SOME REFLECTIONS ON JURISPRUDENCE

BY

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Preface

This little book contains the substance of a course of lectures delivered by me several years ago, with some expansion and some additional discussions, an origin which accounts for, though it may not excuse, a certain amount of repetition. My hearers were warned that a good deal of what I had to say was heterodox and would probably be repudiated by authoritative teachers of jurisprudence, and the readers of this book are entitled to the same warning. But, whether the opinions expressed in the following pages are sound or not, it may be claimed that they suggest points of view which are worthy of consideration, of more consideration than they have hitherto received.

The title of the book is a misnomer from the analytical standpoint. Only the latter part of it is concerned with the analysis of legal concepts, the subject which Austin regarded himself as professing. Most of it deals with the prolegomena of analytical Jurisprudence, that is, with the meaning of the word 'law' as the subject-matter of Jurisprudence. Though 'law' is the material of Jurisprudence, 'law' is no more a legal concept than courage is a courageous concept. The word Jurisprudence is wide enough to cover this. Thus there is some trespassing into the Philosophy of Law, but only a few prominent legal philosophies are discussed, only such as make contact with Positive Law, and only in so far as they make this contact.[1]

I have to thank my friends, Dr C. K. Allen, Dr D. Daube, Professor Lauterpacht and Sir Arnold McNair for reading the

1 I regret that Dr Friedmann's excellent *Legal Theory* reached me too late to be utilised in the text.

typescript and making very valuable criticisms and suggestions. But it is more than usually necessary to say that this does not imply their acceptance of all or any of the views expressed by the writer.

I have also to thank the proprietors of the *Cambridge Law Journal* and the *Law Quarterly Review* for permission to utilise matter which has appeared in their pages, and the officers of the University Press for their unfailing care and helpfulness.

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I

Jurisprudence and Legal Philosophy

If we look at the papers, say, on the law of contract, set in different law schools we shall see differences in emphasis and we may think some papers better designed than others, but we shall have no doubt but that the papers are set on the same subject. It is very different with Jurisprudence. We shall find the papers set in various schools so unlike that we shall be inclined to doubt whether the different examiners are dealing with the same subject. And, in fact, they are not. 'Jurisprudence' is a most hospitable word. It can be understood to include not only the analysis of legal concepts, which is what Austin meant by it, but also all those topics which are discussed under the rubric 'Philosophy of Law'. Writers on this subject may be said to fall into two groups.

(*a*) Those concerned with the rational basis of law, those who attempt to discover the reason why law is binding on us and what, if any, are the limits on the binding force of law. This may be said to concern lawyers, for if there are limits on the binding force of law the lawyer ought to know about them. They have the further interest that some of these writers have the habit, as we shall see later on, of treating rules which cannot be squared with their views as to the rational basis of law as not law at all. With this point of view they tend to overlap with

(*b*) Those (e.g. Kant) who seek to formulate an ideal system of law, wholly independent of any actual system. To this group belong writers on the 'law of nature'. This seems to be no more in effect than an intuitionist system of ethics, confined, indeed, to those duties which organised society ought, in the opinion of the writer, to enforce on its members. What a man ought to do and what he ought to be made to do are not the same thing.

With the law of nature we shall have to deal later; here it is enough to say that on one, perhaps the most usual, view of it, it is a canon to which the law ought to conform (whether in any particular case it does or does not). With this may obviously be associated the 'science of legislation' (Bentham, *Principles of Morals and Legislation*, p. 324, calls it 'Censorial Jurisprudence'), in simpler language 'law reform', which in the hands of Bentham and his followers is a system of Utilitarian ethics, with the same limitation, to what ought to be compelled.[1]

All this is very different from the 'Jurisprudence' which was Austin's real subject. This was the analysis of legal concepts. That is what Jurisprudence meant for the student in the days of my youth. In fact it meant Austin. He was a religion; to-day he seems to be regarded rather as a disease. He cannot be replaced on his pedestal; the intensely individualistic habit of mind of his day is out of fashion. But it is well to do him justice. Jurisprudence as he conceived it was merely the analysis of legal concepts. It certainly was not a philosophy of law (see Oakeshott, *Politica*, 1938, pp. 103 *sqq.*). It is true that at the very beginning of his work he describes it as the 'Philosophy of Positive Law', but he does not mean by philosophy at all what Mr Oakeshott means by it. When he wrote, the word was commonly used to mean any ordered body of knowledge or supposed knowledge (as it is in the expression 'natural philosophy') and that is all that he means by it. His business is the analysis of legal conceptions, ostensibly as they are to be found in various systems of law, actually as he saw them in English Law, with a little, not very profound, comparison with Roman Law. That is why he came to be called an 'analytical' jurist. Here there is a point to be noted. The theory of law and sovereignty seems nowadays

1 Stammler (*Die Lehre von dem richtigen Recht*, 1926, p. 91) says that the questions for the philosophy of law are three. What is law? How does it come to be binding? What principles should guide the legislator? Neither of the last two is within Austin's conception of Jurisprudence, though on each of them he has something to say.

to be thought the most interesting part of his work; it is, in fact, the only part which people read. This leads to a tendency (see Professor Allen in the first essay in his *Legal Duties*) to treat the theory of law and sovereignty, the imperative theory, as the basis of Austin's claim to be an analytical jurist. But in fact this is not part of his real subject at all. Law and sovereignty are not legal conceptions; they are presuppositions. If we look at the book itself and not at modern restatements, we shall see that very clearly. It is the prolegomena to Jurisprudence. Austin called it *The Province of Jurisprudence determined* and he published it as a separate book.[1] It is an exposition of the notions about which we must clear our minds before embarking on Jurisprudence itself. We can see how he set to work. He had, as has been said, to construct the science which he was to profess. His subject being the analysis of law, he had to determine the various meanings of that word and to make clear the sense with which he was concerned, what he called 'positive law'. Of this he reached the definition 'General Command of the Sovereign'. Incidentally he had to shew what he meant by 'general', by 'command', and finally what he meant by 'Sovereign', which last notion he defined to his own satisfaction though perhaps not to everyone's. For though he claims universality for his conceptions it was long ago made clear that this claim was unfounded.[2]

1 Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (*Harvard Law Rev.* 1941, p. 54), says that 'the first edition' (*sc.* of Austin's *Lectures on Jurisprudence*) 'was published in 1832 under the name of *The Province of Jurisprudence determined*'. But, as the title shews, it was not a first edition of the Lectures, but a preliminary chapter. Incidentally, Kelsen calls the work *Lectures on General Jurisprudence*, but, as published, the title does not contain the word 'General'.

2 It is clear that the Austinian Sovereign does not exist in all States. The fact that in the United States there is no standing body or group of bodies which can make what law it likes is causing impatience in juristic and political thinking, as is noted by Brown (*The Austinian Theory of Law*, p. 163), who thinks it likely to be circumvented. As evidence of public feeling he quotes Professor Burgess. From his long quotation from this writer we may select the following purple patch. 'From the standpoint

Over large parts of the past his propositions were not true anywhere. Over much of the world they are not true now. To get out of his statements what is good we must take him with limitations which he would not have accepted, but, subject to which, he was telling the truth. What he really had in mind was contemporary English Law and primarily an English criminal statute. It is not of course maintained that Austin's is the 'true' or 'real' or 'correct' definition of law. It is obvious that a legal philosophy, a study which takes into account all stages in the evolution of law, all aspects of law (including its goodness or badness) and all rules of conduct which commonly go by the name of law (law of nations, law of nature) will need a much wider definition. All that is contended is that, for the purpose in hand, the analysis of the concepts of developed systems of 'municipal' law in the western world, including the Roman, 'prescribed by an uncommanded commander' fits the facts. It

of political science I regard this legal power of the legislature of a single commonwealth' (i.e. State in the Union) 'to resist successfully the will of the Sovereign as unnatural and erroneous. It furnishes the temptation for the powers back of the Constitution to reappear in revolutionary organisation and solve the question by power which bids defiance to a solution according to law.... From this point of view all the great reasons of political science and of jurisprudence would justify the adoption of a new law of amendment by the general course of amendment now existing, without the attachment of the exception, and, in dealing with the great questions of public law, we must not, as Mirabeau finely expresses it, lose the *grande morale* in the *petite morale*.' He means that it is a bad state of things and likely to lead to trouble. He rightly recognises that to change the Constitution in a way which it does not admit is revolution and not a political act at all. He seeks to avoid this by 'interpreting' the Constitution by leaving out a clause (he calls it an exception) which safeguards State rights. This too is revolution as Mirabeau well knew. Burgess recognises the illegality, but holds it justified by Jurisprudence, by which he must apparently mean a morality, not a science of positive law. This is the same writer, who, alone among American publicists, held that Belgium, by resisting the German invasion in the last war, abandoned her neutrality and thus the action of Germany was entirely proper (see *Law Quart. Rev.* 1917, p. 99). For Burgess as for Germans the *grande morale* is the convenience of powerful communities.

serves well enough for that, but to use it for any other purpose is to invite disaster. A druggist instructs his new half-trained dispenser that he is not to make up any prescriptions containing poisons, but to leave them for his employer. He adds, 'As you may not always know what is a poison, you must note that the poisons on these shelves are the substances in blue bottles.' That is enough for the purpose, but if the apprentice applies the same principle elsewhere, there will be trouble.

II

Current Philosophies of Law and Positive Law

THOUGH the philosophies of law which we have mentioned have, strictly, nothing to do with the analysis of legal conceptions, their exponents use language which tends to obscure this fact. It will be well to pass in review some of the best known among them, dealing only with their relation to positive law: a detailed study of them is impossible in the space available and is not necessary for present purposes.

Duguit,[1] in works of which the best known in this country is that translated by Professor Laski under the title *Law in the Modern State*, wrote primarily of France, but laid down doctrines conceived as universal. For him there is no sovereignty. The basis of public law is public service. This is no longer, he says, an *a priori* formula, but has become the expression of the existing situation (p. 32 of translation). The further consequences of his doctrines are set out and criticised by Brown (*Law Quart. Rev.* 1916, pp. 168 *sqq.*), who summarises them as follows. 'The organs or agencies of Government are justified by the ends they serve. They possess a power, but the justification and the extent of that power must be determined by reference to the public services which are to be performed....The acts that they do, if we are to be guided by precedent...are valid in so far as they promote the great ends for which they exist', and 'The [orthodox] theory affirms that statutory law as an expression of sovereign power cannot be questioned in the courts. The contrary is true in America and promises soon to be true in France.' Duguit's views, as expressions of legal conceptions, and this they profess to be, have been rejected on what seem good grounds, by,

1 For Duguit's legal philosophy, see now Friedmann, *Legal Theory*, pp. 159 *sqq.*

inter alios, Brown, cited above, and Esmein in the later editions of his *Droit Constitutionnel*,[1] but something must be said of them. He shews, clearly enough, that there are communities in which a statute made by the authority with the highest statute-making power is not necessarily valid, and thus shews that there need not be in any community such a supreme legislative power. No one nowadays would disagree with this. Duguit admits (p. 84) that the supremacy of Parliament cannot be disputed in England, and his conclusion is that there is no difficulty in conceiving a supreme legislature with limited powers and that things are tending that way. There is nothing startling in this (though not everyone would agree with the concluding proposition), but the language used is misleading. Professor Laski says (*Introd.* p. xliii), 'We recognise that the governing classes retain power, but they retain power to-day not by virtue of the rights they possess but of the duties they must perform. Their power therefore is limited by the degree in which these duties are fulfilled,' and (*ibid.*) 'Its' (i.e. the ruling class) 'acts have neither force *nor legal value*[2] save as they contribute to this end.' Duguit says (p. 39): 'They' (i.e. the elements of the idea of public service) 'consist essentially in the existence of a legal obligation of the rulers in a given country, that is to say, of those who in fact possess power, to ensure without interruption the fulfilment of certain tasks.' Here the language is that of legal obligation. In fact the writer seems, as Brown notes, not to be clear whether he is talking law or political morality. It is true that Mr Gupta (*Law Quart. Rev.* 1917, pp. 154 *sqq.*) seeks to defend Duguit from Brown's criticism. He says that Jurisprudence is an infant science, that, like those of other sciences, its theoretical principles are gradually worked out by experience and that it is futile to prescribe to a science the way it shall follow. But what is in question is not the progress and direction of progress of a science

1 See, e.g., Esmein, *Droit Constitutionnel Français* (ed. 8, by Nézard), I, pp. 46 *sqq.*

2 Italics mine.

but a confusion of language and, as it seems, of thought, in the work of a certain writer. Law and political morality are different things and it is desirable to eliminate confused writing in scientific work. No doubt the ends for which law exists are important. No doubt the study of these ends may be called a kind of Jurisprudence—Bentham called it 'Censorial Jurisprudence'—but Brown was not disputing this. What he said, and said rightly, was that analysis of law as an existing institution is one thing and criticism of it is another and that confusion results from neglect of this distinction. This neglect led Blackstone (in one passage, but not always),[1] Spencer and Duguit to say, wrongly, that a bad law is invalid. It seems to have led T. H. Green to say, wrongly, that Czarist Russia was not a State.[2] It is not very clear in what sense Jurisprudence is an infant science, but in any case it is not too young to be taught to tell the truth. Professor Laski is much too clearsighted not to see the distinction and he makes the rather grudgingly expressed remark (Introd. *cit.* p. xxv) that while the criticism of Duguit 'has legal validity it is, in sober fact, politically worthless'. What does this mean? If statements are incorrect, the pointing out of this ought to be of some value even in political morality. It is in fact an admission that Duguit's propositions are not statements of law, as they purport to be, or even of politics as an analytical science, but of an ideal political morality. It is true that there is a tendency nowadays to see governments as servants, not as masters, which may be desirable, provided we are clear that they are servants of an ideal, not of a capricious electorate. But that does not justify the language of Duguit.

Duguit held that the orthodox theory that statutory expressions of sovereign will cannot be disputed in the Courts is not true in the United States and bids fair not to be true in France (*op. cit.* pp. 83 *sqq.*). For France it is impossible to say what will happen—many strange things have occurred there since Duguit wrote—but his views were energetically denied by Esmein. In

1 *Post*, p. 34. 2 *Post*, pp. 34 *sq.*

fact Duguit seems to be confusing the 'sovereign' and the executive and the jurisdiction of the Conseil d'État. For the United States the proposition is quite unjustified. It is true that there is in the community no legislative body whose enactments cannot be called into question in the Courts. This, however, shews only that Acts of Congress or of other legislative bodies are not expressions of the sovereign will. They are expressions of a will which is not sovereign. There is in the Constitution a provision that no one is to be deprived of property, liberty or life without due process of law. What this meant when it was first introduced into the Constitution we need not enquire: it has been interpreted as a wide moral principle—the Constitution has many such. The effect is that any enactment of Congress or of State legislature is liable to be called into question before the Supreme Court and declared unconstitutional. That is, there is no sovereign legislature. The written Constitution is the only unquestionable authority and the Supreme Court interprets it. This is, in effect, a provision under which public policy, i.e. current morality (or rather the morality of the Supreme Court), controls legislation, just as, with us, it is used to some extent for controlling contracts. And, as with us, this 'police power', as it has been called, has been very uncertain in its operation. Professor Laski says (*op. cit.* p. xxii) that 'its main tendency in recent years has been to defeat the progress of exactly the type of measure upon the desirability of which M. Duguit would probably himself lay the gravest emphasis'.[1] This shews that the opinions of the Supreme Court, in the field in which they can make their views effective, do not agree with those of Duguit. There would be more disastrous differences if Duguit's principles were really in operation.

It should be remarked that if, as in the United States, a written Constitution can control the legislature, there is no reason why such limits should not be introduced into other Constitutions, even unwritten Constitutions. The result would be that there would be no sovereign legislature. If, in a given case, the House

1 See, for illustrations, Friedmann, *op. cit.* pp. 53 *sqq.*

of Lords decided that the legislature cannot possibly have meant what it clearly did mean, because it was contrary to natural justice, or the social purpose, or what not, and Parliament took no steps, a doctrine might grow that an Act of Parliament might be held void in the Courts as being contrary to public policy, etc. Such a doctrine could arise if, and only if, powerful opinion was in favour of it. But this is not in point. The question is not whether it could happen but whether it has happened. It does not appear to have happened. What Duguit shews is that communities may exist in which there is no sovereign legislature and that the fact that a rule is in statutory form does not necessarily prove that it is valid in law. No one will dispute these propositions, but they are useless for his purpose. They do not in the least shew that as a matter of law (and this is what the passages above cited claim) legislation is controlled by 'social purpose'.

It is an essential part of Duguit's theory, indeed it is its basis, that enactment and decision (*jurisprudence* in the French sense of the word) do not really make law. All they do is to discover or at most formulate it (*op. cit.* ch. 3). They may create subsidiary rules—he calls them 'constructive laws'—to give effect to the 'formative laws', but these they merely find. According to him, what creates these is not natural justice or any ideal, but the common consciousness, what the mass of opinion regards as fit to be law.[1] It is this view which leads him to the conclusion that anything enacted inconsistent with the 'social purpose', of which mass opinion is the test, is not law at all. Of course he gives only a narrow field to these 'formative laws'. In France he finds only three: respect for property, freedom of contract and no liability without fault. He allows to legislation and doctrine great influence in forming mass opinion, so that a statute which in his view was not law when it was enacted may come to be law by conversion of mass opinion. All this has been effectively criticised. This 'mass opinion' is totally indeterminate. If a statute is passed as to which public opinion is evenly divided, what is

1 This is much like Krabbe's *Rechtsgefuehl*, *post*, pp. 13 *sqq.*