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Foreword

> *'"Man is born free, yet everywhere he is in chains": words like these [of Rousseau] gave what might be called the plain chant of natural rights, as Locke had intoned them, a polyphonic charm.'*

The tone of the passage itself is unmistakable: only John Kelly could have written a sentence at once so graceful and so resonant, so replete with learning and so refined in its choice of words. He conducted a lifelong love affair with the English language (among others); he may sometimes have felt with Auden that:

> *Time that is intolerant*
> *Of the brave and innocent.*
> *And indifferent in a week*
> *To a beautiful physique,*
> *Worships language and forgives*
> *Everyone by whom it lives.*

But only sometimes, because he also knew the inadequacy of language itself as a vehicle of feeling and we can glimpse as well in the sentence his passion for music, above all when it was at its most complex and many layered, as in the masterpieces of his beloved J. S. Bach.

All this may seem far away from the ineluctable and mighty issues at the heart of Western jurisprudence with which he wrestled in this, his last book. Yet as he brings before us with his own incomparable gifts of exposition the intellectual struggles of these great men, of Plato and Montesquieu, of Aquinas and Voltaire, of Locke and Bentham, we are repeatedly made conscious by him of how much of all of this is a battle with words.

He had indeed edged away with distaste from the verbal contortions typical of some contemporary Anglo–American jurisprudence and only a severe sense of duty can have compelled him, in the last chapter of this book, to follow some of the writers concerned on to what he describes with characteristic acerbity as 'a sort of course in mental and moral athletics, sweating around the

cinder track of mid-twentieth century linguistic analysis and late twentieth century political issues'.

But his purpose was to give students an accessible guide, hitherto unavailable in English, to the history of legal theory in the West and he was too generous and open-minded a person not to recognize the many adventurous and exhilarating perspectives which modern scholars have given us on basic legal problems. His primary concern, however, was to make us see jurisprudence in its historical setting and, in so doing, he has vividly illustrated the recurrent preoccupation of the thinkers who dominate his text with certain themes. Whether it be the natural law of Aquinas, the *grundnorms* of Kelsen or whatever, we can see in his pages the constant search of writers on law for a coherent framework which explains its part in human life and activity. So too we can observe the haunting of the Western mind by still unanswered questions. What is the justification of punishment for crime? Should the law concern itself with private morality? Can we ensure that law is not simply, as the Marxists once said, a structure to support capitalist and bourgeois values?

In illuminating these themes, he has drawn not merely on his knowledge of jurisprudence over the centuries, but on his wide familiarity with the literature of the classical world and of later eras. He has with astonishing skill painted the historical background which is essential to his main themes and, although he writes deprecatingly in the introduction of his own lack of qualifications as a historian, I think the reader of these pages is likely to be far more impressed by the wide range of his reading and the dexterity with which he has related the development of jurisprudence to the convulsions which have marked millennia of history.

Understandably there was not room for everything. As I read his account of the dispute between the Pope and William of Ockham as to how the Franciscan Order reconciled its ownership of property with its vows of poverty, I wondered if he had got round to reading Umberto Eco's enchanting medieval detective story, *The Name of the Rose*, in which that controversy figures prominently. And there may be other areas—parallels between what was happening in legal theory and in other realms of thought and activity—which he would have found time to expand. But now that torrent of intellectual activity, of scintillating wit and monumental erudition is stilled forever. It is some comfort to know that generations of students will have Kelly on their shelves, keeping fit company with

other great writers who have made all of us who work in the law aware of its part in the history of our civilization.

John Kelly came to University College, Dublin, in 1949 on an open scholarship in ancient classics: a year later I followed him by the same route. But our paths diverged for a while as students, since he continued with the classics, while I moved over to history. It was the dramatic society, I think, which brought us together again: John had an austere disapproval of our activities as time-wasting, but too many of his college friends were involved for him to cut himself off completely with Thucydides and Tacitus. He had, in fact, secured himself the position of prompter in 1949 for a tour to Oxford and Cambridge. As a result he knew *The Playboy of the Western World* by heart and allusions to it were liberally strewn through his conversation over the ensuing decades. Then, as he began to study for the bar, I saw more of him. In those days, the Law Faculty of UCD was a strictly part-time school, the most prominent member of which, Professor Patrick McGilligan, a spare figure with a pure Derry accent uncorrupted by fifty years living in Dublin, had considerable influence on John. His attention was engaged by the Irish Constitution, on which McGilligan lectured, but which was then almost ignored by most practising lawyers. And McGilligan was also one of the first of many people who were to be the subject of John's incomparable gifts as a mimic—always a sign with him, the least malicious of men, of his affection and respect for the target.

The travelling studentship which he was awarded in 1953 brought him back into the classical fold, but with the legal dimension still present. In Heidelberg, he encountered the richness of the German tradition of Roman law studies which was to be another enduring interest. But it was also a time of intellectual and emotional maturing: he had grown up in the stiflingly isolated Ireland of the 1940s and the novel which he subsequently wrote based on this period is a touching and funny account of a young Irishman finding his way in life with the sympathetic assistance of more than one German girl.

His work in Heidelberg resulted in the first of his studies of Roman law which were to bring him an international reputation in that field. The period which followed in Oxford was to reawaken his interest in the Irish Constitution now fostered by Robert Heuston, who supervised a thesis subsequently published under the title *Fundamental Rights in the Irish Law and Constitution*. In

Oxford, he forged many enduring friendships, but a conflict was also emerging which was to dominate his life between the world of learning which he loved so much and the attractions of the plane of action. He returned to Dublin to practice for a time at the bar and found in the Law Library (and on the bench) a rich gallery of figures to add to his ever increasing repertoire of imitations. But the seduction of the academic life was still potent and he returned to Oxford in the 1960s as a fellow. It was again a crucial period in his life: he married Delphine and his happy and rewarding life as a husband and father began.

Later in the 1960s he returned to UCD to lead the revitalized and full-time law faculty, built up largely through the dedication of its then Dean, William Finlay. There is not space to detail John's contributions to the establishment of Irish legal studies on a radically new footing: one project which must be mentioned, however, is the launching of the new *Irish Jurist*, on which he lavished so much time and thought.

But the world of affairs still beckoned. His career as a politician began, first as a senator, then as a Dail deputy and successively as Chief Whip, Attorney General and Minister for Industry and Commerce. He brought to Irish political life a gift for oratory, coruscating wit and sharpness of debate which was almost without equal since the foundation of the state. More importantly, he fought against some of the least endearing features of Irish life: hypocrisy, double standards and self-righteousness. Political allies and opponents alike acknowledged his honesty and integrity and his decision to leave political life was widely lamented.

What public life gained by John's dedication, the academic world lost: yet even when he was most fully preoccupied by politics, he continued to produce work of outstanding quality. In particular, *The Irish Constitution* was the most comprehensive work yet published on its subject and reflected at many points the practical knowledge he had gained from his years in active politics.

His novel about Germany had been published under the banal title of *Matters of Honour*, the publisher's preference over John's more allusive choice, *Heidelberg Man*. There was another, which I read in typescript more than thirty years ago, and which portrayed with entrancing accuracy the life of the young Dublin middle class in those days. I am not sure why it was never published and I hope some day to see it in print.

At least we have in his writings much by which we can remember him. But nothing can bring back those darting, mischievous glances behind the glasses, the talk bubbling with fun and an endless relish for the absurdity and oddness of life itself. He was one of those rare people who seemed to brighten a room when he came in and, when he was taken from his family and friends with such cruel abruptness just a year ago, the many who loved him could only console themselves with the knowledge that life would have been so much poorer if they had not known him. And even someone as self-critical as he must have been content with what he had achieved: he was entitled to be at rest.

The bright day is done,
And we are for the dark

18 December 1991 RONAN KEANE

Preface

This book is an attempt to offer students of law and politics a guide of manageable size to the history of the leading themes in the legal theory of Western civilization.

The idea of writing it came from my own teaching experience at Dublin. Under the rubric Jurisprudence, or Legal Theory, lecturers are notably freer to choose their own material and method than when dealing with the practical parts of the law. The lack of a fixed conventional content in the subject can be seen in the very different plans adopted by those who have written textbooks in the field, as a quick glance at Dias, Friedmann, Lloyd, Paton, Salmond, and Wortley will demonstrate. My own preference is to try to take my class through the history of the main themes of legal theory, starting with the Greeks and going up to the present day. But the approach of most of my colleagues in the common-law world is different. They prefer to concentrate on contemporary legal theory, on the doctrines of legal philosophers still alive, or not long dead.

This conception of jurisprudence, at any rate as a subject in a law-school syllabus, comes through for instance in an examination paper which I recently saw set for the Final Honour School (i.e. final examination for the primary law degree) at Oxford. There were sixteen questions, of which candidates were required to answer three. The questions, as one would expect, were mostly of formidable sophistication, and I could only feel glad that I did not myself have to satisfy those Oxford examiners. Anyone to whom they awarded a first-class mark must certainly have had a first-class brain and received first-class tuition. On the other hand, it would have been possible for the candidate, no matter which three questions were selected, to write first-class answers even if suffering from the delusion that the world began around the year 1930.

I think this is a pity. I am not a historian, and today I am sorry that I did not try to make myself one by private reading in my student years. I would not even attempt to explain the reasons why a sense of the past, of the remote roots and the patterns of growth of our world and the ideas which govern it, is important for a student

if he is to be an educated adult and citizen of his country. But I believe it strongly; particularly in the case of law students, whose discipline becomes every day more specialized and more engrossed by modern statute-based mechanisms, operated by a technique which needs be learnt only once. The jurisprudence they are taught ought, therefore, to give a humane foundation to what will be their life's profession; instead of which, it seems to me, they are nowadays mostly given a sort of course in mental and moral athletics, sweating around the cinder-track of mid-twentieth-century linguistic analysis and late twentieth-century political issues. If one needed a graphic representation of this historical parochialism, and if one were permitted to seek it in a different dimension of existence, I would propose the well-known and brilliant Steinberg illustration for a 1976 *New Yorker* cover: it is the world seen from the *New Yorker* offices: in the foreground Ninth Avenue, complete with cars and pedestrians, litter bins, traffic lights, delivery vans, the entrance booth to a parking lot; a block further west, a corner of Tenth Avenue is visible, with a gas station; then the Hudson River, with the funnel of a moored ship; at the far side New Jersey; then a bleak plain, relieved by a few vague cactus-shaped mountains, representing the rest of the United States, with Washington, DC, Texas, and Chicago perfunctorily pencilled in; then a stretch of water, smaller than the Hudson River, for the Pacific Ocean; and finally three low, disconsolate humps labelled 'Russia', 'China', and 'Japan'.

Of course there are already excellent textbooks which do not neglect the historical dimension of legal theory: I have relied heavily on Friedmann's *Legal Theory* and Lloyd's *Introduction to Jurisprudence* in advising students on reading, as well as on H. F. Jolowicz's excellent *Lectures on Jurisprudence*, which it would be a well-deserved tribute to their author's memory to expand and update. But what I would have wished for, and in the end have tried to produce myself—though a trained philosopher or historian would have been far better qualified to attempt it—is something which would have performed at however humble a level for legal theory what Bertrand Russell's *History of Western Philosophy* does for that subject: namely, a simple, chronologically sequential, account of the legal theories produced by, and in their turn influencing, the main epochs of Western history.

When I started work, no modern book of the kind seemed to

exist in English, apart from the translation of C. J. Friedrich's too condensed *Geschichte der Rechtsphilosophie*. There were, indeed, some in German, Italian, Spanish, and Dutch; but for various reasons none of them would have met the case even if translated. Guido Fassò's *Storia della filosofia del diritto* is the best of them; but it is a three-volume work, therefore too grand in scale for a student; it is in places too Italocentric for readers of other nations; above all, it is twenty years old, and so has caught only a few drops from the cataract of Anglo-American jurisprudence of recent years. After I was well launched, I discovered the Swedish scholar Stig Strömholm's *Short History of Legal Thinking in the West* (1985). This has been something of a lifeline for my students; but there is virtually no quotation from the actual writings of significant figures; there are no footnote references to sources or further reading; often he seems to be signalling to people of his own level of sophistication, rather than to students with only dim notions of what distinguishes the seventeenth century from the twelfth. Above all, Strömholm draws his history to a close in 1900. There is, indeed, a lot to be said for not attempting the history of one's own age; Bertrand Russell, for one, evidently thought so, as his own book's second edition (1961) does not so much as mention Wittgenstein, who died ten years earlier; the last two philosophers he discusses, William James and John Dewey, were born in 1842 and 1859 respectively. All the same, even at the risk of inflating what a later age may dismiss as trivial or ephemeral, or neglecting something whose true status I have missed, I think I should at least have a shot at telling students what is actually going on in the name of jurisprudence.

This brings me to the first of a few personal explanations. This book is divided into ten chapters dealing with ten slices of the time separating Homer's world from that of Gorbachov. The last of those ten chapters, which is a good deal longer than most of the others, tries to cover the years since the middle of the twentieth century. But it is not intended to be, and cannot be, a complete, still less a critical, survey of Western jurisprudence in the last few decades. Such surveys exist in several excellent contemporary works, and I do not attempt to compete with them on what would be a necessarily miniature scale. So several of the figures familiar today on legal theory's Ninth Avenue will not be found between these covers, or will be so small as to be, perhaps, unrecognizable.

Secondly, I have certainly not succeeded in mentioning all the important subjects of legal theory in my ten successive periods. The more I worked on this modest book, the more I came to feel the boundlessness of the theme; and that an entire liberal education (and an excellent undergraduate honours course), extending beyond law into general history, philosophy, politics, economics, anthropology, even aesthetics, could be built around the history of legal theory. A work adequate to anchor such a course could easily be projected on a scale sufficient to absorb several lifetimes and fill many volumes. But in a book of barely 500 pages, something has to give. I have tried in each chapter—on the Russell model—to offer, after a short sketch of the general and intellectual history of the age, an idea of what was felt and written about the main problems of law. Therefore (although some themes emerge only late, while others drop out of sight earlier) I try to follow through, in separate sections in each chapter, matters such as the basis of the state, the source of the ruler's authority and of legal obligation, the relation of custom and legislation, the idea of natural law and of natural rights, the rule of law, the concept of equity, the essence of justice, the problems arising from the value of equality, the nature of law itself, the status of property, the proper object and scope of criminal law, the theory of a law to govern nations, and one or two more. My array of themes, while I hope not arbitrary or eccentric, is of course selective; and I might, I suppose, have added to this list matters such as legal personality, the theory of contract, the theory of succession, the theory of evidence . . . But where to stop?

Thirdly a word about the material I have used. In the early chapters there is virtually nothing consciously composed as 'legal theory', because such writing scarcely existed before the end of the Middle Ages. Therefore, in order to present the legal 'thought' of early Europe, one has to reconstruct it by trawling the actual practice of law or state, or the work of men whose main purpose was to theorize not about law, but about society, or ethics, or theology, or politics. Indeed, except perhaps for the pages on the twentieth century, a lot of the material has as much claim to be ranked under the history of political as of legal thought. But a clean separation of those areas is not possible. If one looks at the Carlyles' massive *Medieval Political Theory in the West*, or Sabine and Thorson's *History of Political Theory*, one will see that law, especially what we could classify as constitutional law, is the

backbone of their respective stories, and could not be excised without the collapse of the whole. Ideas of fundamental law and rights, of the social contract, of the rule of law, of the limits of state power, are central to the interest of the political scientist, but no less so to that of the jurist.

Lastly, while I have tried to offer a picture of legal theory in Western history generally, I am conscious of how heavily English-language jurisprudence predominates as the twentieth century progresses. I suspect this has something to do with the very generous staffing of British and American law schools compared with those of France, Germany, or Italy. But it may have to do also with deeper causes in the philosophical or political traditions of the common law and civil law worlds respectively. On this level there appears to be—amazingly in an era of progressive European integration—a barrier greater than mere language differences could explain between Anglo-American jurisprudence and that of the European continent. For instance: in the same year, 1985, there appeared both the fifth edition of Lloyd's *Introduction to Jurisprudence* and the fourth edition of Helmut Coing's *Grundzüge der Rechtsphilosophie* ('Outlines of Legal Philosophy'). In his chapter on contemporary theory, Coing says 'particular attention should be drawn to the significant contribution made above all by Niklas Luhmann towards establishing a theory of law' (this is his legal sociology, which he then describes). But Lloyd, although his Index of Authors contains about 800 names, has no mention whatever of Professor Luhmann. Conversely, Lloyd naturally gives huge prominence to H. L. A. Hart and a good deal also to Ronald Dworkin; but in Coing's work Hart gets four lines, Dworkin not one. To the Continental eye, it is the writers of the common law world who are out of the main stream: an Italian reviewer of *The Legal Mind: Essays for Tony Honoré* (1986) wrote that, on entering the world inhabited by the contributors of papers in the field of jurisprudence in this collection, the Continental lawyer felt himself as an Alice in Wonderland, and wondered if much was to be gained by Anglo-Saxon legal science through persisting in its 'traditional splendid isolation from Continental legal experience'.

J.M.K.

The book, apart from some footnote references, was virtually complete before John Kelly's sudden death. We had talked and corresponded about it. The following extract from his last letter to me helps to put his aims in perspective.

I am sorry if my preface gives the impression that I am critical of Anglo-American jurisprudence of recent years. On the contrary, I think it is an astonishing flowering, and I only wish my own wits would stretch to fully understanding it all and perhaps being able to take up this issue or that. My problem is that the growth is so luxuriant that in the modern jurisprudence course it seems to blot out everything else; and my book is an unpretentious effort to adjust the student's perspective. Perhaps there is too much sailing under the flag 'jurisprudence' and it might more rationally be divided into two teaching subjects: (*a*) history of legal theory; (*b*) modern philosophy of law. At any rate I think law students should not graduate without knowing a little about how we arrived where we are. *Vixere fortes ante Hart et Dworkin multi.*

He was especially keen that I should read the book and advise him on it. I have accordingly made a few corrections and added some references, but the views expressed are wholly his.

TONY HONORÉ

The publishers would like to thank Tony Honoré for having so willingly taken on the task of reading and checking the typescript before sending it to press. They would also like to thank Mr Ernest Metzger of Brasenose College, Oxford for successfully tracking down some several dozen references which were missing from the author's last draft.

Thanks are also due to Faber & Faber for their permission to quote from *In Time of War, Commentary from Journey to a War* (1939), by W. H. Auden.

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I

The Greeks

Greece as a Starting-Point

The reason why Greece has a special place in the history of civilization is not merely that most departments of literature and the visual arts were there raised to levels which later ages agreed to regard as classical, that is, as permanent standards of excellence. It is also because the Greeks were the first people—at any rate, the first of whom Europe retains any consciousness—among whom reflective thought and argument became a habit of educated men; a training for some, and a profession or vocation for others, not confined to observation of the physical world and universe—in which the Egyptians and Babylonians had long preceded them—but extending to man himself, his nature, and his place in the order of things, the character of human society, and the best way of governing it.

Other ancient peoples had contained priests and prophets whose teaching or whose poetic insights included perceptions of human nature and moral precepts; a lot of the Old Testament of the Jews, for example, could be put into that category. Similarly, other ancient peoples, since they had laws, must have had some capacity to reason about the function of a law and how best to make it achieve a particular purpose; this can be presumed of the civilizations of Mesopotamia, from whose ruins the great code of the Babylonian King Hammurabi (about 1800 BC) and the laws of Eshnuna (about 200 years older still) have been excavated. This epoch antedates the high period of Greek civilization by roughly 1,500 years. Nevertheless it was among the Greeks that the objective discussion of man's relation to law and justice became an activity of the educated mind and was recorded in a literature which has been part, ever since, of a more or less continuous European tradition. It is therefore with the Greeks that the history of reflective jurisprudence in the West, or European legal theory, must begin.