



Title	Where Does Law Come From?
Authors(s)	Casey, Gerard
Publication date	2010-12
Publication information	Casey, Gerard. "Where Does Law Come From?" Philosophy Documentation Center, December 2010. https://doi.org/10.5840/phillinquiry2010323/45 .
Publisher	Philosophy Documentation Center
Item record/more information	http://hdl.handle.net/10197/5108
Publisher's version (DOI)	10.5840/phillinquiry2010323/45

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Where Does Law Come From?

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Abstract

Law, like language, is the product of social evolution, embodied in custom. The conditions for the emergence of law—embodiment, scarcity, rationality, relatedness and plurality—are outlined, and the context for the emergence of law—dispute resolution—is analysed. Adjudication procedures, rules and enforcement mechanisms, the elements of law, emerge from this context. The characteristics of such a customarily evolved law are its severely limited scope, its negativity, and its horizontality. It is suggested that a legal system (or systems) based on the principles of archaic law could answer the needs of social order without permitting the paternalistic interferences with liberty characteristic of contemporary legal systems.

I: Introduction

In the darkest days of World War I, the following conversation took place in the trenches between the courage-challenged but cynical Captain Blackadder and the intelligence-challenged but phlegmatic Private Baldrick.

Baldrick: ...these days there's a war on, right? And, ages ago, there wasn't a war on, right? So, there must have been a moment when there not being a war on went away, right, and there being a war on came along. So, what I want to know is: How did we get from the one case of affairs to the other case of affairs?

Blackadder: Do you mean "How did the war start?"

Baldrick: Yeah. (from *Blackadder Goes Forth*, Part IV Episode 6: *Goodbyeee*)

These days we have laws, a myriad of them, and ages ago we didn't have them. So there must have been a moment when, to paraphrase Baldrick, there not being laws went away and there being laws came along. How did we get from one case of affairs to the other? How did law start?

At the stage at which it enters history, law is already the product of a long period of social evolution. It is possible to define law in such a way that its origin is relatively recent, as J. H. Baker does in his *An Introduction to English Legal History* in which law is defined as "a body of known and uniform rules, enforced by the state through its courts." (p. 1) If you believe, as I do, that the state as we have come to know and love it is an entity that came into being in the seventeenth century, that would make law a relative recent invention, which is implausible. It is more than likely that law, in the sense of fundamental social regulative norms, is coeval with language and culture and, like

language and culture, is not, in its origin, the product of deliberate design.¹ Whatever connection it might have with the state is contingent, not necessary. Nonetheless, whatever the evolutionary processes involved and however shrouded in the mists of history they may be, it should still be possible to articulate the conditions for the emergence of law. Of course, since we have no witnesses and no written records of the pre-historic period, our reconstruction must be speculative. The sketch that follows, then, is not intended as an historical description but as a rational construction.

II: The Conditions for the Emergence of Law

Here, in brief, are the conditions for the emergence of law: a plurality of embodied rational beings, minimally three, existing in relation to each another, in the context of scarce resources.²

1. Embodiment

There may or may not be purely spiritual beings. If there are any such, it may be that they can come into conflict with one another in some way. However that may be, on the basis of reason alone, there is not much that we can know about such beings, let alone their modes of social or asocial interaction. In contrast, human beings are essentially and demonstrably embodied beings and the first and inalienable property that each person has is in his own body. As embodied beings, we take up space. While we don't have to be anywhere in particular, we have to be somewhere. As embodied beings, our existence

¹ “Law in the sense of enforced rules of conduct is undoubtedly coeval with society; only the observance of common rules makes the peaceful existence of individuals in society possible. Long before man had developed language to the point where it enabled him to issue general commands, an individual would be accepted as a member of a group only so long as he conformed to its rules.” (Hayek 1982: I, p. 72).

² See in this context, Hart's ‘minimum content of Natural Law’ (Hart 1994: pp. 193-200).

unrolls over time and since we are mortal, time is, for each of us, *the* ultimate non-renewable resource.

2. Scarcity³

If our bodies are our first and most fundamental properties, they are far from being our only property. By being embodied, we of necessity have to stake a claim to the use of a portion of the earth's resources and that requires the development of the notion of property in external objects. If we lived in a magic world in which we could have anything we wanted simply by desiring it then it is difficult to see how the concept of external property could develop at all. Let's imagine that I have a Rolls Royce. It's the only one in existence. You want one too but, being a magician, you don't need to persuade me to sell you mine or have someone make one for you; all you have to do is to wave your wand, utter the magic words and conjure another Rolls Royce out of thin air. In this magical world, one could have possessions but since scarcity has no meaning in such a world, the notion of property in external objects would have no purchase and without such property the need for law is seriously reduced.

3. Rationality

Irrational animals can possess this or that bone or dispute the occupation of a cave but no sense could be given to animals' having the concept of ownership. Ownership is a normative concept—it is not just possession but rightful or lawful possession. While two dogs may squabble over the possession of a bone it makes no sense to say that the victorious canine owns the bone.

³ As I use the term here, 'scarcity' refers not to some absolute quantity or amount of goods but to relative or subjective scarcity in which two or more human beings require the use or possession of one good in physically incompatible ways.

4. Relatedness and Plurality

Why, for the emergence of law, must our embodied beings exist in relation to each other, and why do we need a minimum of three? Imagine Adam alone on an island. What possible point could law have in this context?⁴ Adam is an embodied rational being and the resources of the island, including those of his own bodily being and its temporal conditions, are scarce but what would be the point of law given that there are no social relations to regulate. Adam could, if he found time hang heavy on his hands, work out an elaborate law code, but, since this code could have no possible application, its elaboration would be as pointless as playing chess against oneself.

Now, let Bethany wash up on the island. Suppose she lands on a side of the island that is separated from Adam's domain by an impassable mountain range. To all intents and purposes Adam is still alone. Now, eliminate the mountain range and put Adam and Bethany in contact with each other. Surely now we have the appropriate material circumstances in which law can arise? Again, however, the answer is no. With two people in relation to each other, there can be no law, only agreement or disagreement, because another essential element of law, the neutral resolution of possible disputes, is not possible. For the neutral resolution of disputes, we need a third party. With the arrival of Charlie on the island, in communication with both Adam and Bethany, all the conditions are finally in place for the emergence of law.

III: The Context for the Emergence of Law: Dispute Resolution

Imagine a dispute to arise. (I pass over the question of whether the dispute arises as a result of deliberate malice, negligence or mistake.) Such a dispute can be resolved in three

⁴ "...human law is framed for a number of human beings, the majority of whom are not perfect in virtue." Aquinas, *Summa Theologiae*: I-II, q. 96, a. 2, c.

possible ways: by agreement, by violence, or by adjudication.⁵ Agreement is sometimes, perhaps quite often, possible. Many possible disputes are avoided or resolved by the willingness of the parties to compromise or the willingness of one or other simply to yield. However, agreement is not always possible. What then? When both parties maintain their claims and agreement is not possible the matter can be resolved only by violence or by adjudication.

Violence is expensive and inherently risky. Violence is expensive in that in a conflictual situation, the increase in overall wealth resulting from the division of labour and comparative advantage will diminish or disappear and that is mutually non-beneficial.⁶ Both parties to the dispute therefore have an interest in its peaceful resolution. Violence is inherently risky inasmuch as one or other of the disputants could be killed or injured in the conflict.⁷

If agreement cannot be reached and violence is not a viable option then only adjudication remains. But where Adam and Bethany are in conflict, neither Adam nor Bethany can, in relation to that conflict, be the arbitrator without violating the requirement of impartiality—*nemo iudex in causa sua*. Adjudication, then, requires a third party which, for Adam and Bethany, will have to be Charlie.

Let our dispute be resolved and judgement given. The judgement will have the form: “X (The pig, blackberry bush...) belongs to Bethany.” While Bethany might be happy to hear this and be keen to get on with enjoying her pig or blackberries, Adam wants to

⁵ “...the maintenance of the social order...is the source of law.” (Grotius 1925: p. 12)

⁶ Recent work in game theory has shown that “responsive cooperation is an effective strategy for maximising self-interest.” (Skoble 2008: p. 95).

⁷ “One of the first causes of a legal system is the desire to prevent or discourage feuding and private warfare...” (Baker, p. 4).

hear the reason for the judgement. Without a reasoned basis, the judgement is, or will appear to be, arbitrary and this, while perhaps immediately sufficient, is not enough to prevent the emergence of similar disputes in the future. If dispute resolution is more efficient than violence, dispute avoidance is yet more efficient than resolution and that cannot be had by bare unreasoned judgements.

Even if a particular judgement is substantially bizarre, it still has to have an appearance of rationality. In the long term, it will not do for Charlie to simply say that the dispute is to be resolved in Bethany's favour and then for him to go off to lunch, satisfied that he has done his duty. He has to say *why* this should be so. Disputes are resolved via judgements which have the form: *decision + reason (rule)*; only in this form can they provide guidance for future conduct.⁸

If the decision goes against Adam, why can he not just ignore it? He could, but only at a cost. The loser in a dispute can refuse to accept judgement only if prepared to accept a return to violence and while this is possible, the reason violence was rejected initially, namely, its high risk and high cost, still remains valid as a disincentive. It is therefore in the long-term interests of all to accept judgements, even when these go against their short term interests.⁹ What is to stop Charlie, the arbitrator, from being hopelessly biased? Simply this. Charlie is not a permanent judge but simply one of three people who have to live together on this island. As a possible litigant in future litigation, he has an

⁸ This is still so even in the process of the 'ordeal' which, according to Baker, "was calculated to avoid reasoned decision-making." (Baker 2002: p. 4).

⁹ See Skoble: p. 99.

interest in being scrupulously fair since one of those whom he has judged may, in time, act as judge in a case involving him.¹⁰

Though educed from and applied to a specific case, rules are inherently general.

Generality, however, while necessary, is not in itself sufficient; the rules must also be impartial. The rule can hardly be “Whenever Adam and Bethany have a dispute over a pig, the decision is to go in favour of Bethany”; it must be something like: “whenever a person’s pig/dog/animal destroys another’s crops, then the pig is forfeit.” Rules, then, are abstract and impersonal though, of course, when applied, they are applied to concrete circumstances and particular individuals.

Once elicited from a particular dispute, a rule has a presumptive status as it is unless it needs to be modified (by expansion or restriction) by an apprehension of some feature forced upon subsequent adjudicators by changed circumstances.

If the rule originally adduced is rationally adequate, then it will fit other disputes with similar fact patterns. Human beings require reasonable certainty as to which kinds of acts are legally permissible and which are not. Certainty, in turn, demands consistency.

Consistency requires that the adjudicator give the same or similar judgments in similar circumstances; it also requires that those who have benefitted from one judgement accept other judgements, even if made against them, if they accept the essential similarity of the circumstances. Decisions, then, to have persuasive force, must be generally acceptable and over time, as society develops, there will be a convergence of rational judgements into a set of principles and rules, much as language develops spontaneously

¹⁰ For a real-life example of the spontaneous emergence of law, see Anderson and Hill 2004.

in accordance with rules. The difference is that law will have to be at least partially reflectively appropriated by at least some in the community whereas language can quite well be spoken by all without any *reflective* appropriation of its rules.¹¹

It might be thought that this account of the emergence of a legal system from the context of dispute resolution implies that the legal system is, as it were, designed and planned. On the contrary, my contention is that, in the real world, the fundamental cultural institutions of human society—language, law, logic and morals—are all of them the outcome of a spontaneous evolutionary process which is the creation of no one or no group's design but which is nonetheless rational. It is not, to use Hayek's term, 'constructively' rational—that is, it is not the product of a pre-practical design. Its rationality is, rather, implicit.

IV: Custom

The picture of law I have just sketched is that of the law emerging from the processes of adjudication as an endogenous growth as distinct from the law being exogenously constructed and imposed on a society from the outside.¹² Nor is such law a command of a superior authority, backed by force or the threat of force; it is, rather, the delimitation of customarily permissible and impermissible actions, adhered to by members of the community because they accept them as right and natural, and enforced by social disapproval and, ultimately, social exclusion.

¹¹ Only adjudications concerned with assertions of rights will give rise to law. (See Fuller 1978: p. 353).

¹² "The basis of Roman law, as of any law, was customary." (Leage 1961: p. 14).

Thus we have three essential elements of law: (i) an adjudicative procedure, (ii) a body of rules, and (iii) a means of enforcement. There is a dialectical relationship between adjudication and rules: rules emerge from adjudication and, in turn, feed into and constrain future adjudications. We start *ex post*, continue *ex ante*. “Even a vintage *ex ante* precept, however, had to be devised and imposed *ex post* for the first time in some case.” (Barnett 1998: 127)

The extent of law thus construed is severely limited—it ranges over only those aspects of human action that infringe or are capable of infringing on what others perceive (and what the community agrees) are their rights. All other matters are outside the scope of the law.

The first characteristic of law whose material elements are constrained by a theory of rights is that it is almost uniformly negative. It does not consist of injunctions to do this or to do that but, rather, not to do this and to refrain from doing that. It thus concerns itself with matters relating to the peaceful co-existence of those who live in close proximity and tends to be limited rather than expansive in its operation.

Custom thus fostered and enforced became the beginning of law. The direct and necessary tendency of this restraint was to trace out boundary lines of individual action, within which each person might freely move without exciting the opposition of others. Here we find exhibited in its earliest and simplest form the function of law. (Carter 1907: pp. 133-4)

The second characteristic is that it is horizontal; it concerns the adjudication of disputes between two parties, neither of whom stands in a hegemonic relation to the other. This is what is meant by equality before the law. Crime is not a matter of offending a state or a superior but of violating the rights of another. Punishment is primarily a matter of

attempting, so far as possible, to restore the status quo ante or, where that is not possible (as in cases of homicide), making a mutually acceptable substitute restitution. Positive injunctions result from adjudication as judgements that restitution is owed by A to B as a matter of justice or in satisfaction of a properly constituted agreement—also a matter of justice, albeit not a primary case.

The third characteristic of such an endogenously evolved law is that its enforcement is not achieved by a particular social institution but by the community as a whole by means of disapproval or exclusion, in extreme cases, outlawry.

Systems of archaic law tend to exhibit the above characteristics. There is no substantive distinction between criminal law and tort law; the legal system is private, customary, and evolutionary; and the aim of justice is primarily restorative, with restitution going to the victims rather than to a state. Enforcement operates via a system of sureties and pledges, the chronically recalcitrant being excluded from society and its protections. Archaic law is rational, evolutionary and horizontal; in contrast, the bulk of contemporary legislation is voluntaristic, revolutionary and vertical. Archaic law, says Harold Berman, was

in many respects, a very sensible system. The threat of heavy financial burdens upon the wrongdoer and his kin is probably a more effective deterrent of crime than the threat of capital punishment or corporal mutilation...and at least equally effective as the modern sanction of imprisonment; and it is surely less expensive for society. Moreover, in terms of retributive justice, not only is the wrongdoer made to suffer, but in addition—in contrast to today's more 'civilized' penology—the victim is thereby made whole. (Berman 1983: p. 55)

V: Conclusion

Our imaginations are limited by the tyranny of the present. We tend to believe, unthinkingly, that the way things are is the ways things always have been and always have

to be. The legal systems we have—with their sharp distinction of criminal law from the law of tort, with their idea of crime as an offence against the state, with their presumption that there can be only one system of law in a given territory, and with their theory of punishment radically disconnected from any notion of restitution—are historically contingent and mutable. A non-hegemonic legal system (better still, a plurality of legal systems) based on the principles of archaic law (shorn of its irrational particularistic elements) could well answer the needs of social order without permitting the paternalistic interference with liberty that is characteristic of contemporary legal systems.

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