultivation on land, not an abstract idea of justice, that tenant system was introduced, whereby slavers became tenants at will with certain space of freedom and;

b. since slavery planters are all Christians, the Roman Catholic Church, under the leadership of Pope Innocent III, strongly supported landlords in emancipating their slaves, chiefly aiming at consolidating and extending the privilege and control of the ecclesiastics, not on the cause of Christian spirit, as the counterbalance to the secular power.\(^10\)

Similarly, the law regulating prices of commodities and determining the functions of money arose from the historical fact that, social wealth, resulted from the progress of labour division, needed a certain way of control and management\(^11\). In this historical discourse, laws regarding to the early establishment of banks in Amsterdam and London were made to solve problems emerged in commercial activities\(^12\). Also, as a nation’s opulence was defined in term of gold or silver-based money, there was an

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\(^9\) Ibid 192.
\(^11\) Above n 1, 498.
\(^12\) Ibid 507.
urgent need for having new regulations regarding trade balance among countries such as England, France, Spain and Portugal.\(^{13}\)

Second, if imperativeness and obedience are main features peculiarly attributed to the law, it is so because it grounds on two historically-rooted principles of authority and utility\(^{14}\). By ‘principle of authority’, Adam Smith referred to the common fact that superior characteristics in terms of body and mind capacity, higher age, family origin of higher status, and wealthier life condition that make a man have authority over the others\(^{15}\), while utility’s principle pointed to an obedient pattern of behaviour followed by ordinary people to avoid worse harms and disadvantages\(^{16}\). The operation of these two principles are observable in both monarchical and democratic system. For example, William the Conqueror’s rule regarding to how all estates in England were to be granted to his lords could be seen as an act responding to the requirement of increasing the royal power as the superior over the noble class, not as a result from the want of the nobility to restrain the king’s power, and the same situation was applicable to Malcom Kenmure’s rule in Scotland\(^{17}\). In another instance, the English democratic government of the Whig and Tory factions may well illustrate how the two principles worked: the Whig, using the principle of utility, subordinated to the existing legal system in exchange for the advantages they may obtain from it and avoided disadvantages otherwise, while the Tory seemed to conceive that the government was the almighty superior, much like in a family relationship of a respectful father to his children.\(^{18}\)

In general, Adam Smith developed the theory of four-stage social development to convey the central idea that government and its law were emerged and established on the basis of different kinds of contract, whether this contract was implied, tacit, or explicit. As it is observable later on, the very idea of contract would eventually become the crucial feature of the British political-legal thought. However, the two basic principles of utility and authority, throughout the history of Britain, still serve as the foundation of the government from the previous strict monarchical regime to the later more democratic one. The evolutionary stages specified in Adam Smith’s theory highlighted a wide range of historical factors, including violence, war, geography, 

\(^{13}\) Ibid 510.


\(^{15}\) Ibid.


\(^{17}\) Above n 1, 443.

\(^{18}\) Ibid 431.
religion, technological and social inventions, etc. to which the government and legal system ought to adapt. But in this historical progress, the question concerned Adam Smith was that of what the relationship between the natural rights and the law may be. It seems that Adam Smith inclined on considering common law as encompassing rights seen as independent from government law. At this point, Adam Smith pointed to a very common historical tendency in which rights are often generated independently from the government’s expectation. Hence, the law, enacted by the government, could be seen as responses to the emergences in which the view on rights are changed in a new legal spirit of circumstances at a specific time.\(^\text{19}\)

II. Friedrich Savigny and the theme of ‘Volksgeist’

The nature of law, as conceived by Savigny, is that traditions and customs serve as the internal force that shapes the law and judicial decisions, thus, denying the and absolute and capricious impose of law by an external authority.\(^\text{20}\) This silent power historically inherited in people’s consciousness from generation to generation, which, like language, became an ‘inward necessity’ peculiar to a nation.\(^\text{21}\) It should be noted that Savigny developed this historical approach to study of legal systems within the context of a new independent nation of the German right after the collapse of Napoleon’s reign in 1814. In this circumstance, a legal debate emerged evolving around the central issue of how to build a legal code most indigenous to the German society. On one hand, a wide-spread nationalism in Germany at that time absolutely rejected the adoption of both French code and Roman law on the ground that these legal systems were ‘alien law’.\(^\text{22}\) On the other hand, a circle of German intelligentsia led by Professor A.F.L Thibaut proposed that a code of laws for Germany should be drafted by German legal practitioners selected from states, expecting that this new codification could bring about a radical change in Germany’s legal system.\(^\text{23}\) On his own part, Savigny grounded his historical theory of law on the core concept of ‘Volksgeist’ or spirit of the people, whereby, since the law is the human creation, not the result of any supernatural force, it must be directed at national spirit in which it already existed.\(^\text{24}\) In this sense, Volksgeist has become the main historical rationale in

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\(^\text{20}\) Above n 2, 30.

\(^\text{21}\) Ibid 27.


\(^\text{23}\) Ibid 282.

defence for what the law ought to be. Basically, Savigny’s doctrine of Volksgeist can be summarized in the following points.

First, since it was obvious that what called common law operating in Germany mainly derived from the code of Roman law ordered by emperor Justinian I of the Byzantine empire, there was a strong criticism holding that this system of law not only denied the German nationality, but also prevented the German indigenous legal tradition from accomplishing its scientific foundations and self-governing status. Also, there was another criticism argued that, even if the Roman law was not introduced in Germany, it would be not the case that a German unified code of laws would be established. Though not denying the overwhelming influence of the Roman law, Savigny emphasized on a uniformed system of laws which becomes a part of or adjusts to encompass the traditional feelings and spirit of the Germanic race. If such Volksgeist undoubtedly exists in German history, and if, at the earliest stage of its development, the law is nothing other than the spontaneous expression of customary habits and traditions which evolutionally transformed through time, there would be no reason for not having the law directed at Volksgeist.

Second, Savigny rejected Thibaul’s proposal of codification of German law on two historical grounds. At the first instance, Savigny argued that the German Volksgeist was not yet in its mature state sufficient to undertake an immediate plan of a new legislative establishment. On the other hand, Savigny also pointed out that German juristic capacity was but very limited, not yet available to produce a good code of laws, hence, any attempt to undertake the plan of codification would result in nothing but disappointments. In sum, what Savigny suggested was that the overall condition of Germany in terms of its Volksgeist and confederation state was historically limited and incapable of accomplishing the mission of codification as launched by Thibaut.

Third, Savigny argued that the unified German law should ground on German historical legal inheritance which includes three main sources of legal materials: Roman law, German customary law and some modifications between the two. The Roman law is

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28 Above n 2, 64.
of importance since it provided a general historical model of most common and detailed legal issues and practical refined techniques to which all jurists should be bound.\(^{31}\) German customary law, though less cultivated, is also an important source because it: a/ reflected the consistent legal continuity from the roots; b/ intimately related to all German people and; c/ contained the whole country's interests.\(^{32}\) And finally, legal modifications, as the progressing refinement of the legal system produced by scholars, also serves as a base on which a unified legal system could emerge.\(^{33}\)

III. Sir Henry Maine and the thesis of movement from status to contract

In a sense, in his most influential book *Ancient Law*, Maine's historical approach to study of legal evolution can be seen as a continuous version of Savigny's,\(^{34}\) however with a new theoretical invention of the notion of legal development stages. Basically, Maine's central argument is that legal evolutionary process goes through successive stages, in which, each of the latter grows out of the prior. Lying at the core of this legal evolutionary process is the 'movement from Status to Contract'.\(^{35}\) For the purpose of this essay, I just focus on briefly discussing some of the main arguments developed by Maine, in which, historical aspects are used to explain why the law evolved the way as it did.

First, Maine argued that the development of law can be categorized into four historical phases as follows:

a. the first phase was characterized by the fact that law, in the form of commands, was made by a ruler acting on behalf of a divine inspiration, for instance, Themistes 'as the Godness of Justice' in ancient Greek society;\(^{36}\)

b. the second phase emerged as a result of a transformation of the ruler's imperative orders into customs and traditions, of which, 'sacra gentilicia' of Roman community and 'Hindoo Customary Law' are of most typical;\(^{37}\)

c. the third phase was marked by the fact that customary law is assumed to be the privilege realm of knowledge known only to a minority of aristocratic circle

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\(^{31}\) Ibid 140.

\(^{32}\) Ibid 172-173.

\(^{33}\) Ibid 138-139.


\(^{35}\) Above n 3, 151.

\(^{36}\) Henry Orensstein, 'The Ethnological Theories of Henry Sumner Maine' (1968) 70.2 *American Anthropologist* 264, 268.

\(^{37}\) Above n 3, 6.
who assuming possessed the sole authority to interpret customary law termed as ‘unwritten’ law;\(^{38}\)

d. the fourth phase was reached when customary law transformed into codes of law, of which, the Twelve Tables of Rome is the most typical one.\(^{39}\)

Second, based on this model of historical legal evolution, Maine derived at another important argument saying that, in many societies, the development of law did not stop at the height of the Code era\(^{40}\), but moved forward to make further ‘legal modification’ to make law adaptive to social needs and changes\(^{41}\). Or, in other words, new social progresses require that the law ought to be modified beyond what was coded. But how was this process of modification workable? For Maine, three main instruments had been historically deployed, including: legal fictions, equity, and legislation.\(^{42}\) By ‘legal fiction’, Maine referred to the fact that, sometimes, fictional elements were included in law-making process so that the law appeared to respond to social changes but its original letters remain unchanged \(^{43}\), which was observable in both English and Roman law.\(^{44}\) By ‘equity’, Maine pointed to the bodies of law, as established on a distinguishable source of legal principles, externally attached to original law.\(^{45}\) And finally, through legislation, law can be made by the whole community through a representative organ, imposing regulations on all community’s members.\(^{46}\)

Third, if human history can be generally described as a development from ancient society comprising of assembling families into individuals’ society \(^{47}\), containing a core transformation from ‘status to contract’, then, the evolution of law is nothing other than a true reflection of this process. For Maine, ‘status’ referred to a social condition in which individual members’ relations and obligations are bound strictly within the realm of family bonds; and ‘contract’ denotes individual obligation generated from the

\(^{38}\) Ibid 12.

\(^{39}\) Ibid 13.


\(^{41}\) Ibid 71-72.

\(^{42}\) Lawrence Friedman, *The Legal System: A Social Science Perspective* (Russel Sage Foundation, 1975) 251.

\(^{43}\) Above n 3, 23-24.

\(^{44}\) Ibid 24-25.


\(^{46}\) Above n 3, 26.

individuals’ voluntary agreement. As such, the transformation from ‘status to contract’ is evident in the history of legal development. For instance, since the early time of Roman law, individual relations were bound to four kinds of contract of the oral, the explicit, the actual, and the agreed. Gradually, this ancient Roman contractual jurisprudence generated a tremendous impact on the modern law in general.

IV. Hayek and the thesis of spontaneous order

In his famous work *Law, Legislation, and Liberty*, in rejecting a ‘constructive rationalism’ model whereby law is to be made from the top down, Hayek’s jurisprudence is characterized by his concept of ‘spontaneous order’ which is seen as having no elements of design or plan. As regarding to the main topic of this essay, I will focus on identifying some instances in which Hayek’s concept of spontaneous order contains historical implications which can be used to explain what the law ought to be.

First, by spontaneous order or cosmos, in a sense, Hayek meant that law, as a specific type of order, is a reflection of human endogenous necessity to cope with the disequilibrium world, rather than a pure moral claim or taxis exogenously made by a hierarchical structure rested on command and obedience. This spontaneous order is abundantly evident in natural world; and in human society, spontaneous order emerges as individuals adapt themselves to social conditions. Accordingly, spontaneous order arises just because it developed as a human activity, not originated from an invention by human, and customary law falls into this category, since it is not man-made agent or given by a supernatural force.

Second, since the very essence of law, as spontaneous order, is that it is result of free interactions, not the intentions, Hayek, relying on Max Rheinstein’s argument, came to conclude that law ought to be directed at facilitating a wide range of possibilities for

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48 Above n 3, 149-150.
49 Ibid 278.
50 Ibid 288.
51 Ibid 323.
53 Above n 4, 26, 36.
55 Ibid 41.
spontaneous order to happen, not at restraining or hindering it\(^{58}\). Accordingly, for law to become truly ‘liberal’, it must be non-coercive and the law-making process must be limited in the way that spontaneous order is not disrupted.\(^{59}\)

Third, if spontaneous order arises in free market environment rather than in highly centralized one, it is also arguable that spontaneous order is likely to evolve in a decentralized law-making process rather than in centralized one. At this point, Hayek makes a sharp contrast between law and legislation, which can be summarized as follows: law as spontaneous order is not made by men, but simply happens while designed rules are made by men for specific intended purposes.\(^{60}\) Thus, common law is not created, ‘but discovered’, therefore, law-making process must be seen as investigating latent rules already existed rather than as making constructive legal substances.\(^{61}\) In addition, much in the same with price system and language\(^{62}\), Hayek considers the realm of law spontaneous in essence, and thus, the principles of justice could be reached by the interactions of competitive legal views.\(^{63}\) As this process of discovering and articulating antecedent rules evolves through time by the functional performance of judges, the chance of concurrence of expected values generated from different legal views is maximized.\(^{64}\)

Fifth, if principles of justice ought to be and can be reached by the evolutionary process of different legal views, what ought to be the substantial content of these principles?

In answering this critical question, Hayek rejected both natural and positivist approaches on the ground that what constitute substantial content of ‘just conduct’ is to be determined as far as the ‘just conduct’ is discovered.\(^{65}\) Hayek opposes to the idea that the content of just principles can be reached by both ‘constructivism’ and ‘Cartesian rationalism’ since they often lead to highly-centralized systems opposing to liberal individualism.\(^{66}\) At this point, Hayek advocates an individualist approach originated from David Hume, arguing that social order, like the order of nature, is not intentionally made by human agents, hence, it is an unpurposive result of the

\(^{58}\) Max Rheinstein, ‘Relations of Moral and Law’ (1952) 1 J.P.L 287, 298.
\(^{60}\) Friedrich Hayek, Rules and Orders (University of Chicago Press, 1st ed, 1973) 122,123.
\(^{61}\) Ibid 78.
\(^{63}\) Above n 58, 15.
\(^{64}\) Above n 59, 106.
\(^{65}\) Friedrich Hayek, Individualism and Economic Order (Routledge, 1st, 1948) 7-8.
\(^{66}\) Ibid.
interactions among different civil activities.\textsuperscript{67} In this line of argument, for Hayek, just legal rules are to be determined somewhere in between arbitrary constructivism and rationalism, since common law, as spontaneous order, is the result of decisions made by judges in judicial evolutionary process.\textsuperscript{68}

V. Some conclusion remarks

As we can see from the above discuss, in explaining of and defending for how the law emerges and evolves, historical rationales are used by many influential legal scholars, being termed in variety of theoretical concepts such as ‘spontaneous order’, ‘from status to contract’, ‘Volksgeist’ and ‘natural progress’. Though these theories are distinguishable from one another in many considerable instances, they share one common ground of a historical evolutionary approach to the study of law, which remind us of the following considerations when it comes to the issue of determining what the law ought to be:

a. law has it historical roots back to primitive legal institutions, deriving and being articulated from habits and customs;

b. law gradually evolves as responding to social pressuring demands;

c. hence, law is found, not made, and relatively independent from political authority.

However, the adoption of historical or evolutionary rationales in choosing the most desirable legal outcomes did not go without criticism. There is a question remaining controversial: why, in facing with a wide range of legal alternatives as responses to the needs of the society, a lawmaker ought to select the old rules rather than to devote himself to designing a new one? \textsuperscript{69}

\textsuperscript{67} Friedrich Hayek, \textit{The Confusion of Language in Political Thought} (Institute for Economic Affairs, 1\textsuperscript{st} ed, 1968) 12.

\textsuperscript{68} Friedrich Hayek, \textit{The Fatal Conceit} (University of Chicago Press, 1\textsuperscript{st} ed, 1988) 66.

\textsuperscript{69} Michael Sinclair, ‘The Use of Evolution Theory in Law’ 64 \textit{University of Detroit Law Review} 451, 455.