

# **DIFFERENCE OF SEX AS A TOPIC OF JURISPRUDENCE AND LEGISLATION**

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Difference of sex as a topic of jurisprudence and legislation by Sheldon Amos

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TOPIC OF JURISPRUDENCE AND LEGISLATION.

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\*Ο δ Θεός αναίτιτος, άνθρωπος μη χριστός.



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## I.—INTRODUCTION.

It might almost have seemed a position too obvious even to insist upon, that all particular legislative questions affecting women, as distinguished from men, must give place to a prior discussion as to the true place which women must finally occupy in the general organisation of society. Now, any idea of such an organisation presupposes a distinct theory of the nature and function of marriage, as the critical fact upon which all social organisation, of whatever degree of development, ceaselessly hinges. And yet it strangely happens that modern political philosophers have, with few exceptions, hitherto begun at the other end. They have ventured upon no broad conception of social organisation. They have enunciated no consistent and comprehensive theory of marriage and divorce. They have only brought to light particular injuries which women have long suffered, and they have invoked one and another legislative measure for the remedy of those injuries.

It is unfortunate that thus much of the best work by which the minds of men and women have been quickened has to be done over again from the very first. The true position of women in relation to men has to be ascertained and defined, and thereupon the extent to which law can usefully co-operate with other more delicate and potent instruments finally determined. The question lies at the very threshold of the sciences of Jurisprudence and Legislation, in the broader sense of this last term, in which it is nearly synonymous with general politics. It is concerned with one narrow, though deeply momentous fact, out of all the jointly physical and ethical facts to which the jurist, who deals with the formal structure of all possible systems of law, and the politician, who deals with the materials of which a particular legal system ought to be composed, are alike compelled to attend.

Laws affecting to regulate the relation of the sexes to each other have probably been, in all countries, more completely determined by unreasoning instincts and savage usages than any other laws whatever. Owing, also, to the marvellous tenacity and complication of sentiment which at once exalts and embarrasses this matter, there are no laws which are so difficult to change. Here, more than anywhere else, the modes of feeling of the whole community have to undergo a decisive alteration before bare logical reasoning on the subject can be so much as even tolerated. Criticism of the existing law must be accompanied by an ever-widening and deepening apprehension of the true condition of things which the



law promotes and substantiates. In order to bring about a beneficial change in the law, a clear and popular conception must be formed of what is wanted in the future, together with a precise recognition of the limits of the provinces of law and moral authority to be observed in providing for that future. It is proposed here to sketch out the lineaments of a true human society, such as, by developing and exercising to the full all the latent possibilities of the race, will, the more nearly it is attained, elevate, rather than debase and corrupt, every individual man and woman. The history, ancient and modern, of the political philosophy of sex will afford at once the best possible example and condemnation of erroneous methods of approaching the more universal problem.

## *II.—SOCIAL ORGANISATION.*

The customary form in which English writers have propounded the problem involved in the present enquiry has been the following. It has been noticed that in all countries and all times (with the rarest exceptions) woman has been treated, both socially and legally, as in nearly every respect subordinate and inferior to man. Public opinion, domestic manners, political institutions, and positive laws have unanimously stamped and riveted this conception of the inequality, for nearly every purpose, of the two sexes. It is argued upon these facts that (1) this historical subordination of one sex to the other was the result of nothing else than a gross and arbitrary usurpation of power on the part of the physically strong over the

physically weak ; that (2) whatever actual differences exist at this day between the mental and even some of the physical capacities of men and women, all such differences may reasonably be attributed at least as much to the fact of such diversities of social and political treatment as to differences of physical structure, or to any other actual differences of a less palpable kind ; and that (3), if hereafter women be treated, for the purposes of law, political action, and social existence, in the same way exactly as men, the differences between the sexes will finally be reduced to the smallest possible amount.

Now, the historical facts assumed in the above reasoning are undoubtedly true, and the cause found for those facts in the tyrannical and selfish habits of mankind is a 'true cause' likewise. There lurks, however, a very serious and pernicious error in the implied, though not expressed, propositions, to the effect that differences between the sexes are in themselves an evil, and that the tendency of equal and uniform legislation for the two sexes is to eradicate those differences rather than to deepen and intensify them. It is here contended, on the other hand, that (1) while the alleged inequality between the sexes is a cruel and dangerous imposture dating from the most barbarous times, nevertheless difference between the sexes, in the nature, function, and quality of mind and spirit, as well as of bodily structure, is an element in the constitution of social life so precious and excellent that apart from the plenary recognition of it any high degree of civilisation would be simply impossible. It is contended, again, (2)

that legislation has hitherto erred by confusing the true character of the differences separating the sexes, and only by the greatest attainable uniformity of legislation for both sexes can the essential differences between them manifest and express themselves in the most effectual and unmistakable way.

Contrasting a very primitive state of society with a highly advanced one, the former is seen to be composed of elements atomic, mutually repulsive, hateful, and hating one another. The latter is pervaded by facts and notions implying every degree and kind of reciprocity of function, mutuality of sentiment, and relationships indefinitely multiplied in the most variegated forms.

These last facts and notions are not confined to the grosser fields of economic policy and merely social cooperation. The whole life of the nation, in its subtlest form, hangs in suspense upon them. A thousand modes of sensibility are kept in assiduous action through nothing else than their prevalence. It is not only that under these social conditions men do more work, and do it more quickly and effectually, but that, in and through the very process of working, they learn to experience an indefinite number of mysterious emotions in respect of each other which, in their aggregate, constitute the corporate energy of the nation. Politics, law, industrial and commercial interests, as well as literature and the conscious communication of thought in all forms, are only the cloaks and instruments of this magnificent, though constantly secluded, activity. This illimitable range of reverberating sentiments is the most characteristic