

EUROPEAN STUDIES IN LAW

9

The Nature of Law

Thomas Glyn Watkin



NORTH-HOLLAND

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by

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PREFACE

The ideas presented in this volume first came to me shortly before the start of my last session as an undergraduate at Pembroke College, Oxford, where I was privileged to be tutored by Mr. J.M. Eekelaar. They developed slowly during the course of that session and the following year when I was studying for the degree of Bachelor of Civil Law. I did not, however, have the opportunity to bring them to fruition until I became a lecturer in the Department of Law at University College, Cardiff, since when I have been able to devote two entire summers to research into them and a third to committing them to paper. I wish to thank Professors L.A. Sheridan and H.G. Calvert for the faith and trust which allowed me to disappear from the college during those summers and pursue my own course of study with no questions asked. I hope the results justify their enlightened policy.

When the draft was complete, my father, Mr. T.G. Watkin, read it in holograph and saved me from numerous errors of style. For that help, and for his assistance in compiling the index, I am deeply grateful. My thanks are also due to Mrs. Elizabeth Riley who typed both the original manuscript and the final camera-ready copy, as well as to North-Holland Publishing for the assistance given in preparing the final draft.

Over the years, I have received much encouragement from friends and colleagues who have shown interest in my work; I cannot mention them all by name but I wish to acknowledge my debt to them here. My greatest debt, however, is without doubt to my parents, who provided the home in which virtually the whole of my work was done and without the support of which it could not possibly have been done. Any achievement is as much theirs as mine - although any faults are entirely my own - and to them, therefore, this volume is rightfully and respectfully dedicated.

Cwmparc,
September 20th, 1979

T.G.W.

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<u>CLH I</u>	<u>Continental Legal History Vol. I: General Survey.</u>
<u>CLH VI</u>	<u>Continental Legal History Vol. VI: History of Continental Criminal Law (Von Bar et al.).</u>
D'Entrèves, <u>NL</u>	<u>A.P. d'Entrèves, Natural Law.</u>
Devlin	<u>Sir Patrick Devlin, The Enforcement of Morals.</u>
<u>ELO</u>	<u>A.S. Diamond, The Evolution of Law and Order.</u>
Freud, <u>CW</u>	<u>S. Freud, Collected Works.*</u>
Fuller, <u>ML</u>	<u>Lon L. Fuller, The Morality of Law.</u>
Hart, <u>CL</u>	<u>H.L.A. Hart, The Concept of Law.</u>
Hart, <u>LLM</u>	<u>H.L.A. Hart, Law, Liberty and Morality.</u>
Hoebel	<u>E.A. Hoebel, The Law of Primitive Man.</u>
<u>ILS</u>	<u>J.D.M. Derrett (Ed.) An Introduction to Legal Systems.</u>
Jung, <u>CW</u>	<u>C.G. Jung, Collected Works.</u>
Kenny	<u>Anthony Kenny, Wittgenstein.</u>
Leach, <u>LS</u>	<u>E. Leach, Levi-Strauss.</u>
Levi-Strauss, <u>SSM</u>	<u>C. Levi-Strauss, "The Structural Study of Myth" in Structural Anthropology.</u>
<u>LMS</u>	<u>P.M.S. Hacker and J. Raz (Ed.) Law, Morality and Society: Essays in honour of H.L.A. Hart.</u>
<u>LQR</u>	<u>Law Quarterly Review.</u>
Lucas, <u>PP</u>	<u>J.R. Lucas, The Principles of Politics.</u>
Maine, <u>AL</u>	<u>Sir Henry S. Maine, Ancient Law.</u>
Maine, <u>ELC</u>	<u>Sir Henry S. Maine, Early Law and Custom.</u>
Mill	<u>J.S. Mill, On Liberty (Everyman Edition).</u>
<u>MLR</u>	<u>Modern Law Review.</u>
<u>Oxford Essays</u>	<u>A.W. Guest (Ed.), Oxford Essays in Jurisprudence.</u>
<u>Oxford Essays (2)</u>	<u>A.W.B. Simpson (Ed.), Oxford Essays in Jurisprudence Second Series.</u>

<u>PFL</u>	<u>Pelican Freud Library.*</u>
<u>PI</u>	<u>L. Wittgenstein, Philosophical Investigations.</u>
<u>PL</u>	<u>A.S. Diamond, Primitive Law. Past and Present.</u>
<u>TLP</u>	<u>L. Wittgenstein, Tractatus Logico - Philosophicus.</u>
Wittgenstein, <u>BBB</u>	<u>L. Wittgenstein, The Blue and Brown Books.</u>

- * In the footnotes, quotations from and references to the writings of Sigmund Freud are given to the Pelican Freud Library when the work has appeared there and to the Collected Works where it has not.

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INTRODUCTION

The classical Roman jurist, Gaius, described in his Institutes what has been called the "mode par excellence"¹ of transferring ownership (dominium) under the civil law (ius civile) of Rome, namely mancipatio. The transfer he described was that of a slave.

"... in the presence of not less than 5 Roman citizens of full age and also of a sixth person, having the same qualifications, known as the libripens (scale-holder), to hold a bronze scale, the party who is taking by the mancipation, holding a bronze ingot, says: 'I declare that this slave is mine by Quiritary right, and be he purchased to me with this bronze ingot and bronze scale.' He then strikes the scale with the ingot and gives it as a symbolic price to him from whom he is receiving by the mancipation."²

The ceremony of mancipatio transferred dominium in the slave from one person to another. Before the declaration, the slave was the property of the former; after the declaration and striking, he was the property of the latter.

A more familiar example to the modern reader would be that of a man entering a grocer's shop to purchase an apple. Having waited his turn, he approaches the counter and asks the grocer if he has any apples. The grocer replies in the affirmative and states the price. The customer hands over the purchase price, the grocer hands over the apple and the customer leaves the shop. Different legal systems will analyse this transaction in different ways, but all would agree that a sale has occurred and that ownership of the apple passed at some moment during the transaction from the grocer to the customer. Before the customer entered the shop, the apple was the property of the grocer; when the customer left, ownership of the apple had passed to him.

In England and Wales, young men and young women

come of age when they attain the age of eighteen years. Thus, when a young man goes to bed on the eve of his eighteenth birthday, he is a minor, but when he gets up on the morning of his eighteenth birthday, he has attained the age of majority and is looked upon, by the law at least, as an adult. During the night, at the stroke of midnight, he ceased being a minor and became an adult.

Likewise, if a man and a woman enter a church to marry one another, before the matrimony is solemnized by the priest, they are respectively a bachelor and a spinster, as indeed they will have been described when the banns were called. However, when having taken their vows, they leave the church, they are no longer respectively bachelor and spinster, but husband and wife, both married persons. When they entered the church, they both had capacity to contract a valid marriage; when they left, they had both lost this capacity and had acquired instead a number of obligations towards one another which they did not have on entering the building.

On the same day, a less fortunate couple find themselves in the law courts. Their marriage has irretrievably broken down and they both require a divorce. Before the judge pronounces the decree, they are husband and wife and have certain obligations towards one another; after the decree has been pronounced, they are once more a bachelor and a spinster, each having capacity to contract a valid marriage once the decree becomes absolute, and with the obligations between them at an end or at least substantially altered.

In each of the five examples given above, a transformation has taken place: the slave ceased to be the property of one person and became that of another; the apple ceased to be the property of the grocer and became that of the customer; the teenager ceased to be a minor and became an adult; the man and woman ceased to be a bachelor and a spinster respectively and became married persons, and, in the last example, the couple ceased to be married persons and became a bachelor and a spinster respectively. However, even though most people would ratify the fact that a change has taken place in at least some of these examples, it is difficult to explain how that change has occurred and to state its nature. The slave in the first example is not a different individual after the mancipatio even though he follows a different master

home; the apple is no different on inspection after the sale although it is in a different person's possession; the teenager is recognizably the same person before and after midnight; the man and woman the same people before and after the ceremony or hearing. The change, therefore, is not a physical change in the appearance or structure of the slave, the apple, the teenager, or the man and woman, but a change in the way in which they are classified by others and, where sensible, by themselves. The change, in other words, has not occurred in the external world perceived by the senses but is a change in the way these people think or are thought of by themselves, where sensible, and by others. In other words, the changes have occurred in the mind or minds of the people concerned.³ The question of whether a particular slave, apple, teenager, man or woman exists is one which can be answered by examining the situation in the external world; whether the slave belongs to one master or another, the apple to the grocer or the customer, whether the teenager is an adult or a minor, whether the man and woman are married or single, are questions which cannot be answered by such an examination but require reference to mental concepts in the respective societies involved, an examination of how they are classified or thought of in their respective social groups.

Thus, the transformation described in the examples did not occur in the external world of physical facts perceptible to the senses, but this is not to say that they did not therefore occur at all or that they were unreal. The changes did occur, but they occurred in the minds of the people concerned and not in the external world of facts. Many changes occur in this way but are nevertheless accounted real. Thus, a senior member of the Bar may be appointed a judge, and from that moment will regard himself and will be regarded by others as being a judge. Indeed, that is what being a judge actually means.⁴ Some such transformations require ceremonies, as did the mancipatio and the marriage; thus, law students when they qualify are called to the Bar and cease to be students and become, that is, are regarded as and regard themselves as, barristers; university students have degrees conferred upon them and become Bachelors of Arts; thus, also, are bishops consecrated, kings crowned, and so on.⁵

The significance of mental phenomena is not, however, confined to changes of this sort. Many

things exist only in the mind but are nevertheless accounted real enough despite the fact that they have no existence in the perceptible, external world. Thus, a man may fall asleep and dream. When he wakes up, at least, he will realise that what he has been experiencing while asleep was only a dream. In one sense, therefore, the dream was not real, that is, it did not exist anywhere other than in his mind, but, in another and very real way to the dreamer, it did exist because he was experiencing it. In the same way, although a past event may actually have occurred in the external world, the memory of it has no existence in the external world but only exists in the mind of one who recalls the event. An imagining, on the other hand, never existed at all, but is nevertheless in existence in the mind of him who imagines.

However, whereas the dream, the memory and the imagining only existed in one person's mind, the fact that the senior member of the Bar has become a judge, that the eminent ecclesiastic is a consecrated bishop or that the teenager has come of age, is not so limited, but will be ratified by more than one person. These mental phenomena exist in more than one mind, that is, they are shared by several people, possibly all or a majority of a social group. Many such mental phenomena are shared.⁶ Thus, the boundaries of a particular parish may be well known. For some of its length, the boundary may coincide with some perceptible physical feature on the landscape, for example, a river, but despite the fact that the river exists in the external world, its significance as a boundary does not and is still mental. For some of its length, however, the boundary may be totally arbitrary and, thus, clearly has only a shared mental existence. Likewise, whereas only one person has a dream, a community may share a myth, each member knowing its ingredients and outcome. Although the events never occurred, the myth nevertheless exists even though its existence is confined to the minds of the members of the community in question.

Some such shared mental phenomena form systems.⁷ Two obvious examples are money and language. Taking money first, almost every member of a social group possesses small bits of metal and pieces of paper which are regarded as being valuable. The bit of metal which is a coin may be regarded as of greater value than another bit of metal, such as a shoe horn, although lacking the latter's practical utility. Similarly, a piece of paper called a pound note or a

dollar bill is somehow more valuable in the popular estimation than a similar piece of writing paper, and while the latter may be idly doodled upon or fashioned into a paper aeroplane, to adopt such a course of action with the former would never seriously be contemplated. Yet, externally, money is no more than bits of metal and pieces of paper.⁸ Its value exists in the minds of those members of the community who utilise it, and is, therefore, a shared mental phenomenon.⁹

Language is another system that consists of shared mental phenomena.¹⁰ People who speak English refer to the four-legged domestic animal which barks as a dog. Clearly, the word dog has no obvious connection with the four-legged domestic animal; the connection is arbitrary and exists only in the minds of those persons who speak English. This much is obvious from the fact that to a Frenchman who speaks no English the word dog has no significance; the animal in question is to his mind not called dog but chien. The connection between the word and the object is, thus, arbitrary and without significance to persons who do not speak the language in question; the significance is limited to those who share the mental phenomenon of the language. The linguistic scholar, Ferdinand de Saussure, laid stress on the arbitrary nature both of the sign and the connection between the signifier and the signified. He also used a memorable phrase, the compass of which can easily be extended to all such mental phenomena: "the mind" he said "breathes life into a substance which is given".¹¹ What is true of the spoken word is also true of the written word; there is no connection between the sound which makes the spoken word dog and the lines and curves which compose the written word dog. Again, the connection is arbitrary but very real to all who can read or write the language.

Thus, a whole host of things, commonplaces of everyday life, when considered can be seen to exist only in the minds of men and not in the external world, although they greatly influence the ways in which men relate to and interpret the world in which they live. Sounds and signs are interpreted as meaningful words to make language, metal and paper as of value to make money, rivers and lines on paper as boundaries, and, so in our original examples, events are given a significance so that sales, marriages, divorces and comings of age occur. All these things are mental phenomena only, but their significance is

shared by members of the social groups involved. The psychiatrist, R.D. Laing, has referred to such systems of shared mental phenomena as social phantasy systems¹²; social in that they are shared, and phantastic in that they exist in the mind and not in the external world. However, they are definitely regarded as real by those who share the phantasy.¹³ Those who share the phantasy seldom realise that what they are doing is phantastic; there is a collusion to pretend that it is real, and to that extent it is real as far as the participants are concerned.¹⁴ Thus, the slave has a new master, the apple a new owner, the teenager has come of age and the couple are married or divorced both in their own eyes and in those of the other members of the social group with whom they collude in the community's shared phantasies, although to an outsider who does not collude the effect is invisible and unreal.

To those who participate in the collusion, therefore, such social phantasy systems are a form of reality, so that money has value, language has meaning and laws have validity. All of the five original examples deal with legal situations. Thus, the fact that an article of property belongs to one person, that a particular act is illegal or that a particular person has a certain status are all matters which have to be determined according to the law of the social group in question, and that law is a social phantasy system of that group existing only in the minds of the group's members. Thus, whereas the question of whether an object exists is one concerned with external reality, the question of who owns it relates not to observable fact but to psychological fact, or, to give it another name, phantasy. Similarly, whether an event occurred is a question of fact, whether it was a crime a question of law and, thus, of phantasy. It is a fact that a particular person exists, a phantasy that he is a slave, a minor or a married man. In other words, laws are social phantasies and legal systems are social phantasy systems, like languages, currencies, latitude and longitude and a host of other phenomena familiar enough in everyday life.

An important concomitant of this may, however, have escaped attention and, thus, have misled legal theorists. If laws do not exist in the same way as mountains, rivers, people or planets, it is clearly fallacious to suppose that they can be accounted for according to the same sorts of theories. Planets

move, mountains form and rivers flow in accordance with certain causes, and their respective motion, formation and flow can be described according to the causation involved, the respective descriptions forming the bases of various disciplines, such as astronomy or geomorphology.¹⁵ Such has been the appeal of certain ascendant disciplines that attempts have been made to interpret legal reasoning as on a par with first the processes of mathematics and later the methods of the physical sciences, so that legal reasoning has sometimes been presented as being deductive, at other times as inductive, and sometimes even as a combination of both.¹⁶ However, such theories lose sight of the fact that whereas the subject matter of the physical sciences exists in the external world, the subject-matter of legal reasoning does not, but is rather a phantasy, albeit a shared one. It should not be expected, therefore, that legal reasoning should be a sort of mathematical, logical or scientific process, because laws do not belong to the same category of existence as do the subject-matter described by those disciplines. Whereas a legal theory ought to be rational, it is not to be lightly expected that legal reasoning itself must be, unless the word rational is to be given a wider meaning than that normally attributed to it.¹⁷ As the subject-matter of legal reasoning is a phantasy, as a process it is more likely to be similar in structure and function to other mental phenomena than to external phenomena. In other words, laws may be better explained according to the criteria used to explain other phantasies to which it bears family resemblances, phantasies such as meaning, myth, and, on a different level, dreams and memories.¹⁸

It is submitted that to attempt to explain law according to the criteria used for physical objects and events is a false step, for law is akin to, and bears family resemblances to, other social phantasy systems. It is the purpose of this book, therefore, to explore the phenomenon of law according to this method, and to see whether the structure and function of other phantasies when applied to the social phantasy of law can throw new light upon its nature. Thus, whereas the most persuasive modern theories of law attempt to explain it as a system of rules or norms,¹⁹ the nature of legal rules is nowhere expounded, and this, it is submitted, prevents a deeper understanding of the subject being achieved. It is proposed, therefore, to commence the present study by examining the nature of legal rules according to the criteria set out above, and then to do the same for the