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The Lawyer's Role in Shaping Legislation

Clark L. Bradley*

A key to the importance of the lawyer's role in shaping and affecting legislation may be found by examining the lawyer's historic impact on the laws of past generations. The first laws or codes are of course obscured in the dawn of civilization. But it is known that as man developed over a great period of time, from groups and tribes to nations and civilizations, there first evolved the chief or leader. The earliest of these was undoubtedly the strongest in physical prowess, one who would sustain his power and leadership by besting potential competitors in physical combat. Later, the leader who possessed both physical strength and wisdom made greater gains and ruled for longer periods of time than the leader with merely physical strength.

To the earliest of these leaders, however, came the responsibility of making decisions in disputes among his people. The tribal acceptance of his physical might carried with it the acceptance of his decisions and established the pattern for absolute power of leadership, the pure autocracy.

Over a further period of time, rules and customs began to take the form of laws. The same type of dispute was settled by the previous rule or decision followed by the same or succeeding rulers, and eventually these led to the earliest codes of antiquity. The oldest written code is that established by Hammurabi, King of Babylon from 2123-2081 B.C. This ruler of Mesopotamia, which extended from the mouth of the Tigris and Euphrates rivers to the Mediterranean coast, was mainly a compiler of the previously existing laws and codes.¹

Nowhere in these ancient times do we find the vaguest shadow of a legislature. The earliest of these rulers at the most may have counseled informally with a handful of friends, or possibly at first only with immediate members of his own family. Gradually the ruler accepted trusted individuals for comparing ideas or to obtain information. These persons may have been deemed to have supernatural powers, though never superior to that of the ruler himself. The first lawyers no doubt were deemed to have powers from a divine or supernatural source which they claimed or which may have been bestowed upon them.² From the time of the earliest ruler, the administration of justice has been a part of his absolute powers. No matter what his other

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¹ ROBSON, CIVILISATION AND THE GROWTH OF LAW 10-11 (1935).

² *Id.* at 16.

powers may have been, he was always a judge; he was also a rule or law maker.³ In this very era of antiquity, within the ruler himself, or in time within his aides or counselors, lie the lawyer's origins.

EARLY GREEK PERIOD

Because of the historical importance of the early Greek period on the development of the lawyer and of representative government, some reference must be made to this period. At this time the lawyer is not yet a clearly existing entity, nor is the growth and development of the legislature, but the image is developing.

In early Greece law was not separated from other elements of the social order. The strong family unit, religion and various local organizations all acted substantially to channel public opinion into a force to restrain man from anti-social acts. These factors in this period of time were not well distinguished from law. The Greek word today for law includes the meanings of custom, religious rites, law in general, a rule by law, and controls by society in general.⁴

In this period the Greek city-state developed as a well organized political entity, though it still gave evidence of its recent emergence from a family-organized group which operated on the basis of custom and codified tribal law. There was a tendency towards the development of strict law separate and apart from religion and custom. As Roscoe Pound points out: "Classical Greek law had not reached this stage. In consequence classical Greece did not develop lawyers, for law and lawyers grow up together. Yet here, as in nearly every connection in the social sciences, the germs of our institutions are to be found in Greece."⁵

Among the shadows of the emerging lawyer concept in Greece, there were three groups. These included the interpreters who had a later parallel in Rome to the jurisconsults. The interpreters were consulted as to what was the established traditional law. Another group were the scribes, the early origins of which were oriental rather than western. The third group were the kin leaders who represented other dependent members of the same kin group. Dependency was a key factor since the independent person had to represent himself in disputes.

Exceptions developed in this third category, for the city could not represent itself. Also an accused might call for some one to help him. In time the accused and the accuser were allowed some help. Those who came to rep-

³ *Id.* at 17.

⁴ POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 28 (1953).

⁵ *Id.* at 29.

resent a city or to help an accused were called a *synegoros* or the beginning of an advocate.⁶ The same name was applied to a person appointed to speak for the state in connection with new legislation. From this group developed the *logographos* or speech writer who for a fee prepared a speech for a citizen to memorize and deliver to the citizen tribunals which often consisted of several hundred people. The presentation may have been an appeal in connection with a crime or in connection with the making of a proposed law. The speech writer was in no sense an advocate, but he served an important function and was later copied by the Romans.

ROMAN LAW

In the early Roman Empire and later in the Republic, law as we know it today was developing. This was law administered and developed by a social order organized politically and with a judicial procedure but separated from custom and religion.⁷ In addition to the beginning of procedure, there were actions related to remedies and established duties whereby judges acted within legal confines. This is law in the lawyer's sense.⁸ Actions and defenses to actions were established by edict of the praetor or judicial magistrate. The praetor going into office often proclaimed in his edict the type of relief he favored and the defenses he would recognize. Each succeeding praetor issued an edict but each edict was mainly that of his predecessor with very little added by the new praetor.⁹ Finally in the reign of Hadrian (A.D. 117-138), these edicts were revised and legislative authority attached to them.¹⁰

As the Roman Empire grew, the law of Rome became the law of the world. The Twelve Tables (450 B.C.) were developed and became a basic part of Roman law, remaining unchanged for 250 years and exerting an influence in the field of law for 1,000 years.¹¹ In the provinces the governor was given the jurisdiction and power of the praetor. In the far-flung hinterland of the empire, personal attendance in Rome was most difficult, and this led directly to the development of the procedure of agents or lawyers. Thus the Greek concept of mandatory personal appearance was diminishing.

During this period of development there were examples of legislative influence on legal procedure both in the criminal and civil fields. The writings of Cicero indicate that in criminal cases character witnesses were con-

⁶ *Id.* at 32.

⁷ *Id.* at 35.

⁸ *Ibid.*

⁹ BUCKLAND & MCNAIR, *ROMAN LAW AND COMMON LAW* 3 (2d ed. 1952).

¹⁰ POUND, *op. cit. supra* note 4, at 35.

¹¹ ROBSON, *op. cit. supra* note 1, at 165.

sidered most important and it was inexcusable to have fewer than ten.¹² These witnesses were allowed to give any amount of hearsay evidence. This procedure led to such a degree of abuse that in 52 B.C. the practice was prohibited by legislation. In another instance, legislation was enacted to stop the practice of bringing hosts of friends of an accused into court dressed in mourning. The limitation placed on this procedure was to restrict the "mourners" in court to relatives within a close degree.¹³

Standards for practice began to develop, and in A.D. 468, legislation prohibited the practice of advocacy by those not admitted to a court to practice. Legislation was adopted in 204 B.C. in the form of a statute known as *lex Cincia* which prohibited the charging of money or accepting of a gift to plead a case. Much is written on the history of the right to charge for legal services. At one time Augustus obtained from the Roman Senate a resolution against fees of any kind with a penalty of four times the charges. Finally Claudius agreed to allow fees with a maximum of ten thousand sesterces, or one hundred surei. This would be equivalent to \$475.00. Again under the reign of Trajan (A.D. 98-117) the Senate passed a resolution requiring the parties to take an oath before the trial that no fees or gifts had been promised. The fees were then paid after the trial in an amount not exceeding the maximum. From the third to the sixth century, fees were paid in advance by changes allowed by legislation and codified in Emperor Justinian's reign.

ENGLAND AND COLONIAL AMERICA

In medieval England the rise of the legal profession was quite rapid. The trial format gradually developed, and by the time of Edward I, the common law courts had been established.¹⁴ Chief Judge Fortesque of the King's Bench, in the reign of Henry VI, pictures a fully developed profession in three fields. There were the judges and serjeants, the latter being a form of specially qualified lawyers doing work similar to our present day attorneys general. Some became itinerant justices. They were well paid and were created by letters patent.¹⁵ Then there were the apprentices from which the serjeants were chosen. And lastly there were the attorneys who by the 17th century became a completely separate part of the English legal profession. The barristers had their Inns of Court as their schooling and training centers. Of course in this period of time, the legal profession was well represented

¹² POUND, *op. cit. supra* note 4, at 36.

¹³ *Id.* at 47-48.

¹⁴ *Id.* at 78.

¹⁵ *Id.* at 83.

in government, both in legislative bodies and as interested parties affected by legislation as a profession.

There is a great amount of material tracing the development of the lawyer and his growing role in the society and government around him. It is academic that the legal profession has been basically interested in the development of laws, whether created by king, judicial decisions or by the lawmaking process of the legislatures, as they have continuously and materially affected him.

In the early history of this country the lawyer was also involved in his struggle for his proper place in the life of the Colonies and their development, and the development of law and the courts. Lawyers trained in England helped greatly, and yet as the frontiers of our nation spread slowly westward the record is clear that the problems of the lawyer were manifold.¹⁶ His role in shaping much of anything was at low ebb generally.

Since the founding of the early settlements in America had a strong religious motif, it is not surprising to find a conflict between law and lawyers on one side and religion on the other. The issues were not religious per se, but whether laws should be developed as conceived by man or whether the laws should be based upon natural rights or the Law of Nature or the Law of God. In 1641 the Massachusetts Bay Colony adopted the Body of Liberties, the first code established in New England. Yet there was confusion as to what was the English law and colonial or plantation law in this and other attempts to codify the common law for use in America. A growing antipathy towards England did not help the cause and in 1665 the General Court of Connecticut decided that in the absence of specific law on a subject they should resort to the Word of God.¹⁷ Thomas Lechford is quoted as saying: "The ministers advise in making of laws, especially ecclesiastical, and are present in courts and advise in some special causes annual and in framing of fundamental Lawes."¹⁸ John Cotton was active in civil affairs in Massachusetts as was Nathaniel Ward. The former was the proponent of a Mosaic code of laws and the latter the compiler of the Body of Liberties. Both were clergymen. Cotton's object was "to show the complete sufficiency of the word of God alone to direct His people in judgment of all causes, both civil and criminal."¹⁹

This background of Law of God was not unique with the American Colonies as immorality was subject to discipline by the Ecclesiastical Courts in England as late as 1640. Equity is founded on a moral concept of court

¹⁶ MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* 13 (1930).

¹⁷ *Id.* at 19.

¹⁸ *Id.* at 26.

¹⁹ *Id.* at 29.

enforcement of law. The lack of lawyers was a colonial problem. None came over on the Mayflower in 1620. Those who professed to be lawyers created an hostility which lasted into the eighteenth century.²⁰ In the Colony of Maryland in 1725, the legislature passed an act regulating the fees of lawyers, which in 1729 was extended for an additional three years despite the protests of the legal profession. Prior to this, in 1645, Virginia passed a law which threatened disbarment if a lawyer accepted any kind of a fee.²¹ In the next year a fine was added. Not until 1680 was the lawyer's right to practice law for fees restored; and finally in 1748 a licensing act was passed. Law books, libraries and books in general were very scarce in colonial times, and this factor did not help to elevate the lawyer's standing in society. Judging from the hostility of the legislature of that time, the lawyers were not actively engaged in shaping legislation.

In the eighteenth century the number of trained lawyers in America increased greatly. Contributing to this increase was an emigration of lawyers from Europe and England. It is notable that of the 56 signers of the Declaration of Independence, 25 were lawyers; and of the 55 members of the convention which drafted the United States Constitution, 33 were lawyers.²² To date, 24 Presidents out of 35 have been lawyers.

EARLY CALIFORNIA DEVELOPMENT

It may not seem possible to the reader that as late as 1777 there could exist in another part of our country another stage of development in which the lawyer, as a member of his society, had to start again from a very low point. On January 12, 1777, the Mission of Santa Clara was founded, and three months prior the Mission Dolores of San Francisco was founded. On November 29, 1777, Pueblo de San Jose was founded as the first city to be established in California under civil law.²³ Los Angeles was not to be founded until four years later as the second of such cities. The Missions were the source of teaching obedience to law among their Indian charges. In the commandants of a presidio, however, were vested all the functions of government, civil, military, judicial and economic. In California's archives may be found a *reglamento*, a set of regulations governing the Californians, dated 1779.

California under Spanish rule drew few outsiders. Even under Mexican rule there was not much change. It is recorded that by 1846, the white population of San Francisco was about 200 out of some 700, but by a year

²⁰ *Id.* at 43.

²¹ *Id.* at 43-44.

²² Goldstein, *The Lawyer as a Leader*, 16 ALBANY L. REV. 9-13 (1952).

²³ BATES, HISTORY OF THE BENCH AND BAR OF CALIFORNIA 9 (1912).

or so later had increased to nearly 2,000 in and around the city. It is in San Francisco more than any other place in California that is found the earliest development of law.

The great harbor was a natural attraction and visitors aboard ship came and stayed. The early lawyer was quick to become a part of the customs and social activities from fandangos to rodeos. The practice of law was based on the practical things of life — agriculture, cattle, mines; there was little need for Shelley's Rule and contingent remainders for awhile. Cattle and horse stealing brought a stern, quick trial and if the evidence was strong against the defendant, few lawyers were successful in defending their clients; in some cases there was a real element of physical risk even to try to defend.²⁴ Despite these stern realities, and judges of rare and unusual qualities for their office and their manner of dispensing justice, David Starr Jordan stated: "The lawyers, I am told, took the leading part in the development of California for the first twenty years of her life as a state, reluctantly yielding that place in later days to the man of affairs."²⁵ These were the days of the Vigilance Committee of 1851 and again of 1856, and the crude trials in mining camps with the stern sentence of the lynching rope. And yet of the 48 delegates to the 1849 Constitutional Convention in Monterey, 14 were lawyers; and in the 1878 Convention, out of 152 delegates 59 were lawyers.

Thus, despite a history of trials and tribulations, the legal profession today is an honored and respected group of men and women who accept the challenge of their vocations in all levels of government. Loyd Wright, former President of the American Bar Association, described this responsibility and its importance:

It is my considered opinion that unless there is a new sense of public morality which will cause us as lawyers to realize that good government, and particularly good local government, and the success and standing of the legal profession are interwoven, we are indeed in difficulty. Unless we lawyers refuse to allow our employments and opportunities for professional advancement to conflict with and take precedence over our duties to support, maintain and participate in movements for the improvement of local government, including the local judiciary, we are really in difficulty. We must always be citizens first and lawyers afterwards.²⁶

Today the profession is largely meeting this challenge, primarily by a direct and substantial relationship with government.

²⁴ *Id.* at 15.

²⁵ *Id.* at 7.

²⁶ Wright, *The Lawyer's Obligation in Government*, 6 MERCER L. REV. 207 (1955).

THE MODERN LAWYER-LEGISLATOR

The most direct relationship the lawyer has in shaping legislation is in the instances where the lawyer is in or very close to government itself. One example is where the lawyer is a full-time legislative advocate or lobbyist. The next instance is in the lawyer-client relationship. In this case the lawyer is not a legislative advocate, but appears before legislative committees on behalf of a client or a client sponsored bill; or, as a committee member of a State Bar Association Committee, he may be the sponsor of a bill through a lawyer-legislator; or as a lawyer for corporations of all kinds, public as well as private; or as a lawyer-member of a church, university, lodge or veteran organization. Thirdly, the most direct case is the lawyer-legislator relationship.

The lawyer as a full-time legislative advocate or lobbyist is in most cases able to carry out his work and maintain a law practice as well. There are many cases, however, where his entire time is devoted to this one endeavor.

The word lobbyist should be clarified as in most cases it represents an honorable field of law practice. In most state governments today this is true and it is also generally true in Washington, D.C.²⁷ One of the more uncommon forms of lobbying is through activities directly related to the election of an individual whose platform is particularly favored by the lawyer's clients. This is not a general form of lobbying and will not be dwelled upon here further. Another is to influence legislation by "educational work." This endeavor may be toward a particular piece of legislation or toward the establishment of a political philosophy which might set the stage for other legislation.²⁸

A more direct form of lobbying is contact with specific committees or legislators. Another direct form is contact with a governmental agency or department. In these two cases a skilled lawyer, operating within the limits of rules laid down regarding professional ethics and rules for lobbying, can and does render a valuable service to this client; furthermore, he can and does render a valuable service to a legislative committee that is hearing a technical bill by providing a precise and learned explanation of the bill's workings and effects on existing law. In this field there can be exceptions, in which case the greatest care must be exercised in judging the motives and even the statements of the lobbyist.

In the second category, the lawyer-client relationship, the lawyer makes casual appearances before legislative committees or the individual legislator. Many members of the profession have had this experience, probably

²⁷ HORSKY, *THE WASHINGTON LAWYER* 33 (1952).

²⁸ *Id.* at 37.

more often on the local government level than state or federal levels. Such an experience may have been before a planning commission of a city, for example. On the state level, there are many such appearances made before committees conducting hearings on proposed bills. The lawyer speaks for his client who may, and often does, sit with him before the legislative committee. Although both may testify, more often the usual role of the lawyer representing his client prevails by the lawyer making the presentation. The consequence is a direct role in the shaping of legislation as the action of the committee is a major factor in the progress or termination of that particular piece of legislation.

What greater role in shaping legislation can be had by any lawyer than in the case of the lawyer-legislator? Whether he be a lawyer-councilman, supervisor, state legislator, or representative in the federal government, his is a role of prime importance to his fellow citizens and his own profession.

It is interesting to note here that in both houses of the California legislature the number of lawyers out of the total of each house has remained a remarkably uniform number. The following is a breakdown of lawyer-legislators in the General Sessions of 1953, 1955, 1957, 1959 and 1961: 1953: Assembly, 24; Senate, 10. 1955: Assembly, 18; Senate, 8. 1957: Assembly, 22; Senate, 16. 1959: Assembly, 24; Senate, 17. 1961: Assembly, 23; Senate, 16.²⁹

In the Congress of the United States for the Seventy-first to the Seventy-fifth Congresses, a study showed that the proportion of lawyers ranged from 61 to 75 per cent in the Senate and from 56 to 65 per cent in the House. In the Eighty-second Congress lawyers included the Speaker of the House, the Vice-President, the president pro tem of the Senate, House and Senate majority leaders, and 24 of the 24 standing committee chairmen.³⁰

THE VARYING ROLES OF THE LAWYER-LEGISLATOR

The lawyer-legislator is a respected member of his own house. The one exception is the lawyer-legislator who subverts his position as a lawyer to an extreme political philosophy. In cases where this has happened, the results have been to so submerge his status as a lawyer that he is seldom thought of in that form.

The lawyer-legislator is invariably a committee chairman or vice-chairman. His judgment is sought after by his legislative colleagues in many ways, but very often in particular as to the clarification of complicated or technical bills. He is the author of a commanding number of major bills in

²⁹ *Handbooks of California Legislature* (1953-1961).

³⁰ BLAUSTEIN & PORTER, *THE AMERICAN LAWYER* 97 (1954).

all fields of legislation; he is not just an author, he is an advocate for his bills, carrying his cause forward to the Governor's desk if he can possibly do so. With the lawyer-legislator there is a natural tendency to support legislation proposed by voter constituents from his district. Here there is a strong feeling of the client status transformed into the constituent.

The Judiciary Committee membership of both the Senate and the Assembly consists of all lawyers with the exception at times of one lay member. The work of these committees is to consider legislation amending the Civil, Criminal, Procedure and Probate Codes of California. Practically all of the legislation in this field originates from the lawyer-legislators. Not only do these proposed changes affect the practice of law in this state but they also affect every person, business or aspect of society in one form or another and to one degree or another. No group in the legislature is more critical and concerned with proposed changes. Primarily the concern is as to the effect on the public as a whole, in the form in which the rights of the public are being changed or revised, a concern that these rights are protected. This is a major role in the shaping of legislation.

There are some 26 standing committees in the Assembly and with each legislator serving on at least three committees and most serving on four committees, there are few committees that do not have at least one lawyer member. The effect is immediately noticeable. Debates on bills are more constructive in that the discussion is more closely confined to the issues raised in the bills before the membership. Questions to the proponents and opponents are to the point. The whole committee benefits; the public interested in the hearing benefits; the quality of bills referred to the floor are better; unrealistic and impractical legislation is generally side-tracked. It has been a notable fact that fewer bills authored by lawyer-legislators have been vetoed by the Governors than those of any other group in the legislature, a prime test of the quality of workmanship and effort on behalf of the public that the lawyer-legislator is seeking to serve.

The role of the lawyer is vital in shaping legislation, legislation on every level of government, legislation of a sincere, profound and public-serving nature. "No other profession is more clearly connected with life than the law. It concerns the highest of all temporal interests of man: property, reputation, the peace of all families, the arbitration and peace of nations, liberty, life and the very foundation of society."⁸¹

⁸¹ Goldstein, *supra* note 22, at 12.