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Book Review (reviewing Oswald Spengler, Der Untergang des Abendlandes (1922))

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DIVERSITIES DE LA LÉY

SPENGLER ON LEGAL HISTORY.—Oswald Spengler's "Der Untergang des Abendlandes" (Decline of the West) is generally recognized as the most remarkable philosophical work that has appeared in many years; some Germans say that they do not know whether the author is a genius or a dazzler, but everyone concedes the originality and universality of the range of his vision. The first volume, which has been translated into English, is the more difficult of the two to understand; indeed to those who are not experts in mathematics, music and art, it must to a great extent remain a book with seven seals. The second volume, which is concerned with unfamiliar aspects of history, politics and economics, will have a wider appeal. The following extracts, which relate to certain phases of legal history, are offered with the consent of the American publishers, Alfred A. Knopf, Inc., who have the right of translation; however, the responsibility for the present translation is mine, and it does not purport to be literal. A number of passages and phrases have been omitted, either because they were beyond the skill of the translator, or because they seemed too obscure even for a person reasonably versed in legal history. Some reference to a good encyclopaedia will indeed be indispensable to an understanding of some of the names and terms that occur in the passages translated. Other comment is withheld, and the reader will be allowed to form his own judgment.

"Since 160 A. D. the history of the Latin legal texts belongs to the Arabic period; it is significant that it runs in a precise parallel to the history of Jewish, Christian, and Persian literature. The classical jurists (160-220), Papinian, Ulpian, and Paulus were Aramaeic. Ulpian took pride in calling himself a Phoenician of Tyrus. Their origin was the same as that of the Jewish Tannaim, who soon after 200 completed the Mishnah, and as the origin of most of the apologists of Christianity (Tertullian, 160-223). Contemporaneous was the establishment of the canons and the text of the New Testament by Christian, of the Hebrew Old Testament by Jewish, and of the Avesta by Persian scholars. It is the high scholasticism of the early Arabic period. The Digests and Commentaries of these jurists bear the same relation to the ancient petrified law as does the Talmud to Moses' Torah, and (much later) the Hadith to the Koran. They are new customary law, regarded as an interpretation of authoritatively handed down legal texts. The Babylonian Jews had a highly developed civil law which was taught in the schools of Sura and Pumbedita. Everywhere there arose a profession of jurists, the prudentes of the Christian, the rabbis of the Jewish, and (later) the ulemas (Persian mallas) of the Islamic nation; they pronounce opinions, responsa, Arabic 'fetva.' If the ulema is officially recognized, he is called mufti ('ex auctoritate principis'); the forms are everywhere the same.

About 200 A. D. the apologists are superseded by the church fathers, the Tannaim by the Amoraim, the great juris-consults (*'jus'*) by the interpreters and compilers of the constitutions (*'lex'*). The imperial Constitutions, since 200 the only source of new 'Roman' law, are commentaries on the jurists' law corresponding to the Gemara, a commentary on the Mishnah. Both developments find their contemporaneous completion in the Corpus Juris and the Talmud.

"The Arabic-Latin contrast between *jus* and *lex* finds its clear expression in Justinian. Institutes and Digest are '*jus*,' having the value of canonical texts; constitutions and novels are '*leges*,' new law in the form of interpretation. The canonical writings of the New Testament bear the same relation to the tradition of the Church Fathers.

"No one at present questions the Oriental character of thousands of the Constitutions. We have here true customary law of the Arabic world, which under the pressure of the demands of life, had to be smuggled into the learned texts. The numberless decrees of the Christian ruler in Byzantium, of the Persian ruler in Ctesiphon, of the Resch Galutha (the Jewish Exilarch) in Babylonia, and later of the Khalifs of Islam, have the same significance. . . .
 . . . At the moment when Oriental customary laws were ripe for codification, Justinian formulated a code in Latin which, for linguistic reasons in the East, for political reasons in the West, was doomed to remain mere literature. . . .

"In the West, about 500 A. D., Visigoths, Burgundians, and Ostrogoths, had issued Latin codes for their 'Roman' subjects. This had to be met by a Roman code from Byzantium. The Jewish nation had just completed its code, the Talmud; in view of the large population ruled by it in the Byzantine Empire, a code for the Christians, the Emperor's own nation, became a necessity.

"For the precipitately drafted and defective Corpus Juris was an Arabic and a religious work, as appears from the Christian tendency of many interpolations, from the ecclesiastical constitutions, here placed at the beginning, while in the Theodosian code they were placed at the end, and from the prefaces to many of the Novels. Notwithstanding this, the Code was not a beginning, but an end. Latin disappears from legal life (most of the Novels are written in Greek), and with it the code that was unwisely written in that tongue. Legal history continues its way along the path pointed by the Syriac-Roman Law Book, producing in the eighth century territorial compilations like the Ekloga of Emperor Leo I and the Corpus of the Persian Archbishop Jesubocht. At that time also lived Abu Hassifa, the greatest of Islamic jurists. . . .

"The legal history of the Occident proceeds in three great divisions. The most important became the Norman, derived from the Frankish, law. After 1066 it suppressed in England the native Saxon law, and subsequently became the law of the magnates and presently the law of the entire nation. It developed its purely Germanic spirit from strictly feudal to modern institutions, and has

become the ruling law of Canada, India, Australia and the United States. Apart from this power, it is the most instructive of western European laws. Unlike the others, its development was not controlled by theoretical teachers. The study of the Roman law in Oxford is kept aloof from practice; at Merton in 1236 Roman law is repudiated by the nobility. The judges themselves create new law on the basis of the old through a system of precedents, and these yield treatises like those of Bracton (1259). Ever since, a statute law in close touch with judicial decisions and a customary law interpreted by the courts go hand in hand without the necessity of legislative codification.

"The South was ruled by the German-Roman Codes, southern France by the Visigothic as *droit écrit* in contrast to the Frankish *droit contumier* of the North, Italy down to the Renaissance by the almost purely Germanic law of the Lombards. In Pavia arose a school of Germanic law which about 1070 produced the most important legal treatise of the time, the *Expositio*, and soon thereafter a code, the *Lombarda*. The legal development of the South was ended and superseded by Napoleon's Code Civil, the foundation of further developments in Latin countries and beyond, yielding in importance only to the English law.

In Germany an important movement set in with the writing down of national laws (*Sachsenspiegel* 1230, *Schwabenspiegel* 1274), but came to nothing. There grew up a chaos of petty city and territorial codes, until the visionary politics of dreamers and enthusiasts, bred by the wretchedness of actual conditions, impressed itself upon the law. In 1495 the Diet of Worms enacted a judicial constitution after Italian models. The Holy Roman Empire made the Imperial Roman law German common law. Germanic was superseded by Italian procedure; judges were trained in universities beyond the Alps, and learned, not from the life around them, but from a concept-splitting philology. Only this country has since produced Romanist ideologists, who shielded the *Corpus Juris*, as something sacrosanct, from the realities of life.

"A German at the school of Bologna, Irnerius, about 1100 had made the recently discovered code of Justinian the subject of legal scholasticism. As '*ratio scripta*' the new text was believed in just as were the Bible and Aristotle: reality, the substance of the world, consists not in things, but in concepts, and the true law must be derived not, as in the poor and wretched *Lombarda*, from life and custom, but from the turning in and out of abstract notions. The interest of commentators in the text was theoretical, and they did not think of applying their learning to practice. It was not until after 1300 that their glosses and summaries slowly prevailed against the Lombard laws of the Renaissance cities. Later jurists, Bartolus above all, welded canon and Germanic law together to be used as living law; his work became the Roman law of Spain and Germany, while only in France the jurisprudence of Cujacius and Donnellus went beyond the Scholastic back to the Byzantine texts.

"But from Bologna came, besides the abstract work of Irnerius, another decisive creation. Here Gratianus wrote about 1140 his famous Decretum which formulated the occidental science of ecclesiastical law. In 1234 the Liber Extra completed the main body of the Corpus Juris Canonici. Where the Empire had failed, incapable of creating a common occidental Corpus Juris Germanici, the Church succeeded, producing a complete code of private and criminal law and procedure. And thus appears in the law the great conflict between Emperor and Pope. While in the Arabic world a conflict between *jus* and *fas* is impossible, in the occidental world it is inevitable. Both are the expression of a will to power over the infinite: the worldly law, derived from custom, laying its hands on the generations of the future; the ecclesiastic law, inspired by a mystic faith, laying down rules to be binding forever. This struggle between rivals survives in our marriage law, with its duplicity of ecclesiastical and civil ceremony of solemnization.

"When life falls under the control of cities and of the economics of money, the demand arises for a law such as existed in the ancient city-states since Solon. The purpose of living law begins to be understood, but nobody has been able to alter the fatal Gothic tradition that the creation of the law 'that is born with us' is the privilege of a learned profession.

"As in the philosophy of Sophists and Stoics, the rationalism of the cities turns to the law of nature, from its foundation by Oldendorp and Bodinus to its destruction by Hegel. In England, Coke, her greatest jurist, defended the Germanic law against the last attempt, made by the Tudors, to introduce the law of the Pandects. On the Continent learned systems were built up in Roman forms, down to the German territorial codes, and the ordinances and treatises of the 'Ancien Régime' which Napoleon used in his Code, and thus Blackstone's Commentaries on the Laws of England (1765) are the only purely Germanic code at the threshold of occidental civilization."

ERNST FREUND.