Modern Legal Philosophy Series

THE THEORY OF JUSTICE

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GENERAL INTRODUCTION TO THE SERIES

By the Editorial Committee

"Until either philosophers become kings," said Socrates, "or kings philosophers, States will never succeed in remedying their shortcomings." And if he was loath to give forth this view, because, as he admitted, it might "sink him beneath the waters of laughter and ridicule," so to-day among us it would doubtless resound in folly if we sought to apply it again in our own field of State life, and to assert that philosophers must become lawyers or lawyers philosophers, if our law is ever to be advanced into its perfect working.

And yet there is hope, as there is need, among us to-day, of some such transformation. Of course, history shows that there always have been cycles of legal progress, and that they have often been heralded and guided by philosophies. But particularly there is hope that our own people may be the generation now about to exemplify this.

There are several reasons for thinking our people apt thereto. But, without delaying over the grounds for such speculations, let us recall that as shrewd and good-natured an observer as DeTocqueville saw this in us. He admits that "in most of the operations of the mind, each American appeals to the individual exercise of his own understanding alone; therefore in no country in the civilized world is less attention paid to philosophy than in the United States." But, he adds, "the Americans are much more addicted to the use of general ideas than

the English, and entertain a much greater relish for them." And since philosophy is, after all, only the science of general ideas — analyzing, restating, and reconstructing concrete experience — we may well trust that (if ever we do go at it with a will) we shall discover in ourselves a taste and high capacity for it, and shall direct our powers as fruitfully upon law as we have done upon other fields.

Hitherto, to be sure, our own outlook on juristic learning has been insular. The value of the study of comparative law has only in recent years come to be recognized by us. Our juristic methods are still primitive, in that we seek to know only by our own experience, and pay no heed to the experience of others. Our historic bond with English law alone, and our consequent lack of recognition of the universal character of law as a generic institution, have prevented any wide contact with foreign literatures. While heedless of external help in the practical matter of legislation, we have been oblivious to the abstract nature of law. Philosophy of law has been to us almost a meaningless and alien phrase. "All philosophers are reducible in the end to two classes only: utilitarians and futilitarians," is the cynical epigram of a great wit of modern fiction.[1] And no doubt the philistines of our profession would echo this sarcasm.

And yet no country and no age have ever been free (whether conscious of the fact or not) from some drift of philosophic thought. "In each epoch of time," says M. Leroy, in a brilliant book of recent years, "there is current a certain type of philosophic doctrine — a philosophy deep-seated in each one of us, and observable clearly and consciously in the utterances of the day — alike in novels, newspapers, and speeches, and equally in town and country, workshop and counting-house." Without some fundamental basis of action, or theory of ends, all

[1] M. Dumaresq, in Mr. Paterson's "The Old Dance Master."

legislation and judicial interpretation are reduced to an anarchy of uncertainty. It is like mathematics without fundamental definitions and axioms. Amidst such conditions, no legal demonstration can be fixed, even for a moment. Social institutions, instead of being governed by the guidance of an intelligent free will, are thrown back to the blind determinism of the forces manifested in the natural sciences. Even the phenomenon of experimental legislation, which is peculiar to Anglo-American countries, cannot successfully ignore the necessity of having social ends.

The time is ripe for action in this field. To quote the statement of reasons given in the memorial presented at the annual meeting of the Association of American Law Schools in August, 1910: —

> The need of the Series now proposed is so obvious as hardly to need advocacy. We are on the threshold of a long period of constructive readjustment and restatement of our law in almost every department. We come to the task, as a profession, almost wholly untrained in the technic of legal analysis and legal science in general. Neither we, nor any community, could expect anything but crude results without thorough preparation. Many teachers, and scores of students and practitioners, must first have become thoroughly familiar with the world's methods of juristic thought. As a first preparation for the coming years of that kind of activity, it is the part of wisdom first to familiarize ourselves with what has been done by the great modern thinkers abroad — to catch up with the general state of learning on the subject. After a season of this, we shall breed a family of well-equipped and original thinkers of our own. Our own law must, of course, be worked out ultimately by our own thinkers; but they must first be equipped with the state of learning in the world to date.
>
> How far from "unpractical" this field of thought and research really is has been illustrated very recently in the Federal Supreme Court, where the opposing opinions in a great case (*Kuhn* v. *Fairmont Coal Co.*) turned upon the respective conceptions of "law" in the abstract, and where Professor Gray's recent work on "The Nature and Sources of the Law" was quoted, and supplied direct material for judicial decision.

Acting upon this memorial, the following resolution was passed at that meeting: —

> That a committee of five be appointed by the president, to arrange for the translation and publication of a Series of Continental master-works on jurisprudence and philosophy of law.

The committee spent a year in collecting the material. Advice was sought from a score of masters in the leading universities of France, Germany, Italy, Spain, and elsewhere. The present Series is the result of these labors.

In the selection of this Series, the committee's purpose has been, not so much to cover the whole field of modern philosophy of law, as to exhibit faithfully and fairly all the modern viewpoints of any present importance. The older foundation-works of two generations ago are, with some exceptions, already accessible in English translation. But they have been long supplanted by the products of newer schools of thought which are offered in this Series in their latest and most representative form. It is believed that the complete Series represents in compact form a collection of materials whose equal cannot be found at this time in any single foreign literature.

The committee has not sought to offer the final solution of any philosophical or juristic problems; nor to follow any preference for any particular theory or school of thought. Its chief purpose has been to present to Anglo-American readers the views of the best modern representative writers in jurisprudence and philosophy of law. The Series shows a wide geographical representation; but the selection has not been centered on the notion of giving equal recognition to all countries. Primarily, the design has been to represent the various schools of thought; and, consistently with this, then to represent the different chief countries. This aim, however, has involved little difficulty; for Continental thought

has lines of cleavage which make it easy to represent the leading schools and the leading nations at the same time.

To offer here an historical introduction, surveying the various schools of thought and the progress from past to present, was regarded by the committee as unnecessary. The volumes of Dr. Berolzheimer and Professor Miraglia amply serve this purpose; and the introductory chapter of the latter volume provides a short summary of the history of general philosophy, rapidly placing the reader in touch with the various schools and their standpoints. The Series has been so arranged (in the list fronting the title page) as to indicate the order of perusal most suitable for those who desire to master the field progressively and fruitfully.

The committee takes great pleasure in acknowledging the important part rendered in the consummation of this project, by the publisher, the authors, and the translators. Without them this Series manifestly would have been impossible.

To the publisher we are grateful for the hearty sponsorship of a kind of literature which is so important to the advancement of American legal science. And here the committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

The authors (or their representatives) have cordially granted the right of English translation, and have shown a friendly interest in promoting our aims. The committee would be assuming too much to thank these learned writers on its own behalf, since the debt is one that we all owe.

The severe labor of this undertaking fell upon the translators. It required not only a none too common

linguistic skill, but also a wide range of varied learning in fields little travelled. Whatever success may attend and whatever good may follow will in a peculiar way be attributable to the scholarly labors of the several translators.

The committee finds special satisfaction in having been able to assemble in a common purpose such an array of talent and learning; and it will feel that its own small contribution to this unified effort has been amply recompensed if this Series measurably helps to improve and to refine our institutions for the administration of justice.

TRANSLATOR'S INTRODUCTION

Philosophy of Law is an expression of indefinite meaning. To Austin it means an analysis of the more general concepts underlying the details of legal rule and principle. His method of treating the substance of law is like the method of the grammarian in his analysis of language. It is a method of classification according to certain categories suggested by the material under investigation and implied therein. The purpose of the analysis is the better understanding of the details, which are seen to form parts of a whole, the easier mastery of the manifold rules as flowing from a more comprehensive formula, and the ability to correct errors in specific cases by reference to the broad principles suggested by the subject as a whole. Thus, a rule of grammar that nouns form their plural by addition of "s" to the singular expresses in a few words what would otherwise have to be learned in each case separately. But to make such a rule possible it is necessary that the material of the language — the vocabulary — should be classified according to the categories of the parts of speech, and each part of speech be further analyzed in reference to its attributes of number, gender, case and so on. Analytical jurisprudence, the jurisprudence of Austin, Holland and the majority of English writers on the subject, applies the same method to the material of law, *i.e.* to the social and economic relations of men, and the purpose is the same. That trover is a possessory action is a formula comprehending any number of concrete situations. But in order to express such a formula a good deal of classification and analysis must have gone before. The relations in which persons stand to things

must have been analyzed, so that the categories of ownership and possession have a meaning. Similarly the concept of action and the various kinds of actions are the result of analysis, going back ultimately to the basic elements of law, namely, rights and duties and the consequences of their violation.

This brief description of the nature of analytical jurisprudence shows that its method is a posteriori. It is based entirely on the material presented in the positive law, which it proceeds to arrange and classify according to principles of classification suggested by the subject matter and the use to which it is to be put. The definition of law itself is based upon a comparison of the positive law, as it exists in statute and decision, with other departments of human thought and action to which the word law is applied, such as the laws of physical nature, the laws of ethics, morality, honor, etiquette, the laws of a game, etc.

Analytical jurisprudence never goes beyond the positive law. It is expository of the positive law, not critical or evaluative. It may enable one to correct an error in a specific legal rule, or in the decision of a specific case. The criticism would lie within the system of positive law. It would be to the effect that the rule or decision in question is inconsistent with some other more comprehensive rule or principle derived from the system as a whole. But there cannot be in analytical jurisprudence a criticism of the positive law as such, or of its basic principles. Analytical jurisprudence does not evaluate the fundamental principles of law. Positive law as a matter of fact recognizes rights and duties of various kinds and protects and enforces them in certain ways. It derives its authority from the sovereign power in the State, hence without a State there is no law. The business of the analytical jurist is to expound in a systematic and scientific way what it has actually pleased the sovereign to command his subjects or citizens. It is not his concern to discuss

the right or the wrong, the justice or the injustice thereof. For as a jurist he knows only of legal right and wrong, legal justice and injustice. Hence right and just, wrong and unjust, mean respectively the same as accord with the law and violation thereof. The law itself cannot be according to law or against the law, hence the law itself is neither just nor unjust, neither right nor wrong.

It follows therefore that the study of analytical jurisprudence is of value primarily to the student, the lawyer and the judge. To the legislator and the statesman it is of value secondarily only in so far as it may enable him to formulate his legislation in a precise manner. But it has nothing to teach him that is substantial. The ideal legislator — and if we look upon him as representing the voice of the people, the ideal voice of the people — wants more than the knowledge of formal accuracy in the formulation of a desired law. He wants enlightenment on the desirability and justifiability of the contemplated measure. Analytical jurisprudence is silent in this matter. And not merely the legislator, the judge too is not always in a position to decide a given case in accordance with a technical rule of law. He may have to make a choice between two rules of law equally applicable so far as the technical aspect is concerned. Or there may be no rule applicable to the specific point in issue. Or the law itself may bid the judge decide in accordance with reason and justice. Analytical jurisprudence does not deal with reason and justice, it deals solely with positive law. An obvious solution would be to relegate all questions of the justice of law to the sphere of ethics. But it matters not what name one gives to this department of thought, the group of questions suggested in their peculiar applicability to legal relations must be studied by the jurist and the legislator. And moreover, there is a peculiar group of problems pertaining to the science of ethics, namely, the perfection of the will and the formation of character,

whereas in law we are concerned with external regulation of the conduct of men in relation to one another.

Stammler is not concerned — as a philosopher of law — with analytical jurisprudence. He presupposes that. He defines the philosophy of law as the *theory of those propositions about law* which have universal validity.[1] The concept of universal validity is one that Stammler never ceases repeating. But no study of positive law, however extensive and thorough, is capable of yielding universally valid propositions. They must therefore be arrived at in another manner. They are propositions about law and not propositions of law. They must be universally valid, that is, they must apply to all possible law, past, present and future. They are in the first place propositions which are implied in all law and without which no law is logically possible. They are ways of thinking which are indispensable if we are to think of such a thing as law. The method of arriving at these propositions Stammler speaks of as a critical deliberation ('kritische Selbstbesinnung') on the content of our mind. This is not very clear. And it is not made clearer by Stammler's statement that such critical deliberation presupposes a knowledge of law (the more thorough the knowledge the better); that it is not an a priori process, and is not derived from a fancied mythical source. So much is clear that in Kantian fashion (Stammler is a Neo-Kantian) Stammler lays stress on consciousness, on our mode of thinking and conceiving.

Now if we analyze critically our mode of conceiving reality, we find that we have two such modes, no more and no less. We conceive of natural phenomena as a series of events united by the law of causality. The cause determines the effect which succeeds it in time. This is a universally valid mode of thinking, which determines every possible natural event, else it is not a natural event

[1] Zeitschrift für Rechtsphilosophie, I, 4.

and we can not deal with it as such. We also find another mode of conceiving certain other domains of reality, namely the relation of means and purpose. The purpose, which comes later in realization, determines the means to be chosen. Means is a cause that is subject to choice. Volition pertains to this second category and is defined not as a force but as a mode of arranging and unifying our mental content.

Law is a kind of volition. It is a mode of arranging human acts according to the relation of means and purpose. The legislator does not describe the natural following of certain acts upon others as the physical scientist does with respect to natural phenomena. He determines that certain acts shall take place as means to certain purposes. When the law says that breach of contract should be followed by damages, it chooses the sanction as a means to the purpose of preventing breach of contract or loss to the party injured.

If we analyze volition we find that there are various kinds. An individual may select a given means for a specific purpose. This is individual or isolated volition. The law is not of this sort. It is a volition which binds man to man. It uses the acts of one individual as means to further the purposes of the other, and vice versa. But not all binding volition is of the same kind. The individual whose acts may thus be made use of as means for the purposes of other individuals may retain his privilege of refusing to be so treated and step out of the System; or the System may be such that the individual has no choice except so far as the System chooses to grant it. Law clearly belongs to the second class. Social customs of a certain kind are examples of the first. They are governed by conventional rules. Finally, we can conceive of a mode of volition, binding and sovereign ('selbstherrlich'), but arbitrary. That is, the author of the volition changes it as his whim suggests, and one never

knows how long a given determination will last or if it will last at all. This is not law. Law must be inviolable ('unverletzbar') so long as it is law. Law may be repealed, but cannot be violated arbitrarily. These are the essential elements of law, and taken together form the concept ('Begriff') of law. They are universally valid modes of thinking, and without them law is logically impossible.

It is of interest to compare Stammler's definition of law with that of Holland. Holland defines law as "a general rule of external human action enforced by a sovereign political authority." The word "general" no doubt implies not merely that it is not directed to a single individual as such, but to a class, or an individual as a member of a class, but also that it does not give an order to do a specific thing on a given specific occasion, but a general order in reference to a type of action. The word also implies that the order is intended to last until it is properly repealed. Hence the word "general" implies Stammler's fourth element, "inviolable." If law is "a rule of action," it of course has to do with means and purpose and not with cause and effect. However, Holland does not make this distinction specific, whereas Stammler carefully and rigidly defines wherein volition differs from observation. According to Holland law must be "enforced by a sovereign political authority." This means that there can be no law without a State, and that the State precedes law. Here Stammler disagrees with Holland. There is nothing said about the State in Stammler's definition, and as a matter of fact Stammler is of the opinion that law comes before the State, that the State is a creature of law. The moment there is society, there is externally regulated conduct — this is what society means — and if the individual is not consulted as to his wishes in the matter, we have law in Stammler's sense, whether there is a State in the strict sense or not.

This difference has its consequences. It makes it possible to discuss the justice and injustice of a law without having to go outside of the law. Law is no longer a fiat of a sovereign who creates it. In fact according to Stammler the actual origin of the law in the concrete sense is a question of history or psychology with which philosophy is not concerned. The philosophical concept aims to give the essential elements of the thing in question, but the question of origin is not essential, any more than the question whether the law is written or oral. To be sure, a critic might say that it is all a fight about words. What law is, he might say, is a question of definition. And whether a given attribute of law is or is not universally valid is similarly a matter of definition. The four characteristics given by Stammler are indeed universally valid, because Stammler would refuse the name of law to anything which failed to satisfy those requirements. He would deny universal validity to Holland's definition on the ground that law need not be confined to the State; it may exist in a non-political society. But for Holland the characteristic in question is universally valid because he refuses to recognize a rule of action as law which is not the order of a sovereign political authority. What is to decide between them? And does it make much difference? Whether the justice of a law is a legal or an ethical problem is once more a question of words and definition. I confess to a leaning in favor of such a critic, without any diminution in my admiration for Stammler's rigor of logical method.

But while the choice between two equally plausible definitions may seem arbitrary, preference should be given to that which gives the better results. And here it may be said that, as we shall see later, Stammler succeeds in deriving a great deal from his definition which does not lie in Holland's program at all. This is to justify a non-pragmatic philosopher by a pragmatic test. Stammler would repudiate such a test.

In all his analyses Stammler insists with all possible emphasis that the philosophy of law must deal with pure forms of legal thinking, *i.e.* with concepts which contain nothing of concrete legal material. Thus the concepts of marriage, property, agency, are not concepts of the philosophy of law as such, since they are not applicable to all law and contain matter in addition to form; whereas the four elements in the definition of law satisfy the requirements, since they express the form of thinking which one must have if he is to think of anything legal.

The completeness of the definition Stammler proves from the fact that in deriving it he did not begin with legal propositions and unmethodically endeavor to enumerate characteristics applicable to them, but his method was to analyze the possibility of modes of thinking, taking care to leave nothing out.

Having established the concept of law, he then proceeds to derive what he calls the categories of law, a sort of intermediate concept standing between the definition and the specific legal institutions and regulations. These categories, however, are also purely formal concepts, *i.e.* modes of thinking implied in all legal matters and logically determining them. They are once more universally valid and contain nothing specific. To be sure that they are enumerated in full, he derives them from the four characteristics of law as expressed in the definition — namely, volition, binding together, sovereignty and inviolability.

Since law is a mode of volition, and volition signifies using means to realize ends, law as such must in all cases determine certain persons or things or acts as ends in themselves and others as mere means. Hence arise the concepts of "legal subject" and "legal object." Similarly he derives from the other three elements of the definition the following pairs of categories in order: "legal ground" and "legal relation," "legal supremacy" and "legal subjection," "conformity to law" and "opposition to law."