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On the Laws against Popery in Ireland

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“On the Laws against Popery in Ireland”

(Excerpt)

By Edmund Burke

1760–65

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In the making of a new law it is undoubtedly the duty of the legislator to see that no injustice be done even to an individual; for there is then nothing to be unsettled, and the matter is under his hands to mould it as he pleases; and if he finds it untractable in the working, he may abandon it without incurring any new inconvenience. But in the question concerning the repeal of an old one, the work is of more difficulty, because laws, like houses, lean on one another, and the operation is delicate and should be necessary; the objection in such a case ought not to arise from the natural infirmity of human institutions, but from substantial faults which contradict the nature and end of law itself—faults not arising from the imperfection, but from the misapplication and abuse of our reason. As no legislators can regard the *minima*,[1] of equity, a law may in some instances be a just subject of censure, without being at all an object of repeal. But if its transgressions against common right and the ends of just government should be considerable in their nature and spreading in their effects—as this objection goes to the root and principle of the law—it renders it void in its obligatory quality on the mind, and therefore determines it as the proper object of abrogation and repeal so far as regards its civil existence. The objection here is, as we observed, by no means on account of the imperfection of the law. It is on account of its erroneous principle, for if this be fundamentally wrong, the more perfect the law is made the worse it becomes. It cannot {24} not be said to have the properties of genuine law even in its imperfections and defects. The true weakness and opprobrium of our best general constitutions is that they cannot provide beneficially for every particular case, and thus fill adequately to their intentions the circle of universal justice. But where the principle is faulty, the erroneous part of the law is the beneficial; and justice only finds refuge in those holes and corners which had escaped the sagacity and inquisition of the legislator. The happiness or misery of multitudes can never be a thing indifferent. A law against the majority of the people is in substance a law against the people itself; its extent determines its invalidity; it even changes its character as it enlarges its operation; it is not particular injustice, but general oppression, and can no longer be considered as a private hardship which might be borne, but spreads and grows up into the unfortunate importance of a national calamity.

Now, as a law directed against the mass of the nation has not the nature of a reasonable institution, so neither has it the authority; for in all forms of government the people is the true legislator; and whether the immediate and instrumental cause of the law be a single person or many, the remote and efficient cause is the consent of the people—either actual or implied—and such consent is absolutely essential to its validity. To the solid establishment of every law two things are essentially requisite: first, a proper and sufficient human power to declare and modify the matter of the {25} law; and next, such a fit and equitable constitution as they have a right to declare and render binding. With regard to the first requisite, the human authority, it is their judgment they give up, not their right. The people, indeed, are presumed to consent to whatever the Legislature ordains for their benefit; and they are to acquiesce in it though they do not clearly see into the propriety of the means by which they are conducted to that desirable end. This they owe as an act of homage and just deference to a reason which the necessity of Government has made superior to their own. But though the means, and indeed the nature of a public advantage, may not always be evident to the understanding of the subject, no one is so gross and stupid as not to distinguish between a benefit and an injury. No one can imagine then an exclusion of a great body of men, not from favours, privileges, and trusts, but from the common advantages of society, can ever be a thing intended for their good, or can ever be ratified by any implied consent of theirs. If, therefore, at least an implied human consent is necessary to the existence of a law, such a constitution cannot in propriety be a law at all.

But if we could suppose that such a ratification was made not virtually, but actually by the people not representatively, but even collectively, still it would be null and void. They have no right to make a law prejudicial to the whole community, even though the delinquents in making such an Act should be themselves {26} the chief sufferers by it, because it would be made against the principle of a superior law, which it is not in the power of any community, or of the whole race of man, to alter—I mean the will of Him who gave us our nature, and in giving, impressed an invariable law upon it. It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness of human society, than the position—that any body of men have a right to make what laws they please; or that laws can derive any authority from their institution merely, and independent of the quality of the subject-matter. No arguments of policy, reason of State, or preservation of the constitution, can be pleaded in favour of such a practice. They may indeed impeach the frame of that constitution, but can never touch this immovable principle. This seems to be indeed the doctrine which Hobbes broached in the last century, and which was then so frequently and so ably refuted. Cicero exclaims with the utmost indignation and contempt against such a notion; he considers it not only as unworthy of a philosopher, but of an illiterate peasant; that of all things this was the most truly absurd to fancy—that {27} the rule of justice was to be taken from the constitutions of commonwealths, or that laws derived their authority from the statutes of the people, the edicts of princes, or the decrees of judges. If it be admitted that it is not the black letter and the king’s arms that makes the law, we are to look for it elsewhere.

In reality there are two, and only two foundations of law, and they are both of them conditions without which nothing can give it any force—I mean equity and utility. With respect to the former, it grows out of the great rule of equality which is grounded upon our common nature, and which Philo, with propriety and beauty, calls the mother of justice. All human laws are, properly speaking, only declaratory; they may alter the mode and application, but have no power over the substance of original justice. The other foundation of law, which is utility, must be understood not of partial or limited, but of general and public utility, connected in the same manner with, and derived directly from our rational nature; for any other utility may be the utility of a robber, but cannot be that of a citizen—the interest of the domestic enemy, and not that of a member of the commonwealth. This present equality can never be the foundation of statutes, which create an artificial difference between men, as the laws before us do, in order to induce a consequential inequality in the distribution of justice. Law is a mode of human action respecting society, and must be governed by the same rules of equity which govern every private action, and {28} so Tully [Cicero] considers it in his offices as the only utility agreeable to that nature; *unum debet esse omnibus propositum, ut eadem sit utilitas unius eujusq; et universorum; quam si ad se quisq; rapiat, dissolvetur omnis humana consortia*. [“One thing should be set forth for all, in order that the utility of each and every one should be the same. If each should seize that utility for himself, all human society will be dissolved.”]

If any proposition can be clear in itself, it is this, that a law which shuts out from all secure and valuable property the bulk of the people, cannot be made for the utility of the party so excluded. This therefore is not the utility which Tully mentions. But if it were true (as it is not) that the real interest of any part of the community could be separated from the happiness of the rest, still it would afford no just foundation for a statute providing exclusively for that interest at the expense of the other; because it would be repugnant to the essence of law, which requires that it be made as much as possible for the benefit of the whole. If this principle be denied or evaded, what ground have we left to reason on? We must at once make a total change in all our ideas, and look for a new definition of law. Where to find it I confess myself at a loss. If we resort to the fountains of jurisprudence, they will not supply us with any that is for our purpose. *Jus* (says Paulus) *pluribus modis dicitur; una modo, cum id, quod semper aequum et bonum est, Jus dicitur, ut est Jus naturale*. ["'Right'/'Law' is used in many ways in speech. It is used in one way when that which is always fair and good is called right/law, as in 'natural right/law' "] This sense of the word will not be thought, I imagine, very applicable to our penal laws. *Altero modo, quod omnibus aut pluribus in unâguâque civitate utile est, ut est Jus civile* .["It is used in another way when it is called that which is useful for all or many in each polity, as in 'civil right/law.'"] Perhaps this latter will be as insufficient, {29} and would rather seem a censure and condemnation of the Popery Acts, than a definition that includes them; and there is no other to be found in the whole digest, neither are there any modern writers whose ideas of law are at all narrower.

It would be far more easy to heap up authorities on this article, than to excuse the prolixity and tediousness of producing any at all in proof of a point which, though too often practically denied, is in its theory almost self-evident. For Suarez,[2] handling this very question, *utrum de ratione et substantiâ Legis esse ut propter commune honum feratur,* ["Whether it belongs to the reason and substance of Law to be made for the sake of the common good"] does not hesitate a moment, finding no ground in reason or authority to render the affirmative in the least degree disputable. *In quaestione ergo propositâ* (says he) *mâla est inter authores controversia; sed omnium commune est axioma de substantiâ et ratione Legis esse, ut pro communi bono feratur; ita ut propter illud precipuè tradatur,* ["Therefore, on the question proposed there is fierce controversy among the authorities; but all hold in common the axiom that it belongs to the substance and reason of Law to be made for the common good; such that it is passed chiefly for that purpose"] having observed in another place, *contra omnem rectitudinem est bonum commune ad privatum ordinare, seu totum ad partem propter ipsum referre* ["It is against all that is right to order the common good to something private, or to order the whole toward a part for its own sake"]. Partiality and law are contradictory terms. Neither the merits nor the ill deserts, neither the wealth and importance, nor the indigence and obscurity of the one part or of the other, can make any alteration in this fundamental truth. On any other scheme I defy any man living to settle a correct standard, which may discriminate between equitable rule and the most direct tyranny. For if we can once prevail upon ourselves to depart from the strictness and integrity of this principle, {30} in favour even of a considerable party, the argument will hold for one that is less so, and thus we shall go on narrowing the bottom of public right, until step by step we arrive, though after no very long or very forced deduction, at what one of our poets calls the *enormous faith*—the faith of the many, created for the advantage of a single person. I cannot see a glimmering of distinction to evade it, nor is it possible to allege any reason for the proscription of so large a part of the kingdom, which would not hold equally to support, under parallel circumstances the proscription of the whole.

I am sensible that these principles in their abstract light will not be very strenuously opposed. Reason is never inconvenient but when it comes to be applied. Mere general truths interfere very little with the passions. They can, until they are roused by a troublesome application, rest in great tranquillity side by side with tempers and proceedings the most directly opposite to them. Men want to be reminded who do not want to be taught, because those original ideas of rectitude, to which the mind is compelled to assent when they are proposed, are not always as present to it as they ought to be. When people are gone, if not into a denial, at least into a sort of oblivion of those ideas, when they know them only as barren speculations, and not as practical motives for conduct, it will be proper to press as well as to offer them to the understanding, and when one is attacked by prejudices which aim to intrude {31} themselves into the place of law, what is left for us but to vouch and call to warranty those principles of

original justice from whence alone our title to everything valuable in society is derived? Can it be thought to arise from a superfluous vain parade of displaying general and uncontroverted maxims, that we should revert at this time to the first principles of law, when we have directly under our consideration a whole body of statutes, which I say are so many contradictions, which their advocates allow to be so many exceptions from those very principles? Take them in the most favourable light, every exception from the original and fixed rule of equality and justice ought surely to be very well authorised in the reason of their deviation, and very rare in their use. For if they should grow to be frequent, in what would they differ from an abrogation of the rule itself? By becoming thus frequent, they might even go farther, and establishing themselves into a principle, convert the rule into the exception. It cannot be dissembled that this is not at all remote from the case before us, where the great body of the people are excluded from all valuable property, where the greatest and most ordinary benefits of society are conferred as privileges, and not enjoyed on the footing of common rights.

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[1] “The smallest parts” or “details.” Burke seems to say that laws, being general by nature, cannot state in advance how they are to be applied fairly in all circumstances. The lawmaker may unintentionally craft a law that does harm in a particular situation, but this is unavoidable.

[2] Spanish Jesuit priest, philosopher, and theologian of the late sisxteen and early seventeenth century (1548–1617). He was a very important contributor to the natural law tradition, bridging medieval and early modern thought. His great work on law is the *Tractatus de legibus ac Deo legislatore*, or *The Treatise on Laws and God the Lawmaker.*

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