Introduction to Legal Theory

Third Edition

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INTRODUCTION TO LEGAL THEORY

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To Chris, Rachel and Rowena

PREFACE

THIS book aims to present a short guide to some of the most significant aspects of that very large part of jurisprudence which has to do with legal theory. Its purpose is to introduce some major features of the development of juristic thought, and to provide a sound understanding of the work of some principal contributors to this field. To this end the book should certainly be regarded as a primer and not as a reference volume. Of course, the following chapters necessarily contain a considerable amount of detail bearing on certain aspects of this very wide area of study. What is of paramount importance, however, is not so much the learning of such detail as its creative interpretation. A number of differing approaches to legal analysis and the views of a limited number of jurists will be examined and compared in a manner which, it is hoped, will serve to lend some degree of continuity and cohesion to the reader's study.

An introductory primer such as this must try to avoid too great a simplification of the subject-matter, for despite the initial attractions of simplicity and ease of comprehension, the reader's needs would not ultimately be fulfilled by deliberate avoidance of difficulties. The general introductory chapter which prefaces the following survey of legal theory is designed to anticipate some problems which are commonly encountered in jurisprudential study as a whole. The significance of some observations in that chapter will be immediately apparent. For the rest, the reader may on occasion find it helpful to refer back to these introductory remarks in the course of later chapters. Particularly recurrent problems alluded to are those of definition and of the comparison of differing approaches to the analysis of law.

In the second edition of this book the text of the first was substantially revised, and two new chapters were added on subjects which have an obvious claim to the attention of students of legal theory. Chapter 3, which remains in this third edtion, deals with some significant practical contributions made by natural law doctrine to the solution of some acute legal and moral problems arising out of the

so-called "grudge informer" and allied cases in post-war Germany. Partly in response to student demand and partly with a view to completeness, a new section now appears in this chapter dealing with some characteristics of the Nazi and Fascist systems of order. It is all too easily assumed that the presence of iniquitous laws in a system taints the whole order, whereas in fact significant differences can be detected even in a brief comparative examination of some major features of these two orders, both tainted, as many would say, by an unacceptable ideology.

Chapter 9, the other major addition to the second edition, has also been slightly expanded. Chapter 2, now called "Positivism and Natural Law," gives a fuller treatment of legal positivism; furthermore doctrines of natural law are not now represented, as they tended to be in earlier editions, as being set on a collision course with legal positivism—despite appearances which are apt to be given by some of the sources cited in Chapter 3, "The Dichotomy in Practice." The order of Chapters 5 and 6 has been reversed, since it is more convenient to examine Hart's contribution to legal theory against the full background of preceding work, including notably that of Kelsen. Hart's own work has been treated in an important new series of essays, and those which are the most useful for the purpose of this introduction are cited in Chapter 6.

A new feature of this third edition is the inclusion of a short list of suggested further reading at the end of all but two of the chapters. These lists are certainly not intended as full bibliographies, rather as lists of material from which the reader may expect to derive further benefit after having read the chapters of this book. To give no such suggestions at all would have failed to respond to widespread student demand; to give a great many more might have led to disproportionality, given the confines which must of necessity be placed on an introductory book such as this.

Though this book is essentially a primer, it is designed to enable a reader to use it as a self-contained course if his timetable so dictates. Though any study of legal theory will clearly benefit from the ability to draw examples from all aspects of the content of laws, the approach here adopted assumes none but a rudimentary knowledge of legal systems.

The author wishes to repeat his particular gratitude and indebtedness to Emeritus Professor D. R. Seaborne Davies for his advice and encouragement in the preparation of the first edition of this introduction; also to Mr. C. F. H. Tapper of Magdalen College, Oxford, who read the draft of the first edition and whose helpful comments were most valuable. In preparing the present edition I am also grateful to Dr. T. C. Hopton of the Department of Politics,

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CONTENTS

CHAPTER 1

GENERAL INTRODUCTION

Jurisprudence and legal theory

IT is easier to say what jurisprudence is not, than to say what it is. The definition of any area of study is useful only insofar as it illuminates and does not constrict. It is always tempting to ask for definitions of areas of law or legal study. But attempts to meet the demand may be at best full of preconceptions and at worst positively misleading.

Among the many dangers inherent in the search for definitions, two are particularly relevant to the present study. First, definition may precede adequate knowledge of the subject-matter sought to be defined, and misconceptions may be formed at the outset. Second, and just as serious, the definition presented may in turn lead to the imposition on the matter defined of artificial limits not corresponding to reality.

This book does not cover the whole field of jurisprudence. Its concern is with legal theory, with approaches which have been taken to the description and analysis of the essential constituent elements in the phenomenon "law." Nevertheless, the study of legal theory is but one aspect, albeit a major one, of jurisprudence; and the introductory remarks in this chapter may therefore be of assistance in other jurisprudential studies which are not within our present compass. A hard and fast distinction between jurisprudence in general and legal theory in particular is not truly tenable. Based merely on the meanings of these two terms, it will fail to illuminate the nature of the respective subject-matters. Nor will it be fruitful to attempt to differentiate legal theory from general jurisprudence on account of their respective contents. While jurisprudential study may be made of subordinate legal concepts such as possession, negligence and corporation, the concern of legal theory is also centred on a legal concept; namely law itself. Be the analysis of the nature of law as a whole or of particular legal concepts within it, too many features are common to both types of analysis to justify any distinction sought to be drawn between them.

Broadly speaking, legal theory involves a study of the characteristic features essential to law and common to legal systems. One of its chief objects is analysis of the basic elements of law which make it law and distinguish it from other forms of rules and standards. It aims to

distinguish law from systems of order which cannot be (or are not normally) described as legal systems, and from other social phenomena. It has not proved possible to reach a final and dogmatic answer to the question "What it law?" or to provide exclusive answers to the many questions which have been posed about its essential nature.

The claim of a course in legal theory is not that it produces conclusively definitive answers, rendering redundant any further investigation. Its value lies, rather, in a study of the light which juristic work has shed on the distinctive attributes of law. An examination of the relative merits and demerits of some principal expositions of the subject, focussing attention on their points of strength and weakness, is a convenient method of assessing the varying results. Such conclusions as are expounded in the following chapters arise not from any attempts at exclusive definition. They spring, rather, from the juxtaposition and comparison of a variety of legal analyses, differing in nature but often equal in merit.

Some problems of definition

The definition of the area of study entailed by legal theory is but a minor issue when set among the multitude of problems of definition which have confronted jurists in the development of their analyses of law. The variety of contexts in which the term "law" may suitably be employed is too great to allow of one definition of that concept to the exclusion of all others. For instance, in each of the following expressions the word "law" signifies something different; the Law of England, International Law, the laws of a club (usually called its rules). A sociologist investigating the context and operation of law (or a system of it) might take any or even all of the areas in which "law" is used as the objects of his own inquiry. One of the main tasks of legal theory is to mark off alternative usages and to elucidate the characteristics of "law" incident to each. For the jurist or legal theorist, the existence of a number of accepted but differing usages affects not the breadth of the area of inquiry but its very nature.

An exclusive definitive notion of the nature of law may be too restricted to be of use outside the terms of reference of the writer who adopts it; or else too general a definition may, in an attempt to satisfy everyone, satisfy none.

The conceptual nature of law prevents its susceptibility to forms of definition commonly used elsewhere. First, a form of definition known as "ostensive" definition may be employed, for instance, defining an elephant by pointing at one. Secondly, when a thing is being defined, the general category to which it belongs may be first outlined, and the particular species to which it belongs within the

general category may then be marked off. This form of definition is known as definition *per genus et differentiam*. An elephant, for instance, may be defined by first allocating it to the general category of mammals, and then further specified by a description of its particular characteristics, a trunk, large feet, a tail and so on.

If this form of definition were suitable in the case of law, debates about the essential nature and characteristics of that concept would not have been pursued as they have been. Most accounts of the nature of law and legal phenomena consist, not of definitions, but rather of characteristic descriptions. Such is the nature of law that it is impossible first to outline a general category to which it belongs, and then to specity the distinguishing features of law which mark it off and indicate its particular province within this general category.

Difficulties of precise definition are further compounded when it is realised that disputants in this field are frequently moved by certain (and sometimes uncertain) social or ideological reasons when advancing their suggestions as to the nature of law, and are not concerned only to achieve a logical analysis to the exclusion of relevant human and social values. The term "law" is so wide and can be employed in so many different contexts that different jurists will frequently, in reality, be talking about different things. Their opinions may vary according to the objects they have in mind, their background, their education and the social, political and economic climate in which they work.

That it is not always the same thing which is sought to be defined in differing analyses of the nature of law may sometimes be far from obvious. The student of legal theory can find it difficult to assimilate approaches which may appear as different as chalk from cheese. If one essential distinction is borne in mind, however, much confusion may be avoided. In any comparative study of legal theory, a distinction must be maintained between the character of law and the content of law, or rather of laws. Separate (though related) consideration must be given to "law" in a conceptual sense and to "laws" in the sense of individual legal rules. Some analyses of the nature of law are obscured by want of this distinction. Some criticisms of these analyses have themselves fallen into this very trap. When the same word may be used to refer to aspects of the essential character of law and also to the specific content of a law or legal rule, problems of definition are compounded.

Classification in legal theory

Not unassociated with the desire to define or to delimit the ambit of legal theory and the concept of law itself is the habit of believing that

the views of a particular jurist are adequately presented by the device of labelling him under some general description of a class of jurists, classified by some trait or sympathy prominent in their works. Schools of thought and general movements in thought there certainly are. But Mars is hardly described by merely stating that it is a planet in the solar system. Nor is the solar system described by a list, however long, of its major members. Here name-dropping serves no worthwhile purpose. Without a discussion of their context and the reasons which underlie them, a mere list of cases decided by the courts on a particular topic throws no light on the topic itself. Similarly in legal theory, a mere catalogue of the names of jurists who have contributed to the discussion of some particular problem adds little, if anything, to a worthwhile exposition and explanation of the problem itself.

It is true that, for the sake of convenience and easy reference, some major surveys of legal theory adopt general classifications of juristic work. Headings which are frequently encountered include natural law theories, analytical positivism, modern realism, sociological approaches, historical approaches, and so on. Students are warned, however, to avoid the pitfall of believing that their task is done by memorising in tabulated or similar form a list of juristic works alongside the titles of general classifications. That should come, if at all, at the end of their studies and not at the beginning. For the purpose of fitting in pieces of the jigsaw-puzzle once we have gone some way towards gaining an overall picture of the subject-matter to be examined, such elaborations may be useful to the extent that they are illustrative, but to that extent only. It may well be found that many, if not most, jurists may ultimately be included within a particular category or movement in thought. But to assume that the work of a jurist should display certain features which typify his "classification" would be to do him a disservice. That would be to put the cart before the horse. It is of foremost importance to examine what a jurist has actually written and of only secondary significance to know the classifying term which commentators have subsequently attached to his views.

Variations in approach

It is a remarkable fact of legal theory that so many different ideas, so many different forms of expression, have been used to describe what might appear to be one and the same thing. When we commonly refer to law, a readily understandable meaning is usually attached to what is said in typical contexts such as "What is the law on this

matter?" or "I am studying law." Why, then, all the discussion about what law is?

The diversity of opinion comes from persons intimately connected with the law amongst whom a degree of consistency might be expected. One explanation of the absence of such consistency lies in the fact that the analysis of law differs from the types of analysis employed in the natural sciences. A principal reason for this difference is to be found in the relationship between methods of investigation and the character of the subject-matter to be investigated. The distinction between prescription and description must be mentioned here, though this distinction will not be examined in detail until the following chapter.

The formation of laws is a purposive and prescriptive task. A prohibitory or empowering law is passed by a legislature for a certain reason and with a certain purpose behind it. Furthermore, this regulation of the conduct of people is itself operated by people. The accounts which are given of this enterprise and of the creature, law, which thereby comes into being, are the result of description. Put shortly, the legislator prescribes and the jurist or commentator describes or refers to the effect of what the legislature has done, in the course of his wider description of legal phenomena as a whole. The legislator (used here to refer to all organs of a legal system with lawmaking power) is no doubt concerned with past, present and future circumstances which condition the purpose behind his actions. His primary concern is, however, the prescriptive task of saying what shall or ought to happen, the description of circumstances in the background of his laws being of preliminary importance only. The legislator may, indeed, be quite unconcerned with anything but the making of a new law, though in practice such a lack of concern will be infrequent.

The methods of investigation adopted by the jurist engaged in the task of describing legal phenomena are necessarily conditioned by the nature of the subject-matter to be examined. With reference to this feature of the analysis of data the task of the jurist or legal theorist differs fundamentally from his opposite number, the expositor or commentator in the field of natural science. Chemistry, for instance, stands for the methods of investigation employed by chemists, and for the principles of matter which are elucidated by these methods. The objects under scrutiny are physical, in one form or another of physical existence as specific entities. Law, on the other hand, is not synonymous with legal science. Nor is law a thing or a physical fact which lends itself to the analytical treatment used in the natural sciences. Its essentially prescriptive character precludes such an approach.

Much the same distinction can be made between legal theorists (or jurists) and sociologists who take law or an aspect of it as their object of inquiry. The physical environment within which law functions with all its pressures, demands and responses, can be described in factual terms. But the characteristic nature of the concept "law" itself does not (subject to some jurists whose divergent views will be considered in due course) lend itself to such treatment. The jurist must investigate the prescriptive nature of law. A firm conception of the nature of the object of investigation, which may thus be supplied, is essential to the usefulness of the sociologist's inquiry.

Opinions vary as to the nature of law, the reasons for its existence as a social phenomenon, the characteristics which differentiate it from other forms of regulation and from other institutions of society, as to the place of morality in the law, as to the part which physical force does or ought to play, as to the distinguishing characteristics of those who are or ought to be legally authoritative, and so on. As mentioned, the term "law" may refer both to the nature of a social phenomenon and also to the actual provisions of a legal system whether generally or individually. This variability in meaning, together with the widely varying backgrounds and purposes of writers who have tackled problems associated with the nature of law, has had a considerable influence on the great variety of methods which have been adopted in the analysis of the nature of law. Moreover the connection which each writer has with the operation of a particular legal system, with the creation of laws or with their administration as a practitioner or legal official, or with the teaching of law, or with the study of its nature or of philosophies concerned with law, may exercise some considerable bearing on the type of account which is given. No jurist can conceal his education, his social philosophy, or his ideology forever; nor do many seek to do so.

The ideologies or value-systems underlying some of the theories to be treated in this book will be obvious. The clearest example is Marxist doctrine which has given rise to a concept of law, or of its purposes, directly based on a political philosophy. The more implicit motive forces behind theories of law were summed up in the memorable phrase of the American jurist Oliver Wendell Holmes as "inarticulate major premises." The function of law as a means of social regulation inevitably entails a conditioning of legal theory by values which are inherent in the structure of a particular society or which are held by a particular commentator.

Hart has commented on the remarkable number of formulations which have at one time or another been offered in explanation of the nature of law.[1] Understood in their context, he says, such formula-

[1] Hart, *The Concept of Law* (1961, Clarendon Press, Oxford), pp.1–6.

tions can be both illuminating and puzzling. The light thrown by each on the object of study may dazzle us so much that other features are simultaneously obscured. Jørgensen[2] takes this observation a stage further when, after having said that "the variants have been innumerable in consequence of the fact that the various authors or schools have emphasised one each of the many perspectives which may be applied to legal phenomena," he continues:

> "To the legal scientist it may seem natural to consider law as a system or norms, whereas to the politician it may seem reasonable to take law as a means of governing and to look on the rules of law as sanctioned orders or imperatives. No doubt it will seem strange to many at first glance that law has not only none of the firm and close contents which most people imagine, but has even no constant form. It is, however, the general attitude of probably all sciences today that our perception is sporadic and determined by individual interests, that it is impossible, therefore, to give an exhaustive description of any complex of phenomena observed, but that the description will depend on the interest it is to serve and on the approach accordingly chosen."

Another Scandinavian writer, Olivecrona, sheds further light on the problem of defining something which is certainly not tangible or visible, as is the case with law, and the nature of which is at first relatively unknown.[3]

> "A difficulty immediately appears when we propose to elucidate the nature of the law. That is how to avoid circularity. The object of inquiry is said to be 'the law' of a modern community. But does not this imply some knowledge of what the law is? How else could any object of inquiry be designated by this expression? But then the inquiry seems to presuppose previous knowledge of its object. We are apparently caught in a dilemma. One seems to be unable to define the object of investigation without clearly already being familiar with it. Not surprisingly, therefore, works on the nature of law often begin with a definition of the concept of law. If a definition of law is not proffered, a concept of law is usually presupposed as a necessary starting point."

Where, then, can a starting point be found at which to commence our investigations into the nature of law? Olivecrona continues:

[2] Jørgensen, *Law and Society* (1973, Akademisk Boghandel, Aarhus, Denmark), pp. 4–5.

[3] *Law as Fact* (2nd ed., 1971, Stevens and Sons, London), pp. 1–6.

"It should be possible here, as well as in other branches of science, to define the object of inquiry without anticipating the result. This means framing the questions without making any assumptions concerning the answer.... The common language and the content of the common mind may serve as a starting point for our investigation. We have some immediate knowledge of things just as people had some immediate knowledge of the celestial phenomena from which the study of lightning once began. We therefore have the necessary factual basis from which the inquiry may proceed.

"The course of the inquiry may be set in different directions. One possibility is to study the common mind itself by analysing its notions and tracing their history. This could lead to a more extended knowledge of our ideas concerning 'the law' and the language used to express them. The object of the inquiry could be described as legal ideology. Another possible course is to go beyond the common mind and ask what empirical realities we find where the legal notions are applied. This inquiry is not concerned with ideology but with objective facts.... A third course of inquiry would be to begin with the theories about the nature of 'the law' and try to ascertain the content of their truth.... Of the three courses of inquiry the last one offers certain advantages. It is better to start with the more precise ideas of acute and learned jurists and philosophers than with the more vague notions of the common mind. The point of departure will then be the present position of legal theory."

Though for the moment enlightening when the variety of approaches to the analysis of the nature of law is being considered, the views of Olivecrona will be examined in Chapter Five to see whether he, too, is not making some inarticulated and maybe questionable assumptions.

The problem of the nature of law is rendered even more remarkable when we are reminded that it has provided a source of learned discussion among distinguished lawyers and philosophers for such a very long time—certainly from the early Greeks onwards to the present day. One writer has offered a solution to at least a considerable part of the problem of differences in juristic attitudes.[4] He suggests that variations in approach and some of the major disagreements amongst jurists are attributable to a failure to appreciate the relationship between what he calls "law-concepts," "law-ideas" and "law-theories." The basic concept of a writer's jurisprudence or what,

[4] King, "The Concept, the Idea and the Morality of Law" (1966) 24 C.L.J. 106.