Juris-prudence

Revised edition

The Philosophy and Method of the Law

Edgar Bodenheimer

Fourth Printing, 1981
Library of Congress Catalog Card number 74-77182
ISBN 0-674-49001-0
Printed in the United States of America

PREFACE

to the Revised Edition

Twelve years have passed since the publication of the 1962 edition of this textbook. During this time there have occurred significant developments in analytic jurisprudence and in the legal philosophy of values which have received recognition in additions to the historical part of this volume. The second and central part of this book, dealing with the nature and functions of law, has been largely rewritten. More extensive consideration than in the previous edition has been given in particular to the psychological roots of the law, the conceptual scope and substantive components of the notion of justice, and the criteria for validity of the law. Less comprehensive were the revisions in the third part of the book, concerned with problems of legal method. The section on legal logic was replaced by a more differentiated analysis of the modes of legal reasoning, which in turn made necessary a reappraisal of the role of value judgments in the adjudicatory process.

Throughout this revised edition, reference has been made to important books and articles in the field which have appeared since the publication of the 1962 edition.

Davis, California
June 1974

Edgar Bodenheimer

PREFACE

to the 1962 Edition

My early work (*Jurisprudence,* 1940) which forms the nucleus for parts of the present volume, stated as its purpose "to give aid to the student of law and politics who is interested in the general aspects of the law as an instrument of social policy." The purpose of the present book remains essentially the same, although large portions of the material have been completely rewritten and the scope of coverage has been substantially enlarged. Attention has here been given to a number of jurisprudential problems which were not mentioned in the early work, and an entirely new part, entitled "The Sources and Techniques of the Law," has been included. This last part of the book is addressed primarily, but by no means exclusively, to law students and members of the legal profession interested in the methodology of the law and in the characteristic features and instrumentalities of the adjudicatory process.

The historical materials dealing with the development of jurisprudential thought, which were dispersed through the 1940 volume, have been concentrated in the first part of the present book and have been reorganized along essentially chronological lines. The reader will soon discover that this historical introduction is largely descriptive in character and, with the exception of the concluding section, contains almost no critical appraisal of the schools of thought therein discussed from the point of view of my own legal philosophy. I felt that inasmuch

as the use of the book for instructional purposes was included within the objectives for which it was published, an evaluation of the contributions of the great legal thinkers might appropriately be reserved for class discussion.

The treatment of the substantive problems of general legal theory in the second and third parts of this book, on the other hand, is based on certain philosophical and methodological assumptions which are implicit in my approach to the domain of jurisprudence. Perhaps the most basic one among these assumptions is the firm conviction that no jurisprudential treatise should bypass or ignore the burning questions connected with the achievement of justice in human relations, notwithstanding the difficulties encountered in any attempt to apply objective criteria in dealing with this subject. It is submitted that the theory and philosophy of the law must remain sterile and arid if they fail to pay attention to the human values which it is the function of the law to promote. This does not mean, of course, that the jurisprudential scholar should be encouraged to let his imagination and emotional predispositions run amok in his treatment of the fundamental problems of the legal order. On the contrary, he should be held to a standard of detachment and objectivity which enjoins him to separate, to the best of his ability and within realizable limits, objective phenomena or data verifiable by reason or experience from subjective opinion or purely speculative thought. Furthermore, the jurist must be aware that conclusions with respect to axiological questions are necessarily tentative in character and subject to reconsideration in the light of new findings and new experiences. But although scholarly modesty and restraint is mandatory for those who attempt to seek the truth in the realm of human values, no a priori reason can be shown to exist which compels us to ban all scientific effort from this important sphere of human existence.

The subject matter of jurisprudence is a very broad one, encompassing the philosophical, sociological, historical, as well as analytical components of legal theory. It is impossible within the limits of a one-volume introductory treatise to pursue all the various objectives of this discipline at the same time. Inasmuch as a considerable number of jurisprudential works have been published in this century in English-speaking countries which have concentrated upon an analytical elucidation of basic legal concepts (such as the concepts of right, duty, liability, or corporate personality), no attempt has been made in this volume to provide definitions or explanations of such technical terms of the law or to develop a general theory of contract, property, or criminal responsibility. Furthermore, there has been undertaken only a cursory treatment of the historical, sociological, and economic forces

which in the past and present have helped to shape the evolution of the law. Much valuable insight into this field of jurisprudence can be gained from the works of Ehrlich, Pound, Fechner, Friedmann, and others. Since I feel that the philosophical analysis of the essential nature of the law and of the basic goals and values to be served by the legal order is an aspect of jurisprudential theory which has been somewhat neglected in the nineteenth and twentieth centuries, a substantial part of the present volume has been devoted to this critical area of legal thought.

I wish to thank the Rockefeller Foundation for facilitating the completion of this volume by a generous research grant. Gratitude is also expressed to the Yale Law School, which afforded me not only the use of its excellent research facilities but also the benefit of great intellectual stimulation. Invaluable help has been given by my wife, Brigitte M. Bodenheimer, who assisted in my research and contributed much constructive criticism. She also prepared the Index. Last but not least, appreciation is expressed to Miss Dorothy Alice Cox and Mrs. Mar Dean Leslie for their painstaking assistance in the preparation of the manuscript.

Salt Lake City
February 1962

Edgar Bodenheimer

CONTENTS

PART I

HISTORICAL INTRODUCTION TO THE PHILOSOPHY OF LAW

PART II

THE NATURE AND FUNCTIONS OF THE LAW

PART III

THE SOURCES AND TECHNIQUES OF THE LAW

PART I

HISTORICAL INTRODUCTION TO THE PHILOSOPHY OF LAW

I

GREEK AND ROMAN LEGAL THEORY

Section 1. *Early Greek Theory*

All peoples and nations of this world, beginning with the early stages of their history, have formed certain ideas and conceptions—of varying concreteness and articulateness perhaps—about the nature of justice and law. If we start our survey of the evolution of legal philosophy with an account of the legal theory of the Greeks rather than that of some other nation, it is because the gift of philosophical penetration of natural and social phenomena was possessed to an unusual degree by the intellectual leaders of ancient Greece. By subjecting nature as well as society and its institutions to a searching, fundamental analysis, the Greeks became the philosophical teachers of the Western world and Greek philosophy a microcosm of world philosophy as a whole. While some of the presuppositions and conclusions stated by Greek thinkers have not been able, of course, to stand the test of time because of the discoveries and experience of later epochs, the way these thinkers posed and discussed the basic problems of life in philosophical terminology and explored various possible approaches to their solution

may claim enduring validity. In this sense, the words of Friedrich Nietzsche still hold true today: "When we speak of the Greeks, we unwittingly speak of today and yesterday." [1]

The legal conceptions of the archaic age of the Greeks are known to us through the epic works of Homer and the poetry of Hesiod. Law at that time was regarded as issuing from the gods and known to mankind through revelation of the divine will. Hesiod pointed out that wild animals, fish, and birds devoured each other because law was unknown to them: but Zeus, the chief of the Olympian gods, gave law to mankind as his greatest present.[2] Hesiod thus contrasted the *nomos* (ordering principle) of nonrational nature with that of the rational (or at least potentially rational) world of human beings. Foreign to his thought was the skepticism of some of the Sophists of a later age, who sought to derive a right of the strong to oppress the weak from the fact that in nature the big fish eat the little ones.[3] To him law was an order of peace founded on fairness, obliging men to refrain from violence and to submit their disputes to an arbiter.

Law and religion remained largely undifferentiated in the early period. The famous oracle of Delphi, considered an authoritative voice for the enunciation of the divine will, was frequently consulted in matters of law and legislation. The forms of lawmaking and adjudication were permeated with religious ceremonials, and the priests played an important role in the administration of justice. The king, as the supreme judge, was believed to have been invested with his office and authority by Zeus himself.[4]

The burial of the dead was regarded by the Greeks as a command of the sacral law, whose violation would be avenged by divine curse and punishment. A famous scene in Sophocles' tragedy *Antigone* graphically depicts a situation where this religious duty came into irreconcilable conflict with the command of a secular ruler. King Creon forbade the burial of Polyneikes, brother of Antigone, because he had offended against the laws of the state. Antigone, convinced that her action would expose her to certain death, heroically defied this command and buried her brother in accordance with the prescribed rites

[1] *Human, All-Too-Human,* vol. 7 of *Complete Works,* ed. O. Levy (New York, 1924), pt. II, p. 111.

[2] Hesiod, *Erga* (Works and Days), transl. A. W. Mair (Oxford, 1908), pp. 273–285 (verses 274 ff.).

[3] Felix Flückiger, *Geschichte des Naturrechts,* I (Zürich, 1954), 10; Alfred Verdross-Drossberg, *Grundlinien der antiken Rechts- und Staatsphilosophie* (Vienna, 1948), p. 17.

[4] See Flückiger, pp. 12–13.

of the Greek religion. When the king called her to account, she pleaded that in burying her brother she had broken Creon's law, but not the unwritten law:

> "Not of today or yesterday they are,
> But live eternal: (none can date their birth)
> Not I would fear the wrath of any man
> (And brave God's vengeance) for defying these." [5]

Here, in a famous dramatic work, we find one of the earliest illustrations of a problem which has occupied the attention of the legal thinkers of all ages: namely, the problem of the conflict between two orders of law, both of which seek to claim the exclusive allegiance of man.

An incisive change in Greek philosophy and thought took place in the fifth century B.C. Philosophy became divorced from religion, and the ancient, traditional forms of Greek life were subjected to searching criticism. Law came to be regarded not as an unchanging command of a divine being, but as a purely human invention, born of expediency and alterable at will. The concept of justice was likewise stripped of its metaphysical attributes and analyzed in terms of human psychological traits or social interests.

The thinkers who performed this "transvaluation of values" were called the Sophists, and they may be regarded as the first representatives of philosophical relativism and skepticism. Protagoras, for instance, one of the leading figures among the earlier Sophists, denied that man could have any knowledge about the existence or nonexistence of the gods and asserted that man as an individual was the measure of all things; "being" to him was nothing but subjectively colored "appearance." He also took the view that there exist at least two opinions on every question, and that it is the function of rhetoric to transform the weaker line of argumentation into the stronger one.[6]

A sharp distinction between nature (*physis*) and law (*nomos*) was drawn by the Sophist Antiphon. The commands of *physis* are necessary and inexorable, he taught, but those of the *nomos* stem from human arbitrariness and are nothing but casual, artificial arrangements changing with the times, men, and circumstances. According to him, nobody can violate the laws of nature with impunity; but one who violates a law of the state does not suffer either punishment or dishonor if the violation remains undetected. Implicit in this argument

[5] *Antigone* 450.

[6] The text of the preserved fragments of Protagoras (in Greek and German) is found in Hermann Diels, *Die Fragmente der Vorsokratiker*, 6th ed. by W. Kranz (Berlin, 1952), II, 263 ff.

is the assumption that human conventions are in reality nothing but fetters of natural "right." [7]

Proceeding from similar premises, the Sophist Callicles proclaimed the "right of the strong" as a basic postulate of "natural" as contrasted with "conventional" law. Nature in animal as well as human life, he argued, rests on the innate superiority of the strong over the weak; human legal enactments, on the other hand, are made by the weak and the many, because they are always in the majority. The laws attempt to make men equal, while in nature they are fundamentally unequal. The strong man, therefore, acts merely in accordance with *physis* if he flouts the conventions of the herd and throws off the unnatural restrictions of the law.[8]

The "right of might" was likewise taught by Thrasymachus, who, though he did not perhaps share Callicles' love of the self-sufficient superman, was convinced that laws were created by the men and groups in power to promote their own advantage. In a famous passage in the *Republic,* Plato puts into his mouth the following definition of justice: "I declare that justice is nothing else than that which is advantageous to the stronger." [9] It follows that the just man is he who obeys the laws serving the interest of the governing groups; the unjust man is he who disregards them. But since the subject who obeys the commands of the ruler is in reality promoting the good of another and inflicting injury on himself, Thrasymachus submitted, the just man is always worse off than the unjust man; it pays therefore to act unjustly, if one can get away with it. "Injustice, when great enough, is mightier and freer and more masterly than justice." [10]

Section 2. *Plato's View of the Law*

Socrates, in discussing the meaning of justice with Thrasymachus in Plato's *Republic,* is able to convince the listeners to the argument that the definition of justice had been turned "upside down" by Thrasymachus.[1] This indeed was the considered opinion of Socrates and his great pupil, Plato (429–348 B.C.), of most of the teachings of the Sophists: that the meaning of truth had been turned "upside down" by them, and that their skepticism and agnosticism posed a danger to the

[7] Diels, II, 346. See also J. Walter Jones, *The Law and Legal Theory of the Greeks* (Oxford, 1956), p. 38.

[8] See Callicles in Plato, *Gorgias,* transl. W. R. M. Lamb (Loeb Classical Library ed., 1932), 483–484.

[9] *The Republic,* transl. A. D. Lindsay (Everyman's Library ed., 1950), Bk. I. 338.

[10] *Id.,* Bk. I. 344.

[1] *The Republic,* transl. A. D. Lindsay, Bk. I. 343. On Thrasymachus' view of justice see the preceding section.