

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG.

L E C T U R E XIII.

ORIGIN and DEVELOPMENT of LAW.

1. However thorough the social training may be, we never, among human beings, get to a state where behaviour is perfectly adapted to the social setting. In order, therefore, to maintain the obligations, the behaviour on which the society depends for its existence, there must be sanctions attached to these obligations, that is, provisions for the enforcement of the obligations.

2. A sanction, then, is the social reaction which the individual is taught to expect from the performance or non-performance of his actions.
 The expectation of the reaction which is to follow may ^{act} as a preventive or an incentive to the act; that is, sanctions may be positive or negative. The positive sanctions generally remain vague in all societies except perhaps in military organisations. In this connection we must consider all social rewards and decorations for deeds performed. The negative sanctions are extremely varied, and when organised, come to form the specialised legal sanctions. No society organises all the negative sanctions.

3. Among the negative sanctions the following are some of the most important :-
 - (a) The sanction of opprobrium, varying from ridicule to strong moral reprobation. This sanction plays a large part still in our own societies, but it is not organised to form one of the legal sanctions. Some primitive people have organised it, e.g. the Hottentots, and the Eskimos.
 - (b) The sanction of retaliation or revenge. In the first instance, this is an individual sanction, but it becomes organised in many societies and so becomes a social sanction. Among ourselves this sanction is still the dominant one in international affairs.
 - (c) The ritual sanction. This is a social sanction which plays an extremely large part in all primitive societies, but only a small part in highly civilised societies. The ritual sanction acts automatically. The forces of the universe act directly on the offending individual, as it were.
 - (d) The religious sanction. This sanction is closely related to the ritual sanction, but here the reaction is not automatic; there is always the mediation of some spiritual beings, or gods, who exact vengeance for the breaking of laws laid down by them, either acting directly themselves or through their priests. Such actions may be called "sins", but we must remember that in primitive communities the offences under this head are not often what we would call "moral offences", e.g. breaches of a great many of the ancient Hebrew food restrictions.

4. These last two sanctions lie at the very basis of the social life in primitive communities. From them have sprung punishment of crime, regulations of moral conduct,

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and religion. Anyone coming under the ritual sanction becomes immediately polluted, unclean, and must undergo purification, if he is not to be a danger to himself and to the whole community. We find then, that a primitive community will act as a whole to rid itself of such pollution, and in so doing punishing the first recognised crimes.

The first recognised crimes, therefore, all come under the ritual, or religious sanctions, and do not pass under the legal sanction until a late period of development. Among these crimes are (a) being a thoroughly bad lot, (b) incest, (c) parricide, (d) witchcraft.

5. A crime we may define as an act which is universally disapproved by all the normal members of every society; and punishment is, in the first instance, the stamping out of evil from the society. "The stamping out of crime, the negation of a bad act, is the ground and nature of punishment". (Bosanquet). It is the formal verdict or censure of the social authority which is necessary in order to vindicate the moral standard, to purge the society of evil.

The commission of these extreme crimes, except witchcraft, is rare in primitive societies; hence, we do not find any special authority set up for dealing with them. They are left to the working of the ritual sanction, or they are dealt with by the whole community in a body, or by the religious authorities.

The legal sanctions come to be organised, in the first instance, in connection with the sanction of revenge, which is controlled by means of the legal authorities instituted. In our developed law we have two different legal sanctions :-

(a) The repressive sanction, which is the punishment of what we consider to be crime. Here the public authorities take action against the evil doer. Crimes even in our society are primarily offences against de-seated sentiments of the community, but when once an organised government is established, it has sufficient force behind it to attach a penal sanction to certain acts even when such a sanction is not forced on it by the consensus of public opinion. However, such sanctions cannot remain long in force, if they are contrary to strong public opinion.

(b) The second legal sanction is restitutive. The restitutive sanction simply restores things, as far as may be, to their proper state. Actions which give occasion for restitutive sanctions are called "torts", and the body of law dealing with these, constitutes what we know as civil law, in distinction from criminal law. In the civil courts actions are brought by individuals or bodies within the society, but not by the society itself as a whole.

6. Among primitive peoples we do not have this distinction between crimes and torts. We have certain crimes recognised, but most of what we consider crimes are

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considered private wrongs, and not crimes against the state. At the same time these wrongs are considered reprehensible, and thus they differ from torts in which there may be no guilt, but only maladjustment. They correspond most nearly to what in Roman Law are called delicta privata, private wrongs, in which there is culpa, or guilt, and it is therefore best to distinguish these actions both from torts and from crimes. They are actions involving a mixed sanction, and are best called delicts.

We can trace a long course of development in which gradually these delicts come to be divided into crimes and torts as we now understand these terms. This development can best be traced by a study of homicide, which in early law is a delict and not a crime.

In the most primitive societies, such as those in the Andamans, or among the Eskimos, there is no legal authority at all. Murder comes under the ritual sanction, and the murderer becomes polluted or defiled, but revenge is left entirely to private friends of the victim to exact, if they wish and can. In Australia, where we get sib-structure, revenge becomes not optional, but a duty, and we get the institution of the vendetta with group responsibility. All members of the sib of the deceased are responsible for avenging his death, and any member of the sib of the culprit is liable to be killed, if the culprit himself cannot be caught. In this stage, retaliation is apt to go on indefinitely, each sib in turn trying to exact vengeance for the loss of a member.

The next stage comes when we find the vendetta limited, i.e., when the injured sib is allowed to exact vengeance once, and the feud is then supposed to be wiped out. We then get a state of society like that mirrored in the Bible, where the lex talionis was in force. An eye for an eye, a tooth for a tooth, and no more. The famous code of Hammurabi pictures for us a state of society where this law prevailed.

There are two things to notice about the working of the sanction of revenge: (1) it takes no notice of the agent's intention. Accident, or design makes no difference. A loss is a loss, an injury is an injury, and vengeance is exacted in both cases. We have thus, a stage where responsibility is objective. (2) It is the loss that looms uppermost, and what is demanded is a life for a life, but a loss may either be balanced by inflicting a corresponding loss, or it may be made good by restoration. Thus, we find many people adopting a member of the culprit's sib in place of the deceased, and many similar customs for replacing the loss. This brings us to the practice of compensation which can occur only among people who have some form of wealth, such as cattle. We find then, various stages in the practice of compensation payments :-

(a) The public authorities, elders, or chiefs, etc., try to persuade the injured party to accept compensation, instead of exacting vengeance. The acceptance of compensation is optional. The first legal authority at Rome was a man to whom the injured party could go and demand compensation.

(b) The injured party is forced to accept compensation, and we then find a graduated scale of valuations for

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human life and for damage done to human beings. Various tribes of the Bantu have such scales.

(c) Among the Southern Bantu we find a further step in advance. The chief is here stronger, and all people are considered as belonging to him, hence injury to them is injury to him, and compensation here is paid, not to the injured sib, but to the chief. We are here getting very near to the recognition of the act as a crime against the State.

(d) Among another Bantu people - the Bushongo - we actually get the recognition. Here there is a clear distinction between intention and non-intention. Wilful murder is punished by the chief with death. Accidental homicide is regarded as a private wrong, and the deceased man's people receive compensation. There is no distinction between civil courts and criminal courts, but there is a clear distinction between civil and criminal actions.

7. When the State takes cognizance of crime, the ritual sanction, which so far has always played a strong part without being able always organised, tends to lose its power, and we get for the first time a real punishment for crime by a constituted legal authority.

That the sanction of revenge is not the basis of punishment as has often been argued, can be most clearly seen in studying the social reaction to parricide. The murder of a near relative cannot be revenged or compensated, for that would mean a sib taking revenge on itself or paying compensation to itself. Nevertheless, such an act is considered a most heinous offence. The culprit here falls under the ritual sanction, and is considered polluted beyond redemption in most cases. Very often the people do not wait for the ritual sanction to work, but because of the fear of pollution spreading, they chase the culprit from the village, stone him or otherwise get rid of him. In these cases, the social reaction is a general one, the whole community rising up to rid itself of a source of pollution. Here, then, is the true origin of punishment. The sanction of revenge gives the law of compensation. Only when the public authorities become strong enough, and the public sentiments of the people broad enough, do we get a lapse of the sanction of revenge and a clear acceptance by the public authorities of the duty of protecting the well-being of the whole community.

8. There is one crime which is universally recognised as such in primitive communities - witchcraft, that is, tampering with the unseen forces of the universe for anti-social ends. The murderer is known, the people who commit incest are known. The witch or wizard is not always known. Hence, in order to discover the practitioners of witchcraft we get the process known as ordeal.

The ordeal in primitive societies consists in using as a test, something which is thought to be filled with the sacred forces of the world, and which is so powerful that it will immediately kill, or identify in some other way, anyone who is not pure enough to come in contact with it.

The test is thought to be quite infallible, and is a

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