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CONCERNING JUSTICE

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# Содержание

CHAPTER I	4
CHAPTER II	23
CHAPTER III	31
Конец ознакомительного фрагмента.	32

# Lucilius A. Emery

## Concerning Justice

### CHAPTER I

#### *THE PROBLEM STATED. THEORIES AS TO THE SOURCE OF JUSTICE. DEFINITIONS OF JUSTICE*

For centuries now much has been written and proclaimed concerning justice and today the word seems to be more than ever upon the lips of men, more than ever used, but not always appositely, in arguments for proposed political action. Hence it may not be inappropriate to the time and occasion to venture, not answers to, but some observations upon the questions, what is justice, and how can it be secured. It was declared by the Roman jurist Ulpian, centuries ago, that students of law should also be students of justice.

By way of prelude, however, and in the hope of accentuating the main question and presenting the subject more vividly by comparison and contrast, I would recall to your minds another and even more fundamental question asked twenty centuries ago in a judicial proceeding in distant Judea. It is related that when

Jesus, upon his accusation before Pilate, claimed in defense that he had "come into the world to bear witness unto the truth," Pilate inquired of him "What is truth?"; but it is further related that when Pilate "had said this he went out again unto the Jews." Apparently he did not wait for an answer. Perhaps he repented of his question as soon as asked and went out to escape an answer. Men before and since Pilate have sought to avoid hearing the truth.

Indeed, however grave the question, however essential the answer to their well-being, there does not seem to be even now on the part of the multitude an earnest desire for the truth. Their wishes and emotions cloud their vision and they are reluctant to have those clouds brushed aside lest the truth thus revealed be harsh and condemnatory. The truth often causes pain. As said by the Preacher, "He that increaseth knowledge increaseth sorrow." People generally give much the greater welcome and heed to him who tells them that their desires and schemes are righteous and can be realized, than to him who tells them that their desires are selfish or that their schemes are impracticable. It has always been the few who have sought the truth, resolute to find it and declare it, whether pleasant or unpleasant, in accord with the wishes of mankind or otherwise. Such men have sometimes suffered martyrdom in the past, and often incur hostility in the present, even when seeking that truth on which alone justice can securely rest.

Nevertheless, so closely linked are truth and justice in the

speech, if not the minds, of men, there should be some consideration of Pilate's question. Whether truth is absolute or only relative has been perhaps the most actively discussed topic in the field of philosophy for the last decade. Into this discussion, however, we need not enter, for such discussion is really over the problem of determining the proper criterion of truth. Wherever be this criterion, whether in some quality of inherent rationality or in some utilitarian test of practicability, the truth itself has some attributes so far unquestioned and of which we may feel certain as being inherent, necessary, and self-evident.

Truth is uncompromising. It is unadaptable; all else must be adapted to it. It is not a matter of convention among men, is not established even by their unanimous assent, and it does not change with changes of opinion. It is identical throughout time and space. If it be true now that since creation the earth has swung in an orbit round the sun, it was true before the birth of Copernicus and Galileo. If it be true now that the sum of the three angles of a triangle is equal to the sum of two right angles, it was always true and always will be true, true at the poles and at the equator, true among all peoples and in all countries, true alike in monarchies, oligarchies, and democracies.

Truth is also single. There are no different kinds of truth, though there may be innumerable kinds of propositions of which truth may or may not be predicated. Whichever criterion the philosophers may finally agree upon, it will hold in all propositions alike. The truth of a proposition in mathematics

is the same as the truth of a proposition in any other science, physical, social, political, or theological. It can be no more nor less true in each and all. Again, in every science, social and political as well as others, and as to every proposition in any science, the truth is to be discovered, not assumed by mere convention; and men must discover it and discover it fully at their peril. Failure even after the utmost effort will not be forgiven. If the truth be found it will be a sure guide in life. If it be not found the lives of men will so far go awry. That it may be difficult to find, that we may never be sure we have found it, makes no difference.

Are there any attributes of justice of which we can speak so confidently as being necessary, inherent, and self-evident? That justice ranks next to truth, if not with it, seems to have been, and to be, the general judgment of mankind. It has engaged the thought and fired the imagination of the greatest minds. A few quotations from such, ranging from ancient to modern times, will illustrate this. The Hebrew Psalmist gloried that "justice and judgment" were the habitation of Jehovah's throne. Aristotle wrote, "political science is the most excellent of all the arts and sciences, and the end sought for in political science is the greatest good for man, which is justice, for justice is the interest of all." Early in the 12th century the jurist Irnerius, distinguished for his learning and for his zeal in promoting the revival of the study of law and jurisprudence, and also as the reputed founder of the famous Law School at Bologna, imaged

justice as "clothed with dignity ineffable, shining with reason and equity, and supported by Religion, Loyalty, Charity, Retribution, Reverence, and Truth."

Six centuries later Addison, famed as a clear thinker and writer, thus wrote of justice: "There is no virtue so truly great and godlike as justice... Omniscience and omnipotence are requisites for the full exercise of it." Almost in our own time Daniel Webster, called in his day the great expounder and even now reckoned among the greatest of men intellectually, in his eulogy upon Justice Story thus apostrophized justice: "Justice is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race." Perhaps, however, none of these laudations is so vividly impressive as is the pithy remark of an old English judge that "injustice cuts to the bone."

But what is this justice, declared to be so great a virtue, so ineffable, so supremely important? I have said we feel certain of some attributes of truth. Do we know or can we know anything certain about justice? Is it something above and apart from the will of men, or is it simply a matter of convention among men? Is it immutable, or does its nature change with changing times and conditions? If mutable, does it change of itself or do men change it? Is it universal or local, the same everywhere or is it different in different localities? Is it the same for all men and races of men or

does it differ according to classes and races? Again, is it single or diverse in its nature? Is there more than one kind of justice? We hear of natural justice, social justice, industrial justice, political justice. What do they who use those terms mean by them? Do nature, society, industry, politics, each have a different criterion? Still again, and briefly, is justice an inexorable law like the law of gravitation or can its operation have exceptions? Is it simply a quality of action or conduct, or, as stated by Ulpian, is it a disposition or state of mind? Finally, is it a reality or, as Falstaff said of honor, is it after all "a word," "a mere scutcheon?"

I am not so presumptuous as to venture an answer to any of these questions except perhaps the last. As to that, I appeal to our consciousness, to our innate conviction that there does exist something, some virtue, some sentiment, however undefinable in terms, holding men together in society despite their natural selfishness, and without which they would fall apart. It is this virtue, this ligament of society, that we call justice. We feel that the word is not a mere word, but that it connotes a vital reality in human relationship. If this reality be ignored, men cannot be held together in any society.

If justice be the greatest good, as so generally asserted, then its negative, or injustice, must be the greatest evil. Hence error in men's opinions of what is justice will work that greatest evil. Society as a whole is liable to error in respect to justice; has often been mistaken in the past and may be mistaken today. The individuals composing society are seldom, if ever,

wholly disinterested and dispassionate in their judgments. Each individual is prone to believe that what is apparently good for himself or his group or class, is in accord with justice. Himself persuaded that he is battling for justice, he does not see that he may be battling only for some advantage over others, for some individual relief from common burdens, for some privilege not to be accorded to others; does not see that what he is battling for may cause injustice to others. Through ignorance of the real nature of justice, the grant to one of his plea for what he calls justice may work grievous injustice to others. So when altruists, warm with sympathy, obtain the enactment of laws intended for the betterment of the less fortunate, they may at times do injustice to others and even to those they hoped to benefit. History records many instances where laws intended to insure justice had the contrary effect. Many a statute designed to prevent oppression has itself proved oppressive in operation. Many a theory of justice has been found to work injustice. A conspicuous and familiar instance is found in the history of the French Revolution. The Jacobins believed that their theories if given effect would usher in the reign of justice in France. They obtained power and exploited their theories only to bring in the Reign of Terror, that reign of terrible injustice.

As mistakes and grievous mistakes have been made in the past as to what is justice, so they will be made now and in the future, and can be lessened only by greater wisdom and forethought, by greater effort to consider justice apart by itself,

with philosophical detachment, with minds unclouded by pity, sympathy, charity, and other like virtues, on the one hand, or by envy, hate, prejudice, and like evil sentiments, on the other. True, men are more enlightened now and education is more general, but society is more complex, with more diverse and conflicting interests, than formerly. The social mechanism is now so intricate that even a slight disturbance in one part may disarrange the whole. Injustice to one may injure the many. Hence the duty of ascertaining as completely as possible the real nature of justice is as imperative today as ever. As declared by Ulpian, this duty is especially incumbent upon those who have to do with the framing or administration of the laws, since justice can be enforced only by law.

In any inquiry into the nature of justice we get little help from the wisdom of the ancients. They wrestled with the question but seem to have been as puzzled as we of today. Indeed, Plato represents the sage Socrates as frankly confessing his inability to answer satisfactorily the persistent question "What is justice?" The question comes up for discussion by Socrates and some friends at the home of Cephalus at the Piræus. Socrates criticizes and punctures the definitions advanced by the others until Thrasymachus, apparently with some heat, challenges Socrates to give an answer of his own to the question "what is justice?" and not to content himself, nor to consume time, with merely refuting others. After some further discussion of various aspects of the question, Socrates finally says, "I have gone from one subject

to another without having discovered what I sought at first, the nature of justice. I left the inquiry and turned away to consider whether justice is virtue and wisdom, or evil and folly, and when there arose a further question about the comparative advantages of justice and injustice I could not refrain from passing on to that. The result of the whole discussion has been that I know nothing at all. I know not what justice is and therefore am not likely to know whether or not it is a virtue, nor can I say whether the just man is happy or unhappy." Granting that the confession may have been intended ironically, the further discussion did not result in any practical solution, even if in one possible in Plato's ideal, but impossible, state. Indeed, the inquiry is not yet closed and will not be until the millennium.

Still, upon a question so old, so important, so persistent, so ingrained in human society, and even now receiving such diverse and conflicting answers, a brief consideration of the earlier beliefs and theories may not be useless. As said by Bishop Stubbs, the historian, "The roots of the present lie deep in the past and nothing in the past is dead to him who would learn how the present came to be what it is." The roots should be examined by him who would understand the tree.

In Homer we get a glimpse of a theory of his time, to wit, that each separate decision given by the magistrate in any litigated controversy was furnished to him by Zeus specially for that case. The Greek word for such a decision was *themis*, and it was supposed that somewhere in the Pantheon was a

corresponding deity whose special function was to furnish the appropriate themis for each case. This deity was shadowily personified as the goddess Themis, the daughter of heaven and earth, the companion and counselor of Zeus. It was she who summoned gods and men to council and presided unseen over their deliberations. Hence she came to be regarded as also the spirit of order without which the Greek philosophers, notably Plato, held there could be no justice.

This theory that justice and even the laws were but the will of deity, revealed in various ways, was long generally accepted. In Rome, in the time of the kings, the king was the Pontifex Maximus, and as such, with the help of the College of Priests, declared the laws and decided lawsuits. For some time also under the Republic, when a vote was to be taken in the Comitia upon a proposed law, the question was thus put: "Is this your pleasure, O Quirites, and do you hold it to be the will of the gods?" Under the Empire, despite the reasoning of many philosophers and lawyers that the Emperor derived from the people his power to make laws and declare the law in any given case, he assumed and was assumed to have derived the power and inspiration solely from the gods.

The early Christian Church also preached the doctrine that the ruling power in the state, however established, was ordained of God and as such was entitled to the obedience of the pious. This belief that justice and judgment were simply the will of God, to be ascertained, not by reason but by other means,

was so general and deep that such crude devices as trials by ordeal and battle were often resorted to for determining guilt or innocence and other questions of fact. Indeed, resort to such expedients for determining questions of law, as well as questions of fact, was not unknown. In the tenth century under the Saxon King Otto a question arose whether upon the death of their grandfather his grandchildren by a prior deceased son should share in the inheritance along with their surviving uncles. The king ordered a trial by battle, which being had, the champions for the grandchildren were the victors. It was therefore held to be the divine will that grandchildren by a prior deceased child should inherit direct from their grandfather. I may here remind you that trial by battle was not formally abolished in England until well into the 19th century. And there is even now professed a belief that the will of God can be ascertained by counting ballots. "Vox Populi Vox Dei" is still a shibboleth.

But the doctrine that justice is heaven born, superior to and controlling the opinions and wills of men, did not escape challenge even in ancient times. Those sects of philosophers known as Epicureans and Sophists, consistently with their theory of the nature of virtue in general, maintained that justice was merely a name for such conventions among men as they should adjudge best for their own utility and happiness. The most vigorous champion of this latter theory appears to have been one Carneades, a Greek philosopher of the second century B.C., said to have been the founder of the third Academy and expounder of

the philosophy of probabilities and to have possessed the acutest mind of antiquity. In a course of lectures at Rome he stated the arguments for the orthodox view of justice and then boldly assumed to answer them and demonstrate that justice was not a virtue at all as virtue was defined by the philosophers, but was merely a convention; was what men should agree to be a sound basis for the maintenance of civil society, and hence that it varied with times, places, circumstances, and even opinions. This argument evidently had much effect upon public opinion, for Cato urged in the Senate that Carneades be banished because dangerous to the state.

So great was the influence of Carneades that a century later Cicero, a disciple of the Stoic school of philosophy, thought it necessary to refute him specifically as the chief heretic, and to uphold the orthodox theory against his arguments. Cicero denounced with eloquent warmth the doctrine that utility was the foundation of justice. He declared that, not utility, but nature, was the source of justice, that justice was a principle of nature, the ultimate principle behind all law. To abridge the familiar quotation from his "De Republica," "There is a law which is the same as true reason, accordant with nature, a law which is constant and eternal, which calls and commands to duty, which warns and terrifies men from the practice of deceit. This law is not one thing at Rome, another at Athens, but is eternal and immutable, the expression and command of Deity." In his treatise "De Legibus" he declared that men are born to justice;

that right is established not by opinion but by nature; that all civil law is but the expression or application of this eternal law of nature; that the people or the prince may make laws but these have not the true character of law unless they be derived from the ultimate law; that the source and foundation of right law must be looked for in that supreme law which came into being ages before any state was formed.

This theory of the Stoics so eloquently urged by Cicero was practically the *jus naturale* of the Roman jurists of classical times, though more moderately expressed by them. It does not seem to have been wholly academic, but to have been actually applied at times. In his history of Rome, Mommsen relates that even during the nearly absolute sway of Sulla, after the fall of Marius, the Cornelian Laws enacted to deprive various Italian communities of their Roman franchise were ignored in judicial proceedings as null and void; also that, contrary to Sulla's decree, the jurists held that the franchise of citizenship was not forfeited by capture and sale into slavery during the civil war with Marius. Later, when the church became a power in the state there are instances where laws adjudged to be contrary to the laws of God were refused effect. In England as late as the middle of the 17th century Chief Justice Hobart, a judge of high repute, asserted that "even an act of Parliament made against natural equity, as to make a man judge in his own case, is void in itself for the laws of nature are immutable and they are the laws of laws." In the 18th century Blackstone assented to the doctrine of a *jus*

*naturale* and wrote of it: "This law of nature being coeval with mankind and dictated by God himself is of course superior in obligation to any other... No human laws are of any validity if contrary to this, and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original." True, Blackstone combated the doctrine that duly enacted statutes were to be held void if the judges thought them contrary to reason, but he admitted that that extreme doctrine was more generally held. In this country the doctrine of a higher law than the Constitution even, and to be obeyed rather than the Constitution and laws enacted in accordance therewith, has had and even now has earnest advocates.

But the contrary doctrine of Carneades and the Sophists would not down. After Cicero and the civilians, after Hobart and Blackstone, came our modern utilitarians, or sophists, Bentham, Mill, Austin, and others, who have vigorously maintained with weighty arguments the utilitarian theory of justice; and that theory is now generally accepted by lawyers and statesmen as at least the most workable theory in human affairs. There still exists, however, in the minds of many the belief that above and behind all the turmoil and strife of politics, all the flux and reflux of social movements and public sentiment, the confusion of enactments, amendments, and repeals of statutes, the swaying of judicial opinion, there is some law of nature or in nature, some criterion, which if ascertained and obeyed would be perfect justice.

This question of the origin, the foundation of justice, whether it be of God or of men, seems to have been much more debated than the question what is the nature of justice whatever its origin or foundation. Yet some attempts, other than those attributed to Socrates, have been made of old to give a definition of justice. The earliest description I have found is that of the early Pythagoreans, who, in accordance with their practise of symbolizing the virtues by geometrical figures, designated justice by the square, and the just man by the cube. Plato seems to have had a theory of justice when he wrote in the "Gorgias," "Nature herself intimates that it is just for the better to have more than the worse, the stronger than the weaker, and in many ways she shows that among men as well as among animals justice consists in the superior ruling over and having more than the inferior." In these days our first impulse may be to denounce Plato's statement as altogether wrong if not worse. We should remember, however, that Plato was not considering any altruistic virtue such as kindness, sympathy, benevolence, generosity and the like, but only what nature indicates to be the essential condition of successful association. Thus interpreted, are we prepared to confute the statement? Do we know of any state of society in human or animal life at any time, past or present, of which the contrary of Plato's statement is true?

But passing over all other attempts of the ancients to define justice, none of which seems to have been much regarded by contemporary opinion, I will only cite the most famous, that

by Ulpian, the renowned jurist of the best period of Roman jurisprudence, whose writings were most drawn upon by the learned compilers of the Institutes and Digest of Justinian; viz., "Justitia est constans et perpetua voluntas jus suum cuique tribuendi," or "Justice is the constant and perpetual will to render to every one his right." This definition was adopted by the compilers as correct and made the introduction to the Institutes. It thus received the imperial sanction and was quoted wherever the law of Rome prevailed, down through medieval times and later, almost as if it were an inspired or at least authoritative definition not to be questioned. But notwithstanding the acclaim with which this definition was hailed, I question that it was any improvement on that of Aristotle, who tersely defined justice as "that virtue of the soul which is distributive according to desert." Indeed, I think Aristotle was nearer the mark.

Upon the revival of the study of law and jurisprudence in the 11th and 12th centuries several of the more famous jurists of that time, Azo, Irnerius, Placentinus and others, essayed definitions of justice, but they do not seem to have improved upon Ulpian. Their definitions were vitiated by theological assumptions and none of them has become a text for commentators or students. Neither in modern times has any definition of justice been suggested which has received such universal assent as did that of Ulpian in his time and for centuries afterward. We may therefore return to Ulpian's definition as our point of departure, since his definition is substantially that suggested earlier by Aristotle, and

observations on the later will also apply in many respects to the earlier.

Ulpian's definition is elegant in style, but it does not carry us very far in our inquiry. We are told indeed that justice is a state or disposition of the mind, the disposition to render to everyone his right or, as put by Aristotle, is the disposition to distribute according to desert. It was this statement that captured the medieval jurists and which they made their text, but it is now regarded as incomplete and even inaccurate. One may have the disposition, the desire, the will, to render to every one his right, but unless he can know what is his fellow's right he may unwittingly fail to accord it to him and thus unwittingly do injustice. It evidently is not enough to have the disposition or will; hence the definition is incomplete, and any definition is incomplete which does not furnish a criterion for determining what is the given man's right.

But the definition as far as it does go is not strictly accurate. The man of malevolent disposition who would wrong his fellow if he dared, may yet, to avoid unpleasant consequences to himself, render fully to every other man his right. It would seem, therefore, that justice is an attribute or quality of conduct rather than a disposition or state of mind, and of conduct toward others rather than of conduct toward one's self. It is only of the conduct of men in their relations to other men that we can predicate justice or injustice. One's conduct may result in good or evil to himself and so be wise or unwise, but assuming, what probably

is never the fact, that it affects only himself, in no way affects any other, his conduct is neither just nor unjust. Robinson Crusoe, until the arrival of the man Friday, had no occasion to consider our problem.

But, admitting that each man's conduct, whether active or passive, does affect some other person, what is the criterion by which to determine the justice or injustice of that conduct? It is not enough to say that if the conduct in any degree impedes the other person in the enjoyment of any of his rights it is unjust, otherwise not; for then the question comes to the front, what is the right of that other in the given case? Indeed, this latter question is the crux of the problem of justice. The derivation of the word "justice" also shows this. The Latin *justitia* or *justitium* according to some scholars is compounded of *jus*, right, and *sisto* or *steti*, to place, or to cause to stand, and hence the whole word may be held to signify the maintenance of *jus* or right. With the question of *jus* or right correctly answered, the problem of justice is practically solved. The right of the one being known, the effect of any particular conduct of another on that right, and consequently its justice or injustice, is determinable with comparative ease. Hence to make progress in our inquiry we must consider the problem of rights, for we almost instinctively accept as correct so much of Ulpian's definition as implies that justice is to be predicated of the act of rendering to everyone his right. We instinctively feel that if we render to another his full right we do him full justice, and that if we ourselves are

deprived of any right we suffer injustice. What is his or our right is therefore the real question. This will be our next subject for consideration.

## **CHAPTER II**

### ***THE PROBLEM OF RIGHTS. DIFFERENT THEORIES AS TO THE SOURCE OF RIGHTS***

The problem of Rights is also centuries old. There have been in later years glowing tributes to human rights even more than to justice, though the sentiment of rights is egoistic, while that of justice is in some measure altruistic. There have also been diverse opinions in the past, as now, as to the source, foundation, and nature of what are called Rights, as there were and are of justice. A brief review of these opinions and of the changes in them may present the problem more vividly.

In patriarchal times there could be no political questions about rights. The head of the family was supreme and sole ruler and judge. Even in Rome under an organized civil government the pater familias was long left the power of life and death over the members of his family. When families and tribes were combined in states, government was long conducted on the theory that as the individual had belonged to the family or tribe into which he was born or adopted, so he now belonged to the state, to be directed and disposed of as the state might order. What he might enjoy of life, liberty, or property was the gift of the

state, subject to revocation at will. Plato reflects this theory in making Hippias declare that the measure of man's right is what the state commands. The total abolition of the liberty of innocent persons by holding them in slavery was not deemed any infringement of any right of theirs. This theory was acted upon in democratic as well as in monarchical states. Slavery was as lawful in Athens, Sparta, and republican Rome as in Persia or Egypt. True, there were rebellions and revolutions at times, but, though sometimes provoked by oppression, they were usually to acquire the power of government and not in defense of individual rights. The Plebeians revolted to obtain a greater share in the governing power. The civil wars of Marius and Sulla were not waged for liberty but for power. In Sicily, where the slaves under Eunus had for a time wrested the governing power from their masters, they did not hesitate to enslave in turn.

The doctrine that the individual man has some rights by nature which the state ought not to disregard had no place in ancient nor medieval governments. The English Magna Charta purports to be a grant from the king and, though framed by the barons and forced upon the king, it contains no assertion of rights by nature. The rights claimed were claimed as accustomed rights previously conferred and enjoyed, such as the laws and customs of the time of Henry I. Apart from provisions as to improved methods of administration, the language of the Charter implies restoration rather than revolution.

So in the Petition of Right in the reign of Charles I, no appeal

was made to natural rights, but the demand was for accustomed privileges, for the observance by the king of the old laws and customs of the realm, especially those in force under Edward I and Edward III. In the Petition, the Charter of King John is cited, not as a schedule of the rights of man in the abstract, but as "The Great Charter of the Liberties of England," implying that the liberties therein named were not the natural heritage of men in general but the peculiar heritage of Englishmen, under English law. The prayer of the Petition is simply that the king shall accord the people of England "their rights and liberties according to the laws and statutes of the realm."

So in the Bill of Rights framed by Parliament and approved by William and Mary upon their accession to the throne, it was not asserted that the acts of James II complained of were contrary to any natural right of the subject, but that they "were utterly and directly contrary to the known laws and statutes and freedom of this realm." The purpose of the Bill of Rights was declared by the Parliament in behalf of the people to be "for the vindicating and asserting their ancient rights and liberties." In the earlier remonstrances of the legislatures of the English colonies in America against various acts of the king and Parliament, only the accustomed rights of Englishmen were claimed to be violated. The colonists, at first, claimed as against king and Parliament no rights not accorded to Englishmen in England.

But though the notion that man has rights by nature, not granted by the state and which the state should respect as such,

did not for centuries find expression in state papers or state action, it was by no means non-existent. It was early in the minds of many and found some expression in the writings of jurists and philosophers. In Rome it was a corollary of the doctrine of the existence of a *jus naturale*. The statement of that doctrine by Ulpian incorporated in the Digest implies a doctrine that man does have some rights anterior to and independent of the state. So far, however, as the statement was susceptible of that construction it was not generally acted upon and remained practically a dead letter. The doctrine itself survived, however, engaging the attention and receiving the support of various writers. It gradually gained ground among students of politics and spread rapidly after the Protestant Reformation, so-called, because of the impetus given by that event to the exercise of private judgment. As early as the 17th century, though finding little or no expression in the Petition of Right or Bill of Rights, the doctrine that individual rights were derived from nature rather than from the state was generally entertained by the Puritans and other dissenters from the Established Church, and was invoked by them to some extent as justifying the revolution of 1640. The doctrine also passed over to the Puritan Colonies in America and early found some expression there. In the Massachusetts "Body of Liberties" of 1641 there is a suggestion that the liberties, etc., therein recited, were those demanded by "humanity, civility and christianity" rather than "accustomed" liberties. It was further asserted that these liberties were to be enjoyed by the people of

the Colony and their posterity forever.

The later disputes as to the proper limits of the power of the British King and Parliament over the American Colonies led the colonial lawyers and politicians to a study of the theory of natural rights advanced by various political writers, English and Continental. It has been said, I think with truth, that the writings of Locke, Voltaire, Rousseau, Montesquieu, and even of Blackstone, were more widely read and studied in America than in Europe. The brilliant writings of Tom Paine also had great influence. The result was that the doctrine of natural rights came to be generally accepted by the people of the Colonies as the real foundation of their claims and the real justification for their resistance to the objectionable acts of the King and Parliament. In 1774 the first Continental Congress in its Declaration of Rights declared that the people of the Colonies had those rights by "the immutable laws of nature" as well as by their charters and the principles of the English Constitution. Two years later in the Declaration of Independence the representatives of the people made no reference to their charters nor to the principles of the English Constitution as the foundation of their claims, but based them exclusively on the theory of natural rights. They declared: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness."

The same influences undoubtedly contributed to bring about

the French Revolution of 1789, and the theory of natural rights again found expression in the French state papers of that period. In August of that year, in the early stages of the Revolution, the following "Declaration of the Rights of Man and Citizen" was put forth by the National Assembly and afterwards made the first two articles of the Constitution of 1791, viz., "Art. 1. Men are born and remain free and equal in rights. Social distinctions can be based only upon public utility. Art. 2. The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression."

Thus in the latter part of the 18th century the doctrine that man has some individual rights by nature, not by grant or prescription, and not alienable, obtained official recognition in two great nations. It has since been formally and officially iterated in the Constitutions of many American States and has been proclaimed and invoked as an impregnable established political truth. Nevertheless the doctrine is only a theory, not yet demonstrated nor undoubted. It has been assailed and in the opinion of many refuted, by Bentham, Mill, and other utilitarian writers, the successors of Epicurus, Carneades and the Sophists. Even in France and America it is now repudiated by many and declared to be an obstacle to social and political improvement. Still, despite the vigorous arguments against the doctrine, there remains the innate feeling and a general belief that society abridges individual rights instead of conferring them. In support

of this notion may be cited the fact that the statutes of any state or nation are almost wholly restrictive or compulsory in character, and rarely, if ever, permissive. From the Decalogue down, the language of the law has been compulsive, "Thou shalt" and "Thou shalt not"; and men generally act upon the theory that what society does not forbid by statute or custom the individual may do.

In passing now from the region of theory, of speculative opinion, to what seems to me the region of facts, of actual conditions, of actual traits of human nature, I wish it to be understood distinctly that in what I may say about rights I am considering only the precepts of justice, and that I differentiate those precepts from the precepts of religion, charity, philanthropy, benevolence, and other similar virtues, and even those of what is loosely called humanity. If it be true as asserted by Addison that justice is the greatest and most godlike of the virtues, it does not follow that the just man, to be just, must possess all or any of the other virtues. One can be just without being religious, charitable, or philanthropic, and even without earning the reputation of being humane.

I wish further to premise that I am considering our subject only with reference to those who have grown to the age of self-maintenance and consequent freedom. I do not take into account the rights of children under that age.

With these premises borne in mind, I would now in the next chapter call attention to some propositions of fact, which I shall

assume to be established by science and history and by the reader's own experience and observation, and which I think bear more or less directly on our subject.

# **CHAPTER III**

## ***THE PROBLEM OF RIGHTS***

### ***CONTINUED. THE NEED OF LIBERTY OF ACTION FOR THE INDIVIDUAL***

Men are endowed by nature with sundry powers, faculties, capacities, physical and mental. These, however, are not at all uniform, but are diverse in kind and degree in different races of men and in different individuals of the same race. Nature seems to work through diversity rather than through uniformity, indeed through inequality rather than through equality. Not all men are born poets, nor are all poets equally good poets. Not all men are by nature adapted for intellectual pursuits, and those who are so adapted are not in that respect equally favored by nature. Even in the field of the simplest manual labor there is great diversity of natural capacity. It seems to be nature's theory that mankind, the human race as a whole, will be better served by diversities, by differences in kinds and degrees of powers, than by uniformity and equality.

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