Legal Philosophies

by
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Preface

This book is intended for the beginner in legal philosophy, legal theory or jurisprudence. It has been written with the needs of the law student primarily in mind. It may also be useful to students of politics, or of moral and political philosophy; for no detailed knowledge of any branch of the law is required in order to follow the lines of argument discussed.

Before they embark on a new legal course, such as contract or land law, law students are commonly recommended to read some introductory work which covers the ground of the course in outline. An overview of the terrain, before undertaking detailed study, is thought desirable. In the case of legal philosophy, legal theory or jurisprudence, there is even more need for such an introductory book; for, not only is the subject matter strange to the student, but he finds that he is now expected to employ critical criteria of a wholly new kind. In other law courses, he has learned that 'information' must be supported by citation of statutes or cases, and that 'critical comment' consists either in the analytical exposition of the implications of these same sources or else in matching them with 'policy'. Now, in 'jurisprudence', so much that was taken for granted or left unsaid about the law is put before him. 'Information' appears to consist in acquaintance with the views of a very heterogeneous collection of theorists and philosophers; and 'critical comment' appears to range from the minutiae of textual exegesis, to the deepest questions about the nature of man or society as to which – perish the thought! – he is expected to take up an overt moral or political stance. Besides these difficulties of method, jurisprudence is daunting because there is so much of it. There is no end to the literature of philosophy, politics and social theory which might have a bearing on the issues comprised in it. Oh for the security of a case and statute reading list which, if long, might at least be regarded as definitive!

This book may help to absorb the first shock. It can be read through as a survey of the ground. It covers a wider range of topics than most single courses in legal philosophy, legal theory or

jurisprudence are likely to encompass. Selection will be essential for issues to be dealt with at all adequately, but a glance at the full menu may help.

Portions of the book may also be read, week by week, as an introduction to different topics in a course. Each chapter has been designed, so far as possible, to stand on its own – although cross-references have been made where crucial intersections of theme seemed to require them. There is a select bibliography for each chapter so that the subject can be more fully explored.

No introductory work can make legal philosophies simple, and this book does not try to do so. It attempts two things, apart from providing a general survey: first, to set out the major contentions on either side of a debate, leaving the student to pass his own judgment; secondly, to indicate by what sorts of criteria someone who knows something of the law, but little of philosophy, is supposed to judge jurisprudential issues.

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September 1980

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Table of abbreviations

The following is a list of the abbreviations used for periodicals referred to in this book.

Ad L Rev	Adelaide Law Review
AJ	*Acta Juridica* (South Africa)
Am Anth	American Anthropologist
Am J Comp L	American Journal of Comparative Law
Am L Rev	American Law Review
Am Phil Q	American Philosophical Quarterly
Am PS Rev	American Political Science Review
ARSP	Archives für Rechts-und Socialphilosophie
ASAL	Annual Survey of American Law
Br J L Soc	British Journal of Law and Society
Calif L Rev	California Law Review
Can Bar Rev	Canadian Bar Review
China Q	China Quarterly
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
Colum L Rev	Columbia Law Review
Cor L Rev	Cornell Law Review
Crim LR	Criminal Law Review
Dal LJ	Dalhousie Law Journal
Duc U L Rev	Ducane University Law Review
Duke LJ	Duke Law Journal
Ga L Rev	Georgia Law Review
GST	Groetius Society Transactions
Harv L Rev	Harvard Law Review
ICLQ	International Comparative Law Quarterly
IESS	International Encyclopaedia of the Social Sciences
IJE	International Journal of Ethics
Ind LJ	Indiana Law Journal
Inter-Am L Rev	International-American Law Review
Is L Rev	Israel Law Review
JCL	Journal of Comparative Law

JLE	Journal of Legal Education
JL Econ	Journal of Law and Economics
JLS	Journal of Legal Studies
JPE	Journal of Political Economy
J Phil	Journal of Philosophy
JSPTL	Journal of the Society of Public Teachers of Law
Jur Rev	Juridical Review
LQR	Law Quarterly Review
LS Rev	Law and Society Review
McGill LJ	McGill Law Journal
Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review
Miss L Rev	Missouri Law Review
MLR	Modern Law Review
Mod Sch	The Modern Schoolman
NLF	Natural Law Forum
NY U L Rev	New York University Law Review
OEP	Oxford Economic Papers
Phil Rev	Philosophical Review
PPA	Philosophy and Public Affairs
Rut L Rev	Rutgers Law Review
SALJ	South African Law Journal
Scand S L	Scandinavian Studies in Law
Stan L Rev	Stanford Law Review
Tas U L Rev	Tasmania University Law Review
Tul L Rev	Tulane Law Review
U Br Col L Rev	University of British Columbia Law Review
U Chi L Rev	University of Chicago Law Review
U CLA L Rev	University of California and Los Angeles Law Review
U G LJ	University of Ghana Law Journal
U Pa L Rev	University of Pennsylvania Law Review
U Tor LJ	University of Toronto Law Journal
Vand L Rev	Vanderbilt Law Review
Vill L Rev	Villanova Law Review
Virg L Rev	Virginia Law Review
W & M L Rev	William and Mary Law Review
Wis L Rev	Wisconsin Law Review
Yale LJ	Yale Law Journal

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1 What is jurisprudence about?

Jurisprudence is a ragbag. Into it are cast all kinds of general speculations about the law. What is it for? What does it achieve? Should we value it? How is it to be improved? Is it dispensable? Who makes it? Where do we find it? What is its relation to morality, to justice, to politics, to social practices, or to naked force? Should we obey it? Whom does it serve? These are the questions of which general jurisprudence is comprised. They can be ignored, but they will not go away.

In his daily round, the legal practitioner can usually push aside such questions together with the office cat. But now and then they will jump on his desk. Here is client Jones, storming in with some story about his neighbour's appalling behaviour.

—Yes, well, we might try to take out an injunction – though it's not certain that what he did amounts to what the law regards as a nuisance.

—Not certain! Can't you look it up?

—The law isn't something you just look up.

—What have you got all those books for then?

—They help ... anyway, we'll have to convince the county court judge that your neighbour was acting unreasonably.

—I know the judge. A sound man! He'll agree with me.

—But he's got to apply the law. It's not just a question of the particular judge – or, at least ... you may be sure that you're in the right, but we're not here concerned with questions of abstract justice.

—What sort of justice, then?

—Look, I don't think you'll be entitled to legal aid, so you must decide ...

—I know, the law's up for sale, unless some political do-gooder has decided you're poor enough to have it on a plate. You'll be asking me next: 'How much are your principles worth?' The law's supposed to protect people like me against people like him.

—No it isn't. It is supposed to do equal justice to all.

—But you just said ...

—This sort of discussion is all very well, Mr Jones, and outside office hours I'd be glad to pursue it. Right now, we have to decide on your best course of action.

—I know what I'm going to do. I'll let down the tyres on that great monstrosity he parks outside.

—You can't do that, it's illegal!

—Why should I be the only one to obey the law? Anyway, I can't see the police bothering with a thing like that and he's not likely to waste his time coming to see someone like you.

—That's not the point. Just because you think your neighbour has been antisocial, that's no reason for you to be it too.

—So now you're preaching!

It is sometimes said that the justification for teaching jurisprudence to law students is that it will make them better lawyers. I have disagreed with this view, at least so far as general jurisprudence is concerned. People acquire those technical skills of legal reasoning and legal argumentation which make up the concept of 'good lawyer' by immersing themselves in substantive legal subjects. Jurisprudence has to do, not with the lawyer's role as a technician, but with any need he may feel to give a good account of his life's work – either to fellow citizens, or to himself, or to any gods there be. What is it that is so special about legal reasoning as against any other kind of reasoning? (see chapter 15, below). Does the lawyer contribute to the maintenance of the rule of law? If so, is the rule of law such a worthwhile ideal anyway? (see chapter 11, below). Does the lawyer's role vary from one kind of society to another? (see chapter 19, below). Of course, any lawyer may rest his case at the bar of conscience on his technique alone, and assert that it requires no justification. I recently heard a New York lawyer interviewed about his practice in advising suspected Mafia families, and that is what he did: 'I just do a job, like a surgeon.' Is that enough? Surgeons might not be flattered.

My view about good lawyers being those who have acquired special skills may be old-fashioned. A 'progressive' law teacher would insist that awareness of the social implications of law is of the essence of proper legal training. Whether for his craft or for his well-being as an informed citizen, we can all agree that a lawyer should be familiar with the social dimensions of law. But what are they? What does it mean to say that a thing like 'law' has a 'social context'? (see chapter 18, below). It is commonly urged that the lawyer should not be too parochial. He should not assume that the law of the modern state is the only kind of law. Why not? (see chapter 17, below).

The won't-go-away questions are not and should not be the lawyer's preserve. Everyone has a right to ask whether the ideal of the

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rule of law has value; whether there is any moral duty to obey the law (see chapter 16, below); whether the law ought to diminish our liberty for our own physical or moral good (see chapter 10, below); what it is, if anything, that justifies the institution of punishment (see chapter 5, below). 'Out of office hours', we all stand on the same (usually shakey) ground when we debate the merits of proposed legislation in terms of the public good (see chapter 4, below), or of justice (see chapter 20, below). By 'we' I mean lawyers and non-lawyers. It may be that moral and political philosophers are better informed. Jurisprudence has to entrench upon these disciplines at many points, as well as upon those of social and political theory. It is a scavenger, as well as a ragbag; having no perimeter to its field of inquiry, save that what is studied must have a bearing on some general speculation about law.

If jurisprudence has a heartland all its own, it is legal theory. Much discussion about the moral claims of the law and the moral claims on the law, takes the concept of law itself for granted. Yet, answers to such questions may turn on what picture of law we have. Legal theory asks: What is the nature of law (everywhere, or just in the modern state)? Some would claim that this question deserves an answer in and for itself. For others, the question is important but subsidiary – when we have defined law, we can describe its functions and its values; or, we should choose between competing definitions of law by reference to the functions we believe it has or the values we wish it to serve. Writers make different assumptions about the proper relationship of legal theory to issues of legal philosophy – that is, between an investigation of the nature of law and a discussion of the value implications of law. For Bentham and Austin, law should be defined in terms of political facts, so that it may be laid bare for criticism in terms of utility (see chapter 3, below). For Hart, the diverse social functions of the law must be incorporated into our conception of law, so that any judgments we make about it are not deflected by a distorting mirror (see chapter 9, below). For Kelsen, pure information about legal prescriptions must be separated from intrusive value judgments of all kinds (see chapter 6, below). Despite the obscurities of his esoteric language, Kelsen is the true friend of the practitioner who wants to be called on to describe the law and nothing but the law *in office hours*. For the natural lawyers and for Fuller and for Dworkin – each in their very different ways – such a practitioner cannot be satisfied. What 'the law is' is so intimately connected with what, morally speaking, 'the law ought to be', that our picture of it must include some conception of moral truth (see chapters 2, 11 and 14, below). For the 'realist', all the pictures of law we have are illusions. We must reject them in the interests both of truth and of

proper shouldering of the burden of subjective valuations (see chapter 8, below).

I have expressed the controversial opinion that general jurisprudence is not a necessary part of the training of a lawyer *qua* lawyer – it being, as I think, concerned with the more important matter of the training of the lawyer *qua* citizen and of the citizen *qua* legal critic. 'Particular jurisprudence' may, however, bear more directly on the professional lawyer's concerns. General jurisprudence deals with speculations about the law; particular jurisprudence, with speculations about particular legal concepts. Every lawyer has from time to time to analyse terms of art appearing in legal materials. When is a concept employed in the law fit for jurisprudential analysis as distinct from ordinary legal elucidation? I suggest that no line is to be drawn. There is a continuum from very concrete questions – like, what does this word mean in the context of this statute? – to very general questions – like, what is the essence of a legal right? Roughly, particular jurisprudence concerns itself with terms which are common both to different systems of law and to different branches of law. 'Base fee' is not such a concept, not because it is not difficult, but because it is peculiar to the common law. 'Rape' is not such a concept, because though it appears in all systems, it is peculiar to criminal law. Particular jurisprudence fastens on terms which are inter-branch and inter-systemic – like right, duty, possession, person and so on. Opinions vary as to the value of such analyses for the practising lawyer, but they were certainly intended to assist him (see chapter 7, below).

The two concepts investigated by particular jurisprudence which have the best claim to the attention of the practising lawyer – as indeed to that of the political scientist – are those of 'precedent' and 'legislative intention'. All modern legal systems have to deal with statutory interpretation and have some notion of precedent. The investigation of the version of these concepts employed by any particular system turns out to involve a special mixture of constitutional and conceptual issues (see chapters 12 and 13, below). That will not be news to anyone who has followed recent controversies in the United Kingdom about the law on picketing, which have forced onto the television screen those hardy old questions, of what it means to 'give effect to Parliament's intention', or what it means to be 'bound' by a decision of the House of Lords.

All these questions, then, are what jurisprudence is about. Whether the word 'jurisprudence' is a good baggage label for them matters not at all. Sometimes this word is used as a heavy word for the study or knowledge of the law. There was a time when it was used in England to stand merely for the analysis of legal concepts. In French, 'la

jurisprudence' signifies what we call case law; and 'théorie générale du droit' covers much of the same ground as what is here called jurisprudence. I believe that use of 'jurisprudence' to stand for general speculations of all kinds about the law is now fairly common in modern English usage; that 'legal theory' is used to cover inquiries into the nature of law; and that 'legal philosophy' means that branch of practical philosophy which investigates the value implications of describing something as 'legal'. Whether labels matter when it comes to the word 'law' itself – a question which is highly controversial in the areas of 'primitive law' and 'living law' (see chapters 17 and 18, below) – it is surely the case that labels do not matter in assigning the proper fields for 'jurisprudence', 'legal theory' and 'legal philosophy'. It is the won't-go-away questions which count.

This book does not break up the subject according to a systematic plan. That would be impossible without prejudging crucial questions – such as whether 'the relations of law to morality' is a different question from 'the nature of law'. Some chapters deal with particular questions (like the duty to obey the law), some with topics involving clusters of questions (like statutory interpretation), some with schools of thought (like the historical school), and some with individual theorists. My object is to introduce the reader to a bill of fare. On controversial matters, I have tried to state both sides of a question leaving it to the reader to provide an answer; but one cannot always disguise one's own view. I hope at least to have exemplified how jurists argue so that, if he wants to, the reader can join in. Welcome to the feast.

2 Natural law

One facet of common discourse assumes a correlation between 'good' and 'what comes naturally'. Parental affection, heterosexual love, support for aged kin and comradely interdependence are natural and therefore good. That which ignores or distorts human nature is bad. Lawyers, on occasion, have been prepared to listen to such 'naturalistic' arguments, especially where an issue is not covered by the arguments from authority with which lawyers are more familiar. In a case of first impression in 1970, an English judge held that a 'marriage' between a man and a person who had undergone a 'sex change' was a nullity since it could not involve the natural, biologically-determined consequences of marriage.

> 'Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, upon whether the respondent is or is not a woman ... Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage.'[1]

In another case of first impression in 1976, an injunction was issued to prevent the parents of a mentally defective girl from having her sterilised, as this would take away the child's fundamental human right to reproduce.[2] Conversely, in 1978 an injunction was refused to a husband to prevent his wife having an abortion on the ground that the courts can only enforce rights already recognised by positive law and neither an unborn foetus nor a father-to-be has any such right.[3] The jurists who developed the law of the Roman empire made frequent references to the nature of the case as a basis for settling matters

1 *Corbett v Corbett* [1971] P 83 at 106 per Ormerod J.
2 *Re D* [1976] Fam 185.
3 *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276.

not covered by authority. The compilers of the *Corpus Juris* of the emperor Justinian in 533 AD employed the adjective *naturalis* as a classificatory peg, distinguishing 'natural' obligations and transactions from their counterparts in the *Ius Civile*. Parallel with, and sometimes infusing, these lawyer-like references to the natural, the philosophy of the ancient world had evolved a conception of natural law.

The classical doctrine of natural law, though it would support the naturalistic arguments and classifications of the lawyers, has much more far-reaching implications. It speaks of a law of nature which has characteristics quite different from those of the ordinary laws familiar to practitioners. First, it is universal and immutable. In consequence, it is available at all times and in all places for those whose office it is to enact or develop law. In other words, it is one conception of 'justice', in the sense in which justice stands for the righting of wrongs and the proper distribution of benefits and burdens within a political community. Secondly, it is a 'higher' law. It has a relationship of superiority towards laws promulgated by political authorities. This means that it determines whether ordinary laws are morally binding on subjects. These first two characteristics emphasise the 'legal' quality of natural law. If it were merely a system of private ethics, it would not *eo ipse* be mete for enactment by legislatures and judges and would not set criteria for obedience. Thirdly, it is discoverable by reason. Herein lies the 'natural' quality of natural law. The stoics, the school which elaborated the doctrine, viewed all things, including man, as having natural essences or ends. The reflective intellect possessed direct knowledge of these qualities from which conclusions might be drawn, by rational steps, about what justice requires. Aristotle had claimed that it was natural to man to be a member of a *polis* – often crudely paraphrased as the view that man is a 'political animal' or 'social animal'. That being so, his nature requires rules setting up political organisations and imposing mutual forbearances for the common good.

The most famous summary of the classical natural law doctrine is the following statement of the stoic position given by Cicero in the first century BC.

> 'True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed

from its obligations by Senate or People, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times, and there will be one master and one ruler, that is, God, over us all, for He is the author of this law, its promulgator, and its enforcing judge.'[4]

Natural law was eventually prayed in aid by the Christian church. The New Testament spoke of divine grace and individual redemption, but was rather thin on political blue-prints. Some of the fathers of the church were pessimistic about human institutions. Given the sinful condition of man since the fall, his political arrangements were likely to be defective. St Augustine (354–430) asked rhetorically: 'What are states without justice but robber-bands enlarged?'[5] Medieval scholars were more optimistic. The fall had not taken away man's ability to appreciate his own good, and to reason therefrom to the good society. The Roman Catholic church eventually adopted the views of the Dominican jurist St Thomas Aquinas (1225–1274). Aquinas synthesised Christian revelation with the pre-Christian doctrine of natural law. His legal theory encompasses four types of law. 'Eternal law' comprises God-given rules governing all creation. 'Natural law' is that segment of eternal law which is discoverable through the special process of reasoning mapped out by the pagan authors – intuitions of the natural and deductions drawn therefrom. 'Divine law' has been revealed in Scripture. 'Human law' consists of rules, supportable by reason, but articulated by human authorities for the common good. As to the interrelation between these different types of law, two crucial propositions stand out in Thomist philosophy. First, human laws derive their legal quality, their power to bind in conscience, from natural law. Man's natural end being social, a community prescription which is, in reason, directed to the common good has, by nature, the quality of law. In some instances, the content of law is deducible from first principles of natural law; for the rest, the legislator has the freedom of an architect. Secondly, any purported law which is in conflict with natural or divine law is a mere corruption of law and so not binding by virtue of its own legal quality; nevertheless, even if an enactment is contrary to natural law and so 'unjust', obedience may still be proper to avoid bad example or civil disturbance.

4 *De Republica* III, xxii, 33.
5 *Confessiones* IV.

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