BOOK I

INTRODUCTION

I

THE NATURE OF JURISPRUDENCE

§ 1. Introduction

The writer on jurisprudence is in the fortunate (or unfortunate) position of being able to determine the boundaries of his subject with rather more freedom than remains in other legal courses. Stern conflicts rage concerning its nature and scope. This certainly introduces a liveliness into what many consider a dull pursuit, but it has corresponding disadvantages, for controversy absorbs much of the energy that should be spent in pursuing the subject itself.

Modern jurisprudence trenches on the fields of the social sciences and of philosophy; it digs into the historical past and attempts to create the symmetry of a garden out of the luxuriant chaos of conflicting legal systems. The breadth of its scope, covering a voluminous literature written in many tongues, makes it a difficult subject to master. There is a danger that excessive learning may obscure the real problems that must be faced. Too many works contain such a wealth of reference to the learning of the past and present that they become tedious and unintelligible save to one who is as erudite as the author of the work concerned.

Moreover, even if the work is written in a tongue with which we are familiar, we are sometimes tempted to repeat the old quip that language was given to us to conceal our thoughts. It is true that it is difficult for any system of knowledge to use the terms of popular speech, for, unless the vague meaning given to his terms by the average man is made precise, confusion results. It is not easy to preserve a balance between the use of common words in a strange sense and the invention of terminology which baffles the reader. Thus one writer may use such a common term as *possession* in a sense entirely

his own, causing confusion to all save the most acute; another invents such a technical apparatus that it is necessary to furnish a glossary of eighteen pages.[1] As in modern politics, *-isms* abound. Some difficulties of terminology there must be, for even such a term as *law* has many meanings. But the besetting sin of jurists is to conceal threadbare thoughts in elaborate and difficult language. In spite of the difficulties inherent in the subject, the problems of jurisprudence can be expressed in fairly simple language, though, of course, opinions may well differ as to the real solution.

Jurisprudence is sometimes used merely as an imposing synonym for law, as when we speak of medical jurisprudence. This is not the use to which the term is put in this work. Jurisprudence[2] is a particular method of study, not of the law of one country but of the general notion of law itself. Holland describes it as the formal science of positive law,[3] Allen as the scientific synthesis of the essential principles of law.[4] However it may be defined it is a study relating to law, and although the term *law* may seem to the uninitiated a simple one, analysis reveals that there are many uses of this word. Hence one of the first tasks of jurisprudence is to attempt to throw light on the nature of law. At first sight it would seem to be the most logical procedure first to define *law* and then to discuss the scope of jurisprudence. But there are various ways of approaching the problem, and each 'school' of jurisprudence tends to set up its own definition. Thus, to take only one point for purposes of illustration, law has a twofold aspect: it is an abstract body of rules and also a social machinery for securing order in the community. The sensible approach is to admit that both these sides of law must be considered. But some schools put an exaggerated emphasis on the first, others on the second. Clearly, a jurisprudence which considers only the theoretical rules of the books will be very different from one which attempts to study law in action. Hence a short discussion of the schools of jurisprudence seems to be the clearest way to approach the question. To cover the learning of many centuries is impossible, but it is also unnecessary as the problems remain the same though the answers may differ. In the chapter on natural law[5] certain aspects of the history of jurisprudence will be discussed; for the present we shall concentrate on the problem as it appears today.

[1] Kocourek, *Jural Relations* (2nd ed.), 427.
[2] In France *la jurisprudence* covers what we should term case law.
[3] *Jurisprudence*, ch. i. [4] *Legal Duties*, 19. [5] *Infra*, Ch. IV.

§ 2. The Schools of Jurisprudence

It is common to separate jurists into various schools.[1] Such a classification is useful in so far as it is confined to an attempt to label in a broad way some of the most significant approaches to the problem. But it is clear that many writers will escape the confines of even the broadest distinctions adopted.[2] If we make our classification too complex it defeats its own object for the aim of classification is clarity, and too rigid and detailed an enumeration of species leads only to confusion. Those who desire a fuller treatment should turn to the learned pages of Dean Roscoe Pound.[3]

The great modern controversy has concerned the boundaries of jurisprudence and the methods it should employ. Poincaré has said that 'nearly every sociological thesis proposes a new method which, however, its author is very careful not to apply, so that sociology is the science with the greatest number of methods and the least results'.[4] The same gibe may, perhaps, be flung at modern jurisprudence. Jerome Hall writes: 'Discussions of methods are also apt to be vague and even futile unless they are directly related to specific studies in which they were used.'[5] If we may generalize the conflict—always remembering that brevity as well as wit has its dangers—the dispute today is between analytical jurisprudence (which may be taken here to include the various imperative or positivist theories, the pure science of law, and the Scandinavian realists), functional (or sociological) jurisprudence, and teleological jurisprudence.[6] Some concentrate on the abstract theory of law, wishing to discover the elements of a pure science which will place jurisprudence on the sure foundation of objective factors which will be universally true, not on the shifting sands of individual preference, of particular ethical or

[1] Much of the material in this chapter is taken from an article by the author in 4 *Politica* (1939), 16.

[2] For example Professor Sethna, Professor of Jurisprudence at the Government Law College, Bombay, founded the 'Indian School of Synthetic Jurisprudence' in July 1955. His textbook of *Jurisprudence* (2nd ed., 1959) shows that he draws upon many sources and many different schools for his work, but the result is more of an aggregation than a synthesis.

[3] *Interpretations of Legal History*, 24 *Harv. L. R.* (1910), 591; vol. 25 (1911), 140, 489; vol. 50 (1936), 557. *Encyclopaedia of the Social Sciences* (Seligman and Johnson), viii. 477.

[4] *Science and Method*, 19–20.

[5] In a paper submitted to the VIII Congress of the International Academy of Comparative Law (1970).

[6] The historical school is not specifically mentioned in this enumeration, as its method is necessary in many types of jurisprudence: J. Stone, *Province and Function of Law*, 26–7.

sociological views. The functional jurist argues that, useful as such a pure science may be, it has definite limitations and that, since the very *raison d'être* of law is to furnish an answer to social problems, some knowledge of these problems is necessary even if we desire only to understand the nature of law. We can understand what a thing *is* only if we examine what it does. The teleological school emphasizes that a mere collection of facts concerning social life is of no avail. Law is the product of human reason and is intimately related to the notion of purpose—hence this school asks: what are the supreme ends which law should follow? Frequently this type of jurisprudence is described as philosophical. It is true that this is the method normally used, but philosophy itself overlaps all schools. Kelsen builds his pure science and Savigny his historical theory on a philosophic basis. Hence it saves confusion if we adopt another title, for we do not find the work of the philosopher in one school alone.

These schools are complementary rather than opposed. The dogmatic insistence of certain writers that there is one, and only one, road to truth has tended to obscure this fact.[1]

In the sections which follow we will consider the approach of these schools. But in order to understand historical developments of theory it is necessary to modify the purely logical approach. The work of Bentham provides a convenient starting-point.

§ 3. BENTHAM (1748–1832)

Full credit has not always been paid to Jeremy Bentham as the founder of the English analytical school. Bentham devoted almost his whole life to writing: but he was not so interested in publishing and one of his most important manuscripts on jurisprudence only reached the public in 1945. This treatise, *The Limits of Jurisprudence Defined*, written in 1782, was found by Professor Everett at University College, London, deciphered and then published. This work reveals how much of Austin is due to Bentham and emphasizes that Bentham was not only a writer on the end of law but an analyst who was interested in the mechanics of the legal system.

The many sides of Bentham's activity may be seen by reading the symposium, *Jeremy Bentham and the Law*.[2] His desire for reform

[1] Ehrenzweig, 64 *Harv. L. R.* (1950), 355–9.
[2] Ed. by G. W. Keeton and G. Schwarzenberger.

based on the doctrine of utility, his ambition for codification based on a hatred of judge-made law, gave his work a sense of mission. His approach to sovereignty was similar to that of Austin: his definition of law was wide enough to cover subordinate legislation and administrative regulation: his analysis of rights and duties puts forward in embryo what was once thought to be a discovery of the twentieth century.[1]

Bentham was a realist in temper, and impatient of the rhetoric with which Blackstone and other eighteenth-century writers confused the problem of the nature of law. He was bitterly scornful of the pretensions of natural law. But he had his own gospel, that of utility, and he wished to test every law to see if it led to the greatest happiness of the greatest number. He was attempting to examine keenly the structure, conceptions, and functioning of the legal system in order that outworn abuses might be swept away—that every privilege should be justified by utility.[2] He analyses legal terms (such as power, right, prohibition, obligation, property, and liberty) and attempts to show what, in fact, they mean in the world of practice. His work was intended to provide the indispensable introduction to a civil code.

Austin took from Bentham the tool of analysis which both wielded so well; Austin also adopted the theory of utility, but he regarded it as falling outside the sphere of jurisprudence proper. Finally, the two sides of Bentham's work each created a separate school—the pure analyst interested in the law as such and the teleological writer interested in the ends which law should pursue.[3] It was a disaster for English jurisprudence that Bentham's work was not taken in its entirety. Analysis is barren without a keen view of social policy: a study of the objectives of law is useless unless founded on an analytical appreciation of the *law that is*. But in the nineteenth century, for all Bentham's influence in the world of practical affairs, there was a tendency to deny this in the theory of jurisprudence.

§ 4. John Austin and the Imperative School

In 1832 John Austin, after a course of lectures at the University of London, published a work which he entitled *The Province of Jurisprudence Determined*—and determined it was with great rigour of analysis. After his death he achieved greater fame and became the

[1] W. G. Friedmann, 64 *L.Q.R.* (1948), 341. [2] Everett, op. cit. 49.

[3] It must not be forgotten that although Bentham was an individualist, his doctrine of utility carried within it the seeds of collectivism: Dicey, *Law and Opinion*, Lecture IX.

founder of what was popularly called the analytical school. This title is rather misleading as it suggests that analysis is the exclusive property of this school instead of being (as it is) a method used throughout jurisprudence. Hence Allen prefers to speak of the imperative school, for this emphasizes Austin's particular conception of law.[1] Austin does not fit exactly into any of the broad divisions we have laid down. In some ways he was a precursor of the pure science of law, for he drew the boundaries of jurisprudence somewhat narrowly. Austin was not unmindful of the part played by ethics in the evolution of law; indeed, he devoted several lectures to the theory of utility. But, finding works on jurisprudence full of confusion, Austin decided to confine jurisprudence to a study of law as it is, leaving the study of the ideal forms of law to the 'science of legislation',[2] or teleological jurisprudence as we should term it today. Austin's followers were even more rigorous than their master in confining jurisprudence to an analysis of the rules in force. We will discuss Austin's views under three heads: (*a*) the basis of jurisprudence, (*b*) the method of jurisprudence, and (*c*) the relation of law and ethics.

(*a*) *The Basis of Jurisprudence*

Austin's broad approach to law was to regard it as the command of the sovereign. Positive law is a general rule of conduct laid down by a political superior to a political inferior. The notion of command requires that there must be a determinate person to issue the command, and that there is an implied threat of a sanction if the command is not obeyed.[3] Austin's aim was to separate positive law sharply from such social rules as those of custom and morality. The emphasis on command achieved this end, for the rules of etiquette are not laid down by a definite person. Jurisprudence was the general science of positive law in the rigid sense in which Austin defined it. But if the law of each country is based on the commands of the sovereign person (or body of persons) in that country, on what is jurisprudence to be based? As each sovereign may command what he wishes, will not there be the utmost diversity between the legal systems? Is there any element of identity on which a general science can be based? If we take the legal systems of the world from China

[1] *Legal Duties*, 13–14.

[2] *Jurisprudence* (5th ed.), 32. Actually Austin speaks of his science of the *law that is* as the *philosophy* of positive law, but this usage is rather misleading.

[3] *Infra*, § 20, and H. L. A. Hart's introduction to *The Province of Jurisprudence Determined, etc.* (1954).

to Peru, we find the utmost conflict as to the content of the rules, the classification of the law, and the technical language in which it is expressed. Must not jurisprudence, therefore, be confined to a study of a particular system so that we will have English jurisprudence, French jurisprudence, and so on?

Austin did not deal clearly with this problem. He assumed, without any real investigation, that certain principles, notions, and distinctions were common to all systems of law. Some notions were universal because it was impossible coherently to construct a legal system without using them, e.g. the terms 'duty', 'right', 'injury', 'punishment', and 'redress'.[1] Some principles were common to all refined or mature systems because they depended on general principles of utility which modern nations accepted. If it were suggested that primitive nations often accepted views the opposite of those accepted today, Austin would have had no hesitation in confining jurisprudence to the more advanced systems.

Analysis reveals Austin's foundation to be rather unstable. Firstly, it is clear that there are no universal rules of law—'hardly a rule of today but may be matched by its opposite of yesterday'.[2] 'The moment we have disengaged some principle of which we think to say, with a sigh of relief, "Well, *that* at least is an indispensable element of all law", some patient investigator into the legal systems of the Houyhnhnms in the mists of antiquity will discover a fragment of stone or pottery which disturbs all our conclusions.'[3] Secondly, there are few concepts which are common to all legal systems, and if we confine our analysis to such as we think are universal, we run two dangers: firstly, if further research shows that there are no concepts which are common to all systems, then there is no basis for general jurisprudence at all; secondly, even if a few notions are proved to be universal, they form a somewhat narrow basis for a science of law. Much of what the Romans considered universal is today considered a mere accident of the particular conditions in which Roman law was developed. In the nineteenth century writers frequently deduced certain universal legal principles, but twentieth-century insight shows that these principles are not universal but were based only on the necessities of a capitalist economy that still emphasized *laissez-faire*.

[1] *Jurisprudence*, ii. 1073.
[2] Cardozo, *The Nature of the Judicial Process*, 26.
[3] Allen, *Legal Duties*, 4. There may be principles of law *generally* accepted, although not universally. Thus the Court of International Justice was bidden to draw on general principles of law common to civilized nations: Verdross, *Rec. Gény*, iii. 383.

Rules of property that were considered axiomatic in 1850 do not apply in Russia nor in many other countries today. Hence, doubts have been expressed whether it is possible to construct any basis for jurisprudence that will not be upset by changes in economic and social conditions.

The solution of the problem is that, although there are few (if any) *rules of law* that are universal, yet there may be universal *principles of jurisprudence*. The assumptions of jurisprudence are simple. In all communities which reach a certain stage of development there springs up a social machinery which we call law.[1] Jurisprudence is not primarily interested in cataloguing uniformities, nor in discovering rules which all nations accept. Its task is to study the nature of law, the nature of legal institutions, the development of both law and legal institutions and their relationship to society. In each society there is an inter-action between the abstract rules, the institutional machinery existing for their application, and the life of the people. Even if there were no common elements discoverable in the legal systems of the world, jurisprudence would still have the function of tracing the relationship between law, legal institutions, and the life of the people. Legal systems seem to have developed for the settlement of disputes and to secure an ordered existence for the community. They still exist for those purposes but in addition they are part of the social machinery used to enable planned changes and improvements in the organization of society to take place in an ordered fashion. In order to achieve these ends each legal system develops a certain method, an apparatus of technical words and concepts, and an institutional system which follows those methods and uses that apparatus. The pressure of social needs which the law must satisfy will vary from one community to another, but jurisprudence studies the methods by which these problems are solved rather than the particular solutions. Jurisprudence is founded on the attempt, not to find universal principles of law, but to construct a science which will explain the relationship between law, its concepts, and the life of society.

Austin did not analyse this problem acutely, for both he and many of his followers fell into the error of thinking that what was common to certain nations in the nineteenth century was a universal element of all mature systems. The emergence of Soviet Russia (with its legal

[1] Diamond, *Primitive Law*; Llewellyn and Hoebel, *The Cheyenne Way*; Hoebel, *The Law of Primitive Man*.

system based on a social philosophy that rejects capitalism) saves us from the mistake of considering that what is suitable for one particular economy is a universal rule. Jurisprudence must widen its scope; for if it is concerned only with universal *rules of law*, it will perish for want of material.

(*b*) *The Method of Jurisprudence*

Austin believed that the chief tool of jurisprudence was *analysis*. The emphasis on law as the command of the sovereign led to concentration on mature (or what he sometimes called 'civilized') systems, since it is clear that a sovereign with effective machinery for enforcing law can exist only when the State has reached a fairly high degree of development.[1] Today, however, it is increasingly recognized that, useful as analysis may be, it will not suffice to answer all the problems of jurisprudence. An analysis of the judicial method[2] shows that law is not a static body of rules, but is rather an organic body of principles with an inherent power of growth. The law that is, of which some of Austin's followers so proudly boast, cannot be too sharply divided from the law that ought to be, because where there is no authority, the judge is perpetually clothing with the robe of positive law the rule that he thinks *ought* to exist. Whence is the judge to draw his material? Some of the imperative school seem to proceed on the tacit assumption that all legal problems can be answered by analysis of the rules that exist and by deductions from them. This is too narrow a view. The principles of the common law did not descend from the clouds complete and fully developed: nor can we say that the creative period is yet over. Exaggerated positivism ignores the fact that law develops not by logic alone, but by drawing new values from the life of the community and by gradually reshaping the rules so that they accord with the standards of today.[3] We cannot always convict a dissenting minority in the House of Lords of an error in logic—what is frequently decisive is the judge's view of the purpose that law should achieve.

It cannot be suggested that such elementary truths were beyond the understanding of the imperative school, and one of the besetting vices of jurisprudence is to exaggerate the views of an opponent in order to show how ridiculous they are and incidentally how much wiser the writer is. What is here stressed is only that the analytic system based

[1] *Infra*, Ch. II.
[2] *Infra*, Ch. VIII.
[3] *Infra*, § 46; K. N. Llewellyn, *The Common Law Tradition: Deciding Appeals.*

on Austin's teaching did not make sufficient allowance for the creative element in law and tended to magnify the static character of legal rules. It was considered possible to solve all legal problems by deduction from the actual rules of English law, eked out perhaps by careful borrowing from the Roman jurists.

(*c*) *Law and Ethics*

Austin, as we have said, distinguished jurisprudence, the science of the law that is (without reference to its goodness or badness), from the science of legislation which he based on the principle of utility. Many of his followers ignored entirely the latter study and proudly boasted that they studied the facts, keeping their feet on the ground instead of soaring into the clouds of misty speculation. When Austin wrote it was very necessary to delimit the sphere of jurisprudence because of the prevailing confusion. But we can see today that even the most positive member of the analytical school did not succeed in separating the *law that is* from ideal elements. The analyst did not discover his principles and classifications ready made but evolved them after long and patient study, and they depended not on the law of any one particular country, but on an idealized picture of English and Roman law. Unconsciously, the analysts laid down as the supreme end of law an ideal of logical harmony. Law was treated as a coherent system based on certain fundamental principles from which the particular rules may be deduced. Naturally, no system of law is perfectly self-consistent, but any rule that could not be fitted into the analyst's framework was dubbed an historical accident or a logical anomaly which (it was predicted) would soon disappear. Internal consistency is a desirable attribute of a legal system, for if it is logically interrelated it can be better understood, applied, and extended than if it is a mere chaos of particular rules. But the analyst assumed that logical self-consistency was the sole end of law. This was not stated in so many words, or its fallacy would have been apparent, but it was the underlying assumption on which the analytical school based their work. Clearly, law does not exist for the sake of consistency, for many a rule that is theoretically anomalous is based on sound views of public policy. The English law of tort would be more consistent if liability never arose in the absence of fault, but strong reasons of justice have led the law to create some instances of strict liability. One of the great virtues of the

Roman jurist was that he was unwilling to push a principle to its logical extreme if injustice would result.

Thus, criticism of the analytical school emphasizes two very significant truths for jurisprudence. Firstly, the *law that is* does not exist as a perfectly proportioned body of rules deduced from a few leading principles. The social pressures of the past have led to many convenient anomalies being adopted. Hence any attempt to reconcile the rules on logical grounds easily develops into a study not of the *law that is* but of the *law that should be*, if logic were to prevail. It is not suggested that it is wrong to attempt to render the rules as logically harmonious as possible. All that is stressed is that the analytical school, while proudly boasting that it treated only of the facts, set up an ideal of logical self-consistency by means of which it developed the law. Thus, the second point is that it is extraordinarily difficult for any school to resist setting up an ideal which can be made the basis for constructive criticism of the law. The analytical school boasted that they were treating only of the law that actually existed, but, unconscious as their ideal was, it was the real driving force of their work.[1] The influence of their work was such, however, that their insistence that lawyers should be concerned with the *law that is*, combined with the dogma that judges do not make law, led to a wasteful argument about whether or not judges do make law, and to the exclusion from legal studies in England for many years of many matters which are relevant when judges in fact do make law.

Perhaps the most significant recent development in England, following the imperative school with its origins in Austin's work, is the application to legal thinking of the methods of the linguistic positivists among the philosophers. The influence of Ludwig Wittgenstein[2] at Cambridge is accepted as having been the most significant in the development of those methods; but it is at Oxford that those methods are now most directly influencing juristic thinking—particularly since the appointment of H. L. A. Hart to the Oxford Chair of Jurisprudence in 1952.[3]

The analytical positivists influenced by those methods still affirm the Austinian belief that law can and ought to be made the subject

[1] 'Positivism is a Utopia': O. Kahn-Freund; Renner, *Institutions of Private Law*, 8.

[2] *Tractatus Logico-Philosophicus* (1922); *Philosophical Investigations* (1953); D. Pole, *The Later Philosophy of Wittgenstein* (1958).

[3] Hart, *Definition and Theory in Jurisprudence* (1953); Hart and Honoré, *Causation in the Law*; Hart, *The Concept of Law* (1961).

of study separately from morals;[1] that it can be seen as a system of rules with a logic of its own capable of more satisfactory elucidation than heretofore; and that the methods of linguistic analysis pursued by the philosophers can be employed in jurisprudence to clear up many puzzles which have troubled legal theorists, and to produce clearer thinking for lawyers generally.

To provide an adequate brief explanation of the work of the analytical and linguistic positivists is almost impossible, as it rests on a background comprised of the work of a whole school of philosophers.[2] The main lessons for lawyers, however, lie in new insights into the uses and meanings of words, the classification of things, and into the peculiarities of the use of words in the logic of the law. Some attempt to illustrate the method is made in later parts of this book.[3] Perhaps the primary lessons, however, are to see that the traditional (Aristotelian) way of going about the task of definition, by the assignment of a *res* to a genus and then to a species by reference to essence and differentiating characteristics, is not only bad as a method of definition in most areas of thought,[4] but is positively misleading and confusing when applied to many legal terms, notions, or concepts. The first step appears to be to distinguish between the two tasks: the definition of words, and the description of things—however often the one task must be performed to perform the other. If we are to avoid confusion, we should limit the purpose of definition to the elucidation of the meaning of words and we should not speak of defining things.

The second is to appreciate that words have many meanings depending upon context and use: that they cannot be taken separately on the points of pins and given meanings as though they were merely symbols in a naming process. The variations in use which they enjoy may prevent the assignment of any single characteristic, or group of characteristics, as fixing their *proper* meanings. Their meanings, therefore, may only be elucidated, and satisfactory definitions provided, by examining the work that they do. This in turn will usually require the analysis of facts also; and so a method which at first sight appears to be concerned with words only, turns out

[1] Hart, 'Positivism and the Separation of Law and Morals', 71 *Harv. L. R.* (1958), 593: for a criticism of this position, see L. L. Fuller, 71 *Harv. L. R.* 630.

[2] From Russell, Carnap, and Wittgenstein in his earlier period to the later Wittgenstein, Moore, Ryle; see, for example, G. Ryle, *The Concept of Mind*; Nowell-Smith, *Ethics*; J. Wisdom, *Philosophy and Psychoanalysis* (1953); and J. A. Passmore, *Hundred Years of Philosophy* (1957).

[3] *Infra*, §§ 18, 62, 85 and Ch. XXII.

[4] R. Robinson, *Definition*, ch. vi.

to be concerned with things and the realities of the external world as well.

The third major step is to see that many words (and many legal terms are peculiarly illustrative of this, even though they may be nouns) are not used as names for things which are entities examinable in the external world at all; but are words with meanings which can only be accurately discerned by reference to the rules of the system within which they are used and to the use made of them in that system. Robinson[1] calls such words 'systematic words' and shows, for example, that you cannot answer the question 'what is a Swiss citizen?' by reference to any external entity or by reference to essence and *differentia*; but only by reference to rules which establish what human beings become or are Swiss citizens. Those rules will be rules of a particular legal system. And Hart makes the point that many legal terms used as nouns are not names for things, but are words used to make arguments, press claims, or draw conclusions, of law. Those arguments, claims, conclusions, can only be seen as acceptable or as valid, by reference to the rules of the appropriate system. Thus the meaning, and hence the definition of such words, can only be elucidated satisfactorily by studying the use of them within the system of reasoning concerned. As an example of this method Hart would explain the meaning of the word 'right' in the law in the following manner:

(1) A statement of the form 'X has a right' is true if the following conditions are satisfied:

(*a*) there is in existence a legal system.

(*b*) under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action.

(*c*) this obligation is made by law dependent on the choice either of X or some person authorized to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorized person) so chooses or alternatively only until X (or such person) chooses otherwise.

(2) A statement of the form 'X has a right' is used to draw a conclusion of law in a particular case which falls under such rules.[2]

[1] *Definition*, 128–9.

[2] *Definition and Theory in Jurisprudence*, 16–17. The problem of definition is discussed by W. A. Wilson, 32 *Mod. L. R.* (1969), 361.

This approach has been subjected to sharp criticism already[1] and its exponents have been charged with mere playing with words and with saying nothing of importance for the solution of the real problems which face lawyers. There are, however, many problems which have defied solution by legal theorists. The claim made for the modern analysts is not that their methods will provide right answers to all those problems but that they will help to remove some of the obstacles which have prevented satisfactory solution of those problems in the past. As put by Wittgenstein, the aim is 'to show the fly the way out of the fly bottle'.[2] Where the fly will fly after escaping from the fly bottle is a separate question altogether.

§ 5. The Pure Science of Law

Nearly a century separates the work of Hans Kelsen from that of Austin.[3] If Austin was driven to make his jurisprudence rigid because of the confusion of previous writers, Kelsen represents a reaction against the modern schools which have so far widened the boundaries of jurisprudence that they seem almost conterminous with those of the social sciences. But while Austin did not consciously formulate a detailed philosophy, Kelsen admittedly builds on the doctrine of Kant.[4] Most philosophers emphasize that jurisprudence must study the relationship between law and justice, but Kelsen wishes to free 'the law from the metaphysical mist with which it has been covered at all times by the speculations on justice or by the doctrine of *ius naturae*'.[5] He is thus a philosopher in revolt from the tendencies to which philosophy has led so many writers. He desires to create a pure science of law, stripped of all irrelevant material, and to separate jurisprudence from the social sciences as rigorously as did the analysts. The mathematician is not interested in the way in

[1] C. A. Auerbach, 'On Professor H. A. L. Hart's Definition and Theory in Jurisprudence', 9 *J. Leg. Ed.* (1956), 39; E. Bodenheimer, 'Modern Analytical Jurisprudence and the Limits of its Usefulness', 104 *U. of Penn. L. R.* (1956), 1080; I. S. Shuman, 'Jurisprudence and the Analysis of Fundamental Legal Terms', 8 *J. Leg. Ed.* (1956), 437; E. Gelner, *Words and Things* (1959).

[2] *Philosophical Investigations* 47e—quoted by Lloyd, *Introduction to Jurisprudence* (1959), p. xiv.

[3] *Allgemeine Staatslehre*; *Reine Rechtslehre*; *General Theory of Law and State*; 55 *Harv. L. R.* (1941), 44; *Annales de l'Institut de droit comparé* (1936), ii. 17; J. W. Jones, *Historical Introduction to the Theory of Law*, ch. ix; *The Pure Theory of Law*, 50 and 51 *L.Q.R.* (1934–5), 474, 517; *General Theory of Law and the State* (trans. A. Wedburg) (1946); *What is Justice?* (1957).

[4] But he modifies Kant's theories and adopts diverse elements from other writers: Martyniak, *Archives de phil. du droit* (1937, 1–2), 166.

[5] Kelsen, *Law, a Century of Progress*, ii. 231; Jones, 47 *L.Q.R.* (1931), 62.

which men think nor is he directly concerned whether his work is to be used to build a bridge or to work out a new system to break the bank at Monte Carlo: so the jurist, if he is to be scientific, must study the legal rules abstracted from all social conditions. Kelsen refuses to define law as a command, for that introduces subjective and political considerations and he wishes his science to be truly objective.

First, Kelsen wishes to separate the realm of jurisprudence from that of natural science. The latter deals with cause and effect: for example, Newton attempted to formulate a general principle which would describe what actually does happen to the apple when its stalk is loosened from the tree. Law, on the other hand, does not attempt to describe what occurs but rather to prescribe certain rules, to lay down standards of action which men ought to follow. If X breaks the criminal law, then he ought to be punished. The sole object of study for jurisprudence is the nature of the norms (or standards) which are set up by law. A legal system exists in order to impose obligations on certain individuals; to know whether in a particular case an obligation exists, we ask whether the individual, if he disobeys a rule, would suffer a sanction. But Kelsen does not take Austin's step of defining law as a command of the sovereign. Law and the State are really the same thing envisaged from different aspects. A legal order becomes a state when it has developed organs for the creation, declaration, and enforcement of law. When we look at the abstract rules we think of the legal order; when we examine the institutions by which law is put into effect we think of the State. But this is merely looking at the same thing from two angles.

If, however, we cannot adopt the easy method of defining law in terms of the State, by what can we distinguish a rule of law? Rules of law cannot be tested by their content, the actual subject-matter with which they deal, since law may cover any topic. The modern tendency to regulate so many of the affairs of the private citizen means that the sphere of law is daily increasing. Nor can we define law in terms of justice, for many rules may be unjust, but they do not therefore cease to be law. 'Justice is an irrational ideal'—that is, it cannot be clearly defined by reason, and hence it is not a satisfactory concept for a science of pure law.[1]

Kelsen finds the criterion in the way in which the rule is created. A judge in a mock trial may pass the same sentence as the judge of a properly constituted court, but the latter sentence has legal validity

[1] Kelsen, 55 *Harv. L. R.* (1941), 44 at 48.

because the prescribed conditions of the legal order have been fulfilled. Hence we must trace every legal act back to a norm which imputes legal validity to certain human behaviour. The imprisonment of Jones is justified because of the sentence of a criminal court: the court has this power because of the criminal code: the criminal code has legal effect because it was enacted by the appropriate legislative body, which is granted the power to legislate by the constitution. But how can we explain the legal force of a constitution? What is the legal basis of the power of the King in Parliament to change the law? Constitutions ultimately have an extra-legal origin. Even if the whole community unanimously agrees to accept a particular constitution, that agreement has no legal force, for until a constitution is adopted the methods by which law is to be created are not laid down.[1] A revolution may destroy an old constitution and create a new one, but such matters are beyond the sphere of jurisprudence which must posit an initial hypothesis or *Grundnorm* beyond which it cannot go. Once it has been accepted as a basis that the will of the King in Parliament ought to be obeyed, we may trace the validity of any particular legal rule to determine what is to be the initial hypothesis for any country we must go beyond jurisprudence, examine the world of reality, and discover an hypothesis that has some measure of correspondence with the facts. It would be futile to state as the initial hypothesis for the U.S.S.R. that the will of the Tsar ought to be obeyed. But it should be noted that the hypothesis need not *absolutely* correspond with the facts. In England the will of the King in Parliament ought to be obeyed, but no one supposes that every member of the community actually does obey the law on every occasion. This emphasizes again that law does not state what actually does happen, but lays down what ought to happen; yet if the legal order is to be effective, it must secure a certain measure of acceptance.

An interesting example by which to test Kelsen's theory is the Unilateral Declaration of Independence by Rhodesia. The Privy Council, as part of the English legal order, naturally decided against the validity of the Rhodesian emergency powers which had not been laid down in accordance with the *Grundnorm* the court accepted.[2]

[1] Cf. *Att.-Gen. for N.S.W.* v. *Trethowan*, [1932] A.C. 526; *Harris* v. *Minister of the Interior*, [1952] 2 S.A. 428 A.D.; *Minister of the Interior* v. *Harris*, [1952] 4 S.A. 769 A.D.; Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation', 31 *A.L.J.* (1957), 240.

[2] *Madzimbamuto* v. *Lardner-Burke*, [1969] 1 A.C. 645; see also *Adams* v. *Adams*, [1970] 3 All E.R. 572, where a divorce granted in Rhodesia was not afforded recogni-

The Rhodesian courts looked at the problem in the light of the new legal order created by the declaration of independence, and relied partly on the theory of necessity and of the actualities of politics.[1] In other words, these courts in effect accepted a new *Grundnorm* for Rhodesia.

The sphere of jurisprudence, then, is a study of the nature of this hierarchy of norms, the validity of each norm depending on its being laid down in accordance with a superior norm until we reach the initial hypothesis which jurisprudence can only accept and cannot hope to prove. The initial hypothesis is abstract, but as we descend the ladder the norms gradually become more concrete until we reach the final norm which imposes an obligation on a particular individual, e.g. either by the judgment of a court, the order of an administrative officer, or the making of a contract between two citizens. In essence these three operations merely carry out a superior norm and impose constraint on individuals.

It is difficult to appreciate the significance of Kelsen's work until the application of the theory is understood,[2] but for the present we are concerned only with the bearing of his theory on the problem of the boundaries of jurisprudence. The subject-matter for jurisprudence is the legal norm emptied of all practical content, all questions of ethics or social philosophy being beyond the jurist's ken. His claim that he has created an impartial and universal science is justified, but are we not left with the dry bones of the law deprived of the flesh and blood which give them life? The great value of his work is its critical force, since he ably shows that many writers have clothed with the glory of first principles of jurisprudence what are only their own prejudices. Kelsen is not alone in his disgust at 'politics masquerading as jurisprudence', at those who object to state regulation of labour conditions because it interferes with the onward march of the neo-Hegelian idea that law must give increasing freedom to the individual will. Kelsen is correct in showing that law is a weapon that may be used to effect many ends—indeed, it is curious to see that his impartiality in the conflicting social problems of today has led conservatives to call him a dangerous radical and the revolutionaries to dub him a reactionary. Kelsen's work is also valuable in its emphasis that in

tion in England, as the Rhodesian judge had not, according to the English *Grundnorm*, been validly appointed.

[1] J. M. Eekelaar, 32 *Mod. L. R.* (1969), 19; R. W. M. Dias, 26 *Camb. L. J.* (1968), 233. A most useful study is that of J. W. Harris, 29 *Camb. L. J.* (1971), 103.

[2] *Infra*, §§ 21, 75–6, 90, 99.

executing the norms of law the judge has much discretion—it is impossible for any general rule to provide for all contingencies, and the general rules must be made precise by those who have the duty of applying them. But, in order to maintain the air of impartiality, Kelsen regards as outside the scope of jurisprudence all discussion of natural law, and all examination of the sources whence the judge draws his rules when there is no authority in point.[1] This leaves the science of law very 'pure', but deprives it of all interesting contact with life itself. Indeed, what we obtain from this method is not a theory of legal development but simply the formal principles of juristic thought.[2] To exclude the whole of sociology and of ethics leaves jurisprudence but a mental exercise in abstract notions. The objection to Kelsen's pure science of law is that if the premisses are rigidly followed, the result is too formal to be of service to jurisprudence; if the jurist goes beyond his premisses, the method is destroyed. Kelsen would be very impatient of any argument that jurisprudence should serve the needs of life—its aim in his eyes should be to enable us to understand the nature of law and the State. But the point made here is that Kelsen's method does not even give us a true picture of law, for jurisprudence must go beyond the formal hierarchy of norms to study the social forces that create law. The doctrine of natural law has certainly been abused, but is jurisprudence, therefore, to ignore the whole question of ethics? Indeed, Kelsen himself goes beyond the limits of his method in discussing the nature of international law and really bases his view on the ideal of the legal unity of the world.[3] Nor can we understand the real nature of the State by regarding it in a purely formal light.[4] The philosophic difficulties involved in Kelsen's clear separation of the legal world of norms from the world of reality cannot be here discussed,[5] but it may be pointed out that, however pure his science is kept, the initial premiss for any legal order can be discovered only by a study of the facts in that particular community.

No one can doubt that Kelsen has made an original and striking contribution to jurisprudence. In 1832 Austin cleared away much

[1] H. Lauterpacht, in *Modern Theories of Law*, 105 at 133.

[2] F. Hallis, *Corporate Personality*, 56–7. On the other hand, Kelsen recognizes the validity of other methods, e.g. sociological jurisprudence. His concern is really to establish the validity of his pure science as the best, although not the only, approach: 55 *Harv. L. R.* (1941), 53.

[3] *Infra*, § 21. Formally Kelsen saves his method by verbally recognizing that this is not the only alternative: Lauterpacht, op. cit. 129.

[4] Carré de Malberg, *Confrontation de la théorie de la formation du droit par degrés.*

[5] Wilson in 1 *Politica* (1934–5), 54.

dead wood, and a century later Kelsen with critical acumen exposed many fallacies. But the aim of the pure science of law is a narrow one, and it must be complemented by other and broader approaches.

§ 6. The Historical School

The historical school antedates the work of Kelsen, but the reason for postponing discussion of the historical thesis is that, in opposition to the doctrine of the pure science of law, the historical school considered law in direct relationship to the life of the community and thus laid the foundation on which the modern sociological school has built. The eighteenth century was an age of rationalism; it was believed possible by arm-chair deliberation to construct a universal and unchangeable body of laws that would be applicable to all countries, using as a premiss the reasonable nature of man.[1] The historical school in part was a result of that surge of nationalism that arose at the end of the eighteenth century. Instead of the individual, writers began to emphasize the spirit of the people, the *Volksgeist*. In 1814 a programme for the school was enunciated by Savigny.[2] The central question was 'how did law come to be?' Law evolved, as did language, by a slow process and, just as language is a peculiar product of a nation's genius, so is the law. The source of law is not the command of the sovereign, not even the habits of a community, but the instinctive sense of right possessed by every race. Custom may be evidence of law, but its real source lies deeper in the minds of men. 'The living of law' is the secret of its validity. In those matters with which he is directly concerned every member of the community has an instinctive sense as to what is right and proper, although naturally he will have no views on matters which are beyond his experience. Thus the mercantile community will have an intuitive appreciation of the rules that should govern bills of exchange, a peasant of the doctrines that should be applied to agriculture. Such is the approach of the historical school, and it naturally led to a distrust of any deliberate attempt to reform the law. Legislation can succeed only if it is in harmony with the internal convictions of the race to which it is addressed. If it goes farther, it is doomed to failure.[3]

[1] *Infra*, § 33.

[2] *On the Vocation of our Time for Legislation and Jurisprudence*: H. Kantorowicz, 53 *L.Q.R.* (1937), 326.

[3] Chinese philosophy approaches law in much the same spirit: cf. J. Escarra, *Archives de phil. du droit* (1935, 1–2), 70. Marxist dialectical materialism argues that the law is a product of social change—but for different reasons.

The contribution of the historical school to the problem of the boundaries of jurisprudence is that law cannot be understood without an appreciation of the social milieu in which it has developed. The slow evolution of law was stressed and its intimate connection with the particular characteristics of a people. Ever since Savigny wrote, the value which jurisprudence can gain from a proper use of the historical method has been well recognized, and in England Maine[1] and Vinogradoff[2] have kept the interest in these problems alive. Writers of legal history such as Pollock and Maitland[3] or Sir William Holdsworth[4] have provided surveys whose value for the jurist lies in the clear demonstration of the close connection between the common law and the social and political history of England.

In particular, the historical school destroyed for ever the shibboleth of immutable rules of law, discovered by abstract reason: they demonstrated that, just as in the case of the human body, transplants of legal systems or constitutions may be defeated by the immunological reaction of the receiving country.

But in Savigny's particular presentation there were exaggerations of which the historical method must be freed if it is to play its true part. Firstly, some customs are not based on an instinctive sense of right in the community as a whole but on the interests of a strong minority, for example, slavery.[5] Secondly, while some rules may develop almost unconsciously, others are the result of conscious effort—our modern trade-union law was not achieved without much struggle. The flood of legislation in the twentieth century connected with what has become known as the 'Welfare State' marks the denial of Savigny's views in practice if not in theory. Law has been used to plan the future deliberately and not merely to express and order the results of past growth. Thirdly, the creative work of the judge and jurist was treated rather too lightly. The life of a people may supply the rough material, but the judge must hew the block and make precise the form of law. It is possible to exaggerate the 'great lawyer' interpretation of history, for in a sense all men are children of the age in which they live, but to regard the judge as a mere passive representative of the *Volksgeist* is just as dangerous. Both in equity and in the common law we can still trace the influence of the masters of the past, and any layman would be surprised if told that

[1] *Ancient Law.*
[2] *Outlines of Historical Jurisprudence.*
[3] *History of English Law before the Time of Edward I.*
[4] *A History of English Law.*
[5] C. K. Allen, *Law in the Making*, chs. i and ii.

he had an instinctive sense of right concerning the rules of contingent remainders or the subtle refinements of the doctrine of equitable waste. Fourthly, imitation plays a greater part than the historical school would admit. Much Roman law was consciously borrowed, and when the success of the French Code was acknowledged, other nations laid it deeply under debt. When the East began its rapid assimilation of Western ideas, it borrowed freely from the codes of Germany and France.[1] Savigny himself could never quite exorcize the ghost of the reception of Roman law in Germany; the thesis that the jurists, in weaving Roman rules into the customary law, were mere representatives of the *Volksgeist* would have been ridiculed by the peasants who accused the *doctores iuris* of depriving the tenant of his customary rights in land by the introduction of foreign rules. Lastly, Savigny encouraged what Pound has termed 'juristic pessimism'—legislation must accord with the instinctive sense of right or it was doomed to failure. Hence conscious law reform was to be discouraged. There was sometimes a tendency to think that once the evolution of a rule had been traced, this description justified its existence. It is fatally easy to accept abuses in that to which one is accustomed, for 'nothing binds [*sic*] the vision so much as custom and habit. There was a time when the criminal law of this country was in a state which would have been a disgrace to a half-civilized community and . . . judges in high authority and writers . . . wrote about it that it was the perfection of human wisdom.'[2] The historical method in jurisprudence, therefore, should be supplemented by a critical approach based on a philosophy of law, in order that a true perspective may be maintained. Evolution is not necessarily progress, and one of the best aids to our own short-sightedness in dealing with the familiar common law is an acquaintance with many systems. This is well recognized by those who pursue the historical method today.

[1] An interesting account of the latent conflict between a borrowed code and a national tradition is that of Pound, 61 *Harv. L. R.* (1948), 749.

[2] Per Greer, L.J. *Leon* v. *Casey* (1932), 48 T.L.R. 452 at 455. It is easy, however, to exaggerate the 'juristic pessimism' of the historical school. Savigny's real point was that a code was impossible without the labour of many generations of jurists in order to distinguish the living law from what was dead: see J. W. Jones, *Historical Introduction to the Theory of Law*, 58.

§ 7. The Functional School

Dean Pound[1] is usually credited as being the American leader in the school of sociological jurisprudence, but it is unfortunate that the term 'sociological' was never used in this connection—to speak of the functional method would have been more accurate and less confusing. The fundamental tenet of this school is that we cannot understand what a thing is unless we study what it does. It is, perhaps, a penetrating study of the judicial method that has led these writers to urge the widening of the boundaries of jurisprudence. It is generally recognized today that the judicial process does not supply answers to concrete problems with the inevitable accuracy of an adding-machine. Where there is no authority in point, 'the inarticulate major premiss' or the 'social picture' of the judge may determine which of two competing analogies should be adopted. Too large a role has been assigned by some to the 'inarticulate major premiss', and too little attention given to the effect upon judges of their immersion in the common law system.[2] If the judge entirely ignored questions of social interests, of expediency and practical convenience, however, any system of law would become unendurable. But what attitude should jurisprudence take to this awkward question of the values that direct the development of law? Kelsen would expel them in order to retain the scientific method, but Pound considers that they must be analysed thoroughly in order to understand legal development—and an appreciation of legal development he considers a key to the nature of law. To Pound law is more than a set of abstract norms or a legal order—it is also a process of balancing conflicting interests and securing the satisfaction of the maximum of wants with the minimum of friction.[3] The analogy of social engineering is one which Pound uses more than once. Pound's work is well balanced, marked by tolerance and shrewd scepticism. To those who delight in controversy for its own sake he administers a just rebuke—'in the house of jurisprudence there are many mansions. There is more than enough room for all of us and more than enough work. If the time and energy expended on polemics were devoted to that work, jurisprudence would be more nearly abreast of its tasks.'[4] He expects no new heaven

[1] *The Philosophy of Law*; *Interpretations of Legal History*; *Outlines of Jurisprudence*; *Jurisprudence* (1959). The most understanding survey of Pound's writing is that of J. Stone, *Province and Function of Law*, 355 et seq.

[2] Sir Owen Dixon, 'Concerning Judicial Method', 29 *A.L.J.* (1956), 468.

[3] *Interpretations of Legal History*, 156.

[4] 44 *Harv. L. R.* (1930–1), 711.

by a stroke of the pen but urges that the jurist should study the actual social effects of legal institutions and endeavour to make legal rules really effective for the purpose for which they were designed. Law in action may be very different from law in books.[1]

What, however, is the criterion that should be applied in reaching a compromise between conflicting interests, for inevitably some must be sacrificed? Pound's view is essentially relativistic, for he emphasizes that the jurist as such has no divine charter to determine the ends which law should pursue but can only tentatively effect compromises valid for his time and generation because they are based not on absolute ideals but on the views held by that particular community at the moment.[2]

The left wing of the functional school is frequently termed the realist school. In the sense of a body of men agreeing on defined principles, no such group exists. But certain writers show a common approach to the problems of law, and the term 'realism' has been chosen to describe the method.[3] The realists trace their intellectual ancestry to the scepticism of Holmes J.[4] Pound is regarded as having seen the truth but as having failed to apply it effectively to jurisprudence.[5] The great merit of these two jurists was the balance and proportion of their work, for due weight was given both to the logical structure of the law and the influence of social forces. The realists, however, emphasize the element of uncertainty in law and the part played by the personal characteristics of the judge. Law is defined not as a set of logical propositions but in terms of official action. Law is what courts (or other officials) *do*, not what they *say*. Until a court has passed on certain facts, some realists argued, there is no law on the subject yet in existence, for the opinion of lawyers is only a guess as to what the courts will decide. Since law is defined in terms of official action (and not of the rules which should guide action), it follows that any force that will influence a judge in reaching a decision (whether corruption, indigestion, or partiality for the other sex) is a fit subject for jurisprudence. Much scorn is poured on the classical[6]

[1] Pound's six-point plan is laid down in 25 *Harv. L. R.* (1911–12), 513.

[2] *Infra*, § 36.

[3] Judge Jerome Frank, *Law and the Modern Mind*; for a bibliography of realist writings see G. N. Garlan, *Legal Realism and Justice* (1941), 135–43.

[4] 'I always say that the chief end of man is to form general propositions—adding that no general proposition is worth a damn', *Pollock–Holmes Letters*, ii. 13.

[5] 'If ever a man hid his light under a bushel it was Pound': Judge Frank, 80 *Univ. of Pa. L. R.* (1931–2), 19.

[6] Apparently Frank regarded any jurist as 'classical' who did not accept his thesis.

jurists for being deceived by what the courts said they were doing instead of examining what they actually did. The formal rules of law can have little weight in legal evolution—any rule is unsatisfactory because human relationships are too numerous and complex to be confined within a formula, because society is always changing, moral judgments are developing, and the law therefore is in a state of flux.[1] Words cannot accurately depict reality and rules have no meaning apart from their application in a particular case. Judge Frank accused the classical jurists of legal fundamentalism, of verbalism, of scholasticism, of childish thought ways, of worshipping rules, and of exaggerating the element of certainty in law.[2]

The early writing of the realists was frequently misinterpreted: now that sufficient time has passed it is easier to see it in a true perspective. Although they began earlier, the great arguments started by realist writing took place in the twenties and thirties of this century. Those were decades of philosophical, political, and economic upheaval throughout the world. The First World War had shattered the established order of European society and government, and the great depression of the 1930s presented the world, and particularly the United States of America, if not with new problems, with demands which had never been met adequately before. Most of the more widely read realist writers did not deny the importance played by rules of law in the effective operation of legal systems.[3] They did deny, however, that the study of the authoritative pronouncements of those placed within a legal system to make them, whether legislative, judicial, or otherwise, provided a sufficient explanation of the operation of a legal system. As has been seen, they took this denial so far as to define law as what officials do, rather than to define it by reference to the rules which are established (*inter alia*) to control and guide what officials do. They were almost universally agreed in rejecting, or at least in being suspicious of, any *a priori* logic and in accepting an instrumental logic.[4] They were pragmatists. However united they may have been in their rejection of then orthodox and absolutist explanations of law and legal systems, their particular interests took them off in widely divergent directions.

Some[5] attempted to establish a method by which the problems of law and legal development could be made objective, descriptive, and

[1] A. Kocourek, *Rec. Gény*, ii. 459. [2] *Law and the Modern Mind*, 41, 57, 69.
[3] K. N. Llewellyn, *The Bramble Bush* (1951), foreword, 9–10; *The Common Law Tradition: Deciding Appeals* (1960). [4] J. Dewey, *Logic* (1938).
[5] Like W. U. Moore, H. Oliphant, and perhaps W. O. Douglas.

factual. They approached law as a social science and, largely ignoring the rules which were said by many to be the law, they attempted to investigate the facts and decisions and consequences of legal activities, and so, by statistical methods, to produce new and objectively valid criteria for prediction on the one hand and evaluation on the other.[1] Others made the main burden of their attack the indeterminacy of language and the impossibility of providing certainty in particular official action by the framing of general rules. In this they were excited and encouraged by the growing study of semantics by thinkers outside the law.[2] Others concentrated upon the search for the real factors which control judicial decisions after assuming, or in some instances demonstrating, that the authoritative rules of law pronounced by judges as reasons for their decisions did not, in fact, control but were more in the nature of rationalizations made after a decision had been reached on other grounds. For these, various psychological theories were important and a new link with the behavioural sciences was established in the examination of the judicial process.

K. N. Llewellyn concentrated rather on the uncertainty in the actual operation of the rules in appellate courts—he wished to make a 'sustained and realistic examination of the best practice and art of the best judges and their judging'[3] and he has, in fact, in a major work attempted just such a study.[4] Similarly, W. W. Cook submitted the basic rules of private international law to an incisive analysis which showed that what appeared on a superficial glance to be certain was full of inherent ambiguity.[5]

Judge Frank divided the realists into two groups: 'rule-skeptics' and 'fact-skeptics'.[6] The 'rule-skeptics' were those who concentrated on appellate courts and on the nature and uses of legal rules.[7] The 'fact-skeptics' were those who concentrated on trial courts and who found the major cause of legal uncertainty in the uncertainties of fact

[1] For a criticism of this work see H. Kantorowicz, 'Some Rationalism about Realism', 43 *Yale L. J.* (1934), 1240, 1246.

[2] Ogden and Richards's book, *The Meaning of Meaning*, seems to have had a profound influence upon them.

[3] 40 *Col. L. R.* (1940), 581 at 614.

[4] *The Common Law Tradition: Deciding Appeals* (1960).

[5] *The Logical and Legal Bases of Conflict of Laws.*

[6] It may be that Judge Frank was the only prominent member of the second group.

[7] Frank said, 'Some (not all) of this group (Oliphant being the most conspicuous here) espoused the fatuous notions of 'behaviouristic psychology'. Some (not all) of these 'rules-skeptics' went somewhat further than Cardozo as to the extent of the existent and desirable power of judges to alter the legal rules.'—'Cardozo and the Upper Court Myth', 13 *Law and Contemporary Problems* (1948), 369, 384.

finding. Judge Frank claimed that the degree of legal uncertainty was far more extensive, in fact, than most legal scholars were prepared to admit.[1]

If, and in so far as, Judge Frank was emphasizing only the uncertainties introduced into the judicial process by the difficulty of finding the true facts, clearly few would disagree with him. It is the lower courts which deal with the great mass of litigation, and to a humble plaintiff it may not matter whether he loses because of a misunderstanding of the law or because of an error as to fact. If Frank's plea was that the courts should improve the techniques for finding facts, then he emphasizes a point that has not been sufficiently stressed in the past.[2] It is to be noted, however, that until he had had several years' experience as a judge both on trial and appellate courts, Judge Frank was just as vehement a 'rule-skeptic' as any of those he grouped under that name. To understand the judicial process we must, of course, use every aid. In any particular litigation it may be important to study the personality of the court before which the issue will come: but when we are considering the general development of the rules of law, individual peculiarities tend to cancel out.[3]

The realists had more in common than their rejection of much that they saw accepted around them. To a man they were reformers. As might have been expected in the 1920s, they found the law framed in terms of premisses, concepts, and principles drawn from religious, philosophical, and metaphysical thinking of past centuries. In the main, they found methods characteristic of eighteenth-century rationalism and nineteenth-century utilitarianism, but still based in many parts upon medieval metaphysics. They attacked these bases. They insisted that to know what a thing is one must see what it does; that rules of law must be assessed by reference to their consequences. They saw law as but one method of social control and hence they argued that it could not be understood or developed rationally with-

[1] He said, 'So far as appellate courts and the legal rules are concerned, the views of the "fact-skeptics" as to existent and desirable legal certainty approximated the views of Cardozo, Pound, and many others not categorized as "realists".' 'Cardozo and the Upper Court Myth', *Law and Contemporary Problems* (1948), 369, 384.

[2] It is much easier to concentrate our attention on appellate courts. Judge Frank suggested that in an ideal law curriculum there would be a study based on first-hand observation of what courts, administrative agencies, and legislatures actually do. *Courts on Trial.*

[3] Some American writers regret that we have not sufficient evidence concerning the intelligence quotients of particular judges (167 *Annals of the American Academy of Political Science* (1933), 144) and of their psychological complexes. This would add a new terror to election to the bench.

out understanding its relationship with disciplines concerned with humanity and societies—politics, economics, psychology, sociology, and anthropology.[1]

The heyday of American realism was a time for free-swinging criticism of established ideas and established authority. It is not surprising that some of the realists' publications provoked such comments as: 'It was perhaps appropriate that the age of jazz should produce a jazz jurisprudence';[2] and 'the Bar has always studied the human personality of judges, but it has been too modest to dignify such research by the name of jurisprudence'.[3]

Perhaps the most immediate and most important influence of American legal realism was upon legal education. The aims and methods of law schools almost throughout the United States of America, both in the classroom and out of the classroom, underwent change. Classes were invited less and less to analyse the written opinions of judges to ascertain what the 'law on a point is', and more and more to examine the kinds of problems which are thrown up to be solved by the judicial system and to speculate about the kinds of thinking which would solve them best. This change affected profoundly the kind of materials used in legal education and in particular the content and format of American casebooks.[4] The concentration upon the problems to be solved rather than upon the formal and authoritative explanations of how they had been, or ought to be, solved, changed the whole nature of legal education. It forced upon law students a consideration of the interrelations between the study of law and the study of other social sciences. It brought into their field of vision the changes and developments in other social

[1] Perhaps the most succinct statement of the points the realists had in common is to be found in Llewellyn's 'Some Realism About Realism', 44 *Harv. L. R.* (1931), 1222. There Llewellyn concluded that the realists had the following in common: (*a*) A conception of law in flux; (*b*) a conception of law as a means to social ends; (*c*) a conception of society in flux; (*d*) for the purposes of the study in hand a separation of the *is* from the *ought*; (*e*) a distrust of traditional legal rules and concepts; (*f*) a distrust of giving too much importance to prescriptive rules in the decisional process; (*g*) a belief in the value of grouping cases in narrow categories; (*h*) an insistence on evaluation by reference to consequences; (*i*) a belief in the results which would be achieved by programmed and sustained research projects investigating the facts; and see Garlan, op. cit.

[2] C. K. Allen, *Law in the Making*, 3rd ed. 45. (This sentence does not appear in the 7th ed.)

[3] In the first edition of this book, 21.

[4] E. W. Patterson, 'The Case Method in American Legal Education: Its Origins and Objectives', 4 *Journal of Legal Education* (1951), 1; H. A. J. Ford, *The Evolution of the American Casebook*, 7 Res Judicatae 256; A. Ehrenzweig, 'The American Casebook: Cases and Materials', 32 *Georgetown L. J.* (1944), 244; B. Currie, 'The Materials of Law Study', 3 *J. Leg. Ed.* (1951), 331.

disciplines, such as sociology, psychology, politics, economics, and international relations, in a way that an earlier generation of law students had been able and sometimes encouraged to avoid.

Those changes brought with them their own disadvantages. A decline became evident among law students in their understanding and appreciation of the internal discipline and coherence of systems of law viewed as rules and principles. It may be that such a decline was inevitable in any case in a country where more than fifty ultimate courts of appeal may give differing final answers to a question of common law,[1] and that in a national law school it was already impossible to support the notion of a disciplined and authoritative body of law in the form of principles and rules which exist and operate apart from the men who apply them. If so it would be wrong to lay the decline mentioned wholly at the door of the realists. In any case during the 1920s and 1930s many changes in legal education were brought about as the result of efforts of law teachers who would not have called themselves realists.

It is not without significance to note that Thurman Arnold, one of the more colourful realist writers of the 1930s,[2] wrote recently: 'The ideal of a judiciary which discovers its principles through the enlightened application of established precedents dramatizes that most important conception that there is a rule of law above men. In that sense, law must be a "brooding omnipresence in the sky". This is an ideal which can never be attained, but if men do not strive for it the law loses its moral force';[3] and that he also wrote: 'Realistic jurisprudence is a good medicine for a sick and troubled society. The America of the early 1930s was such a society. But realism, despite its liberating virtues, is not a sustaining food for a stable civilization.'[4]

Now that the dust of earlier conflicts has settled, however, there seems to be less difference between the right and left wings of the functional school than was formerly supposed. The gospel of both is that the jurist must study the functioning of law in society: a realistic examination of the judicial process is obviously a part of such an approach. Inevitably, however, differences of emphasis will arise between various writers.

[1] *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.
[2] *Apologia for Jurisprudence*, 44 *Yale L. J.* (1935), 729; *The Folklore of Capitalism* (1937); *The Symbols of Government* (1935), etc.
[3] 24 *U. of Chi. L. Rev.* (1957) at 634.
[4] Ibid. at 635.

§ 8. The Sociology of Law

Pound's sociological jurisprudence should be distinguished from what is now called the sociology of law. The natural confusion caused by the similarity of these terms is an added reason for preferring the name 'functional school' as the best description of the work of Pound.

Sociology of law is defined in many ways, but its main difference from functional jurisprudence is that it attempts to create a science of social life as a whole and to cover a great part of general sociology and political science. The emphasis of the study is on society and law as a mere manifestation, whereas Pound rather concentrates on law and considers society in relation to it.[1]

Thus Ehrlich[2] (1862–1920) builds on the foundations laid down by Savigny a broad theory that law depends on popular acceptance and that each group creates its own living law which alone has creative force. All that the judge does is to make precise and definite the raw material thus furnished by the community. He contrasts *living law* with the mere *norm for decision* laid down by the judge. To concentrate on the latter is to miss the real spirit of law. Codes may be technically in force in the sense that a court will apply their provisions if they are called in question, but frequently a community ignores the codes and lives according to rules created by consent. In parts of Austria the statute law has not greatly affected the real life of the community. The legislation of France and Rumania may be much the same, yet the law of the first differs very much from that of the second. Modern commerce has already gone far beyond the German Commercial Code. Hence to understand the legal life of a community the jurist must supplement his study of the code or the decisions of the courts by an analysis of the facts. 'To attempt to imprison the law of a time or of a people within the sections of a code is about as reasonable as to attempt to confine a stream within a pond. The water that is put in the pond is no longer a living stream but a stagnant pool, and but little water can be put in the pond.'[3] Any English writer would admit this but would consider that the courts gave a reasonably true picture of the living law. Ehrlich, however, draws the conclusion that jurisprudence is merely a branch of

[1] N. S. Timasheff, *Sociology of Law*; R. Pound, 'Sociology of Law and Sociological Jurisprudence', 5 *Univ. of Toronto L. J.* (1943), 1; G. Gurvitch, *Sociology of Law*.

[2] *Grundlegung der Soziologie des Rechts*, translated by Moll (1936) as *Fundamental Principles of the Sociology of Law*.

[3] Ibid. 488.

sociology and extends the boundary of jurisprudence almost to absurd lengths. The first attempt must be to study living law just as the physiologist studies living tissue. It is not essential that law should be created by the State, or applied by the courts, or that there be a system of legal compulsion.[1] The real law consists not of propositions but of legal institutions created by the life of the groups within society—hence the importance of studying the factual institutions that create law. The custom of the past is the rule of the future. He considers that the jurist should study the factory, the bank, the railroad, the great landed estate, the labour union, the association of employers, and a thousand other forms of life. Every department in a factory should be studied so that no process of manufacture or sale should escape the jurist's eye. Rather breathlessly, one wonders if a lifetime would be enough to deal with one industry. Allen is tempted, without 'disrespect to the labours of a very learned, sincere, and original jurist', to term this kind of project 'Megalomaniac Jurisprudence'.[2] Some limit must be drawn, or jurisprudence, however great the zeal of its adherents, will dissipate its energies over too wide an area.

Huntington Cairns[3] also attempts to create a legal science with a dominant emphasis on sociology. He considers that modern jurisprudence is a 'meaningless and fruitless pursuit of a goal incapable of achievement'.[4] Jurisprudence is really an applied science, and no technology has ever succeeded unless it was based on the findings of a pure science. No universal propositions can be laid down concerning legal concepts or rules because they differ from race to race. If jurisprudence wishes to become scientific, it must create a science of society. The basis must be human behaviour as influenced by, and in relation to, disorder. It is impossible to discover how law operates unless we have greater knowledge of the factors that cause change in society and govern its evolution. When this is understood, jurisprudence as a technology can apply these rules to reach useful results. At present jurists are attempting to build a house before the foundations have been laid.

At this point it is convenient to make some general observations on the approaches of Pound, the realists, and Cairns.

Many have criticized these schools on the ground that they desire

[1] Op. cit. 24. [2] *Law in the Making* (7th ed.), 32.
[3] *The Theory of Legal Science*; *Law and the Social Sciences*.
[4] *The Theory of Legal Science*, 11.

to teach a little of everything save the law. A textbook of sociology cannot be made a work on jurisprudence merely by changing the title. A knowledge of the properties of clay may be useful to a modeller, but twenty years spent in scientific analysis of this material would be a waste of artistic talent. Manning wittily caricatures the sociological jurist by comparing him with a professor of mathematics who, concerned about his country's bridges, urges his students to form the advance guard of creative engineering, and stresses that mathematics cannot be studied in isolation from town planning.[1] But might we not use another analogy? A medical professor says:

> Anatomy is all you need to know. It is true that you will gain your knowledge from a dissection of the dead and in your practice you will be concerned with the bodies of those who, at least until they receive your merciful attentions, are still in the land of the living. It is true also that in the case of the patient psychological forces, business worries and married life may affect his health. But the study of these things is difficult and if we want an impartial science we must leave them alone. Austin our founder recognized that some of these things would affect your professional practice, but he wisely concentrated on anatomy alone. I advise you to do the same and to save your profession from having a little knowledge of everything save anatomy.[2]

Neither analogy is, of course, nor is it meant to be, exact, for each begs the question of what is meant by law.

It is submitted that the relationship between law and social interests may be usefully studied by jurisprudence for three reasons. Firstly, it enables us better to understand the evolution of law. What is needed is not a dogmatic assumption that economic self-interest (or some such force) has determined the evolution of law, but a penetrating analysis of the interaction between a tough and taught tradition, which has sanctified the logical structure of the law, and the immediate pressure of social demands. The absorbing task is to watch the struggle of modern social interests to secure expression in spite of the narrow confines of the decisions of the past. To attempt to explain the law on a purely logical basis is equivalent to interpreting a graph of the vibrations in a speeding motor-car without taking into account the surface of the road.[3]

[1] *Modern Theories of Law*, 219. [2] Paton, 4 *Politica* (1939), 24–5.

[3] Vyshinsky, *Law of the Soviet State*, 81, supports the union of jurisprudence and the social sciences, though with the object of showing the merits of dialectical materialism; K. Renner, *Institutions of Private Law and their Social Functions*; A. V. Dicey, *Law and Opinion in England*.

Secondly, although man's views of ethics and of his social needs have changed as the centuries roll by, nevertheless the element of human interest provides a greater substratum of identity than does the logical structure of the law. Comparative law frequently illustrates that, while the legal theories of two systems may be as far apart as the poles, each may be forced for reasons of convenience so to modify the application of its theoretical basis that ultimately the practical results are not far removed. Many Roman decisions on the *Lex Aquilia* are surprisingly similar in effect to those of the English law of tort.[1] German law adopted a subjective theory of contract, English an objective, but each has been forced to adapt its theoretical basis to the needs of commerce.[2] In spite of differing theories, the English and Roman rules of possession were built up under the 'pressure of needs and circumstances which cannot have been wholly dissimilar'.[3]

Thirdly, although the view of Kelsen that the jurist should not discuss the question of social interests is attractive in that it encourages an impartial jurisprudence, yet such a study is essential to the lawyer to enable him to understand the legal system. As a mere question of terminology, it matters not how narrow is our pure science of law if it be supplemented by broader learning. But there is a danger that, if we regard jurisprudence proper as a pure science of law (in Kelsen's sense), the study of the broader questions will disappear from books that are perused by the lawyer.[4] We desire an impartial judge, but the law itself cannot be impartial (in one sense) for its very *raison d'être* is to prefer one social interest to another. Is the judge less likely to make a clear survey because the question of the social interests involved in a particular problem is freely canvassed instead of being the 'inarticulate major premiss'? Public policy is a less dangerous ground of judgment if the reasons for any particular application are clearly set forth,[5] since the very effort to justify a decision may limit the effect of prejudice.

The greatest achievement of the functional school is that it has

[1] Cf. *Dig.* 9. 2. 9. 4; H. C. Gutteridge, *Comparative Law* (2nd ed.), 49.

[2] E. J. Schuster, *Principles of German Civil Law*, 92.

[3] Holdsworth, *History of English Law*, vii. 460. It is not, of course, suggested that the element of human interest leads to identical solutions in the case of every system. Even over a period of one hundred years the common law shows surprising changes. The argument in the text is only that the pressure of social needs will frequently explain what, from the point of view of the logic of the law, may be a mere anomaly.

[4] Lord Simon, in conversation, once described the law as seen by practising lawyers and judges as 'knowledge in blinkers'.

[5] Cf. Lord Wright, *Radcliffe* v. *Ribble Motor Services Ltd.*, [1939] A.C. 215 at 239 et seq.

infused new life into both the study and the development of law. A promising beginning has been made which leads us to expect much in the future. The actual functioning of certain parts of the law has been intensively studied.[1] Perhaps the most valuable results are a new understanding of the judicial method and a broader outlook both in the universities and in the courts. A determined attempt is now made to teach law as a function of society instead of as a mere abstract set of rules, while the courts are canvassing freely the reasons of social policy which lie behind certain rules of law.[2] Probably no common law rule has ever received such sweeping condemnation as the doctrine of common employment received at the hands of the House of Lords.[3] The evil results of the rule were clearly laid down and, though unable to destroy it entirely, the learned Lords diminished its power as far as the fetter of precedent would allow. Administrative law, at first regarded as an intrusion, is now sympathetically studied in the light of the ends which modern government must achieve.[4] Psychology and psychiatry have revolutionized the approach to the problems of criminal law.[5] The real difficulties of constitutional law are now freely canvassed, and in America Brandeis, while at the bar, persuaded the Supreme Court that if an attack was made on the constitutionality of a statute (as being an unreasonable interference with life, liberty, or property), counsel should be permitted to introduce evidence from the social sciences

[1] As illustrations the following works may be mentioned: (*a*) in criminal law, see Jerome Hall, *Theft, Law and Society*, and the survey, *Criminal Justice in Cleveland*, directed and edited by Roscoe Pound and Felix Frankfurter; (*b*) study of the functioning of the law relating to injuries caused by motor vehicles—*Report of the Committee to study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences*. It was discovered that if there was no insurance, the injured victim had only one chance in four of receiving anything; (*c*) studies of the effect of legal regulation on the habits of a population, e.g. Underhill Moore and C. C. Callahan, 53 *Yale L. J.* (1943), 1; (*d*) studies of corporation law, e.g. Berle and Means, *The Modern Corporation and Private Property*; (*e*) analysis of property in the modern world, K. Renner, *The Institutions of Private Law and Their Social Function*.

[2] Lord Atkin, *United Australia Ltd.* v. *Barclays Bank*, [1941] A.C. 1 at 29, referring to technical rules invented to meet requirements of the forms of action which have now disappeared, said: 'When these ghosts of the past stand in the path of justice, clanking their mediaeval chains, the proper course for the judge is to pass through them undeterred.'

[3] *Radcliffe* v. *Ribble*, [1939] A.C. 215. Parliament took the hint and abolished the rule.

[4] e.g. J. Dickinson, *Administrative Justice and the Supremacy of Law*; Jennings, *The Law and the Constitution*. Report of the *Committee on Administrative Tribunals and Enquiries* (The Franks Committee) (1957), Cmd. 218; K. C. Davis, *Administrative Law*; W. A. Robson, *Justice and Administrative Law*; M. D. Forkosch, *Administrative Law*.

[5] *Infra*, Ch. XV.

which would show the probable results of the legislation in question. The acceptance of the 'Brandeis brief' means that the courts frequently consider the real social problems instead of confining the argument to abstract logic.

All this must be placed to the credit of the functional and realist schools. But it must be confessed that the problem of method has not yet been solved. Huntington Cairns undoubtedly lays down a sphere that is too wide for jurisprudence in the lawyer's sense. But there is much in his contention that until social science itself progresses a functional jurisprudence is working in the dark.

The great success of the physical sciences contrasts strikingly with the meagre results secured by social studies. Hence arises the cry that, if only the rigorous method of the scientist were applied to the analysis of social life, then great progress would be made. But two points must be noted: firstly, no trick of method can secure for the social scientist the same accurate results secured by his colleague in physics or chemistry. The essence of the method of the physical sciences is controlled experiment by which the conditions are kept invariant save for one factor. For the sociologist it is rarely possible to achieve this test. Whether man has free will or not, he is a more complex study than an alpha particle, and we cannot hope to secure for the social sciences the rigid definitions and universal demonstrability of natural science.[1]

Secondly, the scientist merely observes facts: in society we are concerned not only with what is, but with the operation of standards dealing with what ought to be. It is impossible to draw a clear-cut line between the fact and the ideal, for each operates on the other. No controlled experiment could ever tell us what should be the end of law. Research may yield useful results which may guide our choice, but the ultimate reason for the choice of one form of social life rather than another is our philosophy of values. A wise community does not always accept that form of organization which will create most wealth—the cost in human suffering may be too high. But the choice between wealth and human suffering is not one that can be determined by research: it depends on the view of the community as to the purpose of life itself.

Thirdly, there is a great gap between research and its application.

[1] K. N. Llewellyn, 20 *N. Car. L. R.* (1941) ,1; M. R. Cohen, *Reason and Nature*; J. Michael and M. J. Adler, *Crime Law and Social Science*; J. Hall, *Annals of the American Academy of Political and Social Science*, clxvii (1933), 119; A. Nussbaum, 40 *Col. L. R.* (1940), 189; Lon. L. Fuller, *The Law in Quest of Itself*, 65.

In the physical sciences the advantages of the use of atomic energy are so great that nothing is allowed to stand in the way of its application: in the social sciences the application of research may conflict with ignorance or prejudice and thus action is retarded.

Hence advance in the social sciences cannot be rapid, and until they are more fully developed, it is hard to see that a comprehensive science of law can be created.[1] The jurist cannot cover the whole scope of social learning, and until there are clearer conclusions on which he can draw, he can only make tentative grasps at truth. This is stressed, not to belittle the work of Pound or Cairns, but to emphasize that progress must inevitably be slow and that the blame for this must not be laid on the lawyers alone. Psychiatry could be developed only after medicine had reached a certain stage, and if jurisprudence is a social science, it can make real advances only when better foundations are laid for sociology itself. So far we have ambitious programmes, some useful empirical results, the infusion of a new spirit into jurisprudence, and a more realistic analysis, but not the actual creation of a juristic science.

The difficulty of studying the sociological effects of the legal system is stressed by B. Abel-Smith and R. Stevens[2] in their survey of modern law. Too many aspects had not been studied in detail and there were enormous gaps in the statistical evidence available to them.

Let us take some examples of the problems which face modern society—poverty, the control of crime, the eradication of war and industrial strife. In each of these the law must play its part. In attempting to control poverty, we are not only in the hands of the economists, but also of our political masters. Can the ideal solution be imposed on the community, if it means further taxation? In the control of crime, further development and research in psychiatry and in the study of the effect of particular methods of punishment is a *sine qua non*. The problem of the eradication of war is discussed in 'Report from Iron Mountain on the Possibility and Desirability of Peace'.[3] The book is alleged to be a secret report to the President of the United States as to what would happen if peace—real peace—suddenly broke out. This, however, is merely the humorous vehicle for

[1] S. P. Simpson and R. Field, 32 *Virg. L. R.* (1946), 855; 22 *N. Y. Univ. L. Q. R.* (1947), 145.

[2] *Lawyers and the Courts* (1967); see also J. L. Montrose, *Precedent in English Law and Other Essays*, 357–64, who points out that all too often when the lawyer dealing with a specific problem turns to sociology, economics, or philosophy for guidance, he will receive little help.

[3] L. C. Lewin (1968).

a sober analysis of the actual effects on the American economy of the need to prepare for war. Fear of war creates an artificial demand and keeps the economy turning over. War creates unity (sometimes) and causes a psychological release. The point of the book (if I read it rightly) is not to justify war, but to emphasize that millions of dollars and the energies of thousands of men have gone into the 'war game', whereas little research has been done on the 'peace game'. What can take the place of war in stimulating research, medicine, and technology? The conclusion is that peace should be introduced slowly and after much thought, if we are to avoid chaos!

Functional jurisprudence, therefore, is a parasitic study which can develop only as fast as the social sciences. It needs money and men; and ironically enough society is willing to spend millions to put a man on the moon, but relatively little for the solution of social problems which are of far greater importance to the common man.

Above all we must remove from our study of society emotions and the easy acceptance of first principles which are not subjected to objective, critical examination. In 1638 the Jesuits in Peru discovered that quinine would alleviate the effects of malaria. The Faculty of Medicine at Paris forbad the use of quinine, as it was regarded as opposed to the first principles of medicine. It is needless to emphasize that the advance of medicine has been due to the substitution of cold scientific analysis for theoretical axioms. In social science, and in jurisprudence, we often try to clinch our arguments by the use of emotive words instead of by scientific analysis. A decision is 'progressive' or 'reactionary': a man is a 'liberal' or a 'communist'. Real advance will come when we reject the approach to virtue and vice which we see on the television screen. One author, surveying fifty years of American writing on Soviet criminal law, states: 'The American scholars, working in Soviet criminal law, have, by and large, tended to find what they wanted to find.'[1]

Lord Wilberforce satirizes some of the modern tendentious research: 'Pick out some examples of conduct which illustrate your thesis, omit all contradictory material and any statistical analysis, throw in a few newspaper snippets or attractive anecdotes and then re-state as a conclusion the thesis you started with. Is this good enough . . .?'[2]

[1] Z. L. Zile, 70 *Col. L. R.* (1970), 194 at 216.
[2] 10 *J. Soc. Public Teachers of Law* (1969), at 259.

§ 9. The Teleological School

The teleological school regards the functionalists as laying down the pen when the task is only beginning. Pound believes that the end of law should be to satisfy a maximum of wants with a minimum of friction. The school we are now discussing would ask: 'What is meant by interests or the end of law? In the inevitable conflict of interests, what criteria should the law use in sacrificing one to another?' Pound himself was clearly interested in the end of law, but in his writing the two strands of relativism and absolute values are hard to reconcile.[1]

There are two fundamental points in the approach of this school. Firstly, it is argued that a proper answer must be given to the problem of the validity of law. Austin said that law was valid if it was the command of a sovereign, the realist if it was embodied in a particular decision of a court, but to the philosophers these seem rather superficial replies. Secondly, this school stresses that law is intimately related to justice, and that some attempt must be made to discover an absolute criterion by which law may be judged.[2] Consciously or unconsciously we all use ethical standards in criticizing the law. The analytical school set up an ideal of logical harmony, while even the pragmatic Pound assumes that law *should* satisfy as many social interests as possible. The iconoclastic realist is often moved by a burning passion for law reform, by a desire that law should be made a more effective weapon for social control. If we remain on the lowly level of fact, these are mere assumptions which cannot be proved—such views are based on ideals as to what law should be. In the same way, many criticize a distinction on historical grounds, thereby assuming that it is an ideal for law that historical continuity should never be broken—some historical jurists cling to the notion that all evolution is a progress to higher values. So far as the teleological school emphasizes that it is better to lay bare the unconscious ethical presuppositions of our thought, the argument is irrefutable. Ethics looked at comprehensively is merely a reasoned study of preferences, an endeavour to find a foundation for the judgments of value we are always making.

This school therefore asks: 'What should be the ideal end of law? What should guide us in developing the law?' The functional school shows somewhat the same interest, for Pound's doctrine of social

[1] *Introduction to the Philosophy of Law: Contemporary Juristic Theory.*
[2] Cf. Felix Cohen, *Ethical Systems and Legal Ideals.*

engineering assumes that law must be developed to meet changing social values.[1] But Pound expressly admits that philosophy has failed to provide an ideal scale of values and that the best the jurist can do is to proceed with the task of adapting law to the needs of his generation—the choice between conflicting ideologies is one for the community at large.

The teleological school is optimistic enough to consider that a reasoned scale of values can be discovered as a basis for legal development. The greater part of the work of this school lies in the realms of philosophy, and hence philosophical jurisprudence is a term that is frequently applied. But philosophy overlaps many schools of jurisprudence: we find traces of its doctrines in Savigny, Kelsen, and Pound, to name only three. The term teleological school is more appropriate, as it emphasizes the fundamental quest—the purpose[2] of law.

§ 10. The Scandinavian Realists

In recent years interest has been attracted to a significant movement in legal theory in the Scandinavian countries by the publication in English of representative works by various Scandinavian authors. This movement has been labelled Scandinavian Realism. It is thought, however, that few Scandinavians, if any, would accept the label, nor would any of them accept as schoolfellows all those who have been lumped together by outsiders. Those best known to English readers are Olivecrona, Lundstedt, and Ross.[3] There are wide differences between them,[4] but they have it in common that they are all influenced by the philosophical works of Hägerström,[5] much as the English analytical positivists are influenced by the work of Wittgenstein. And the two influences have similarities, for both rejected traditional metaphysical thinking and both developed from philosophical bases of a positivistic kind.

Hägerström set out to destroy the notion that right–duty relations and legal obligations have any objective existence. He asserted that

[1] Pound emphasizes that even the concept of function implies a purpose: *Social Control through Law*, 132.

[2] *Infra*, Ch. IV.

[3] K. Olivecrona, *Law as Fact*; A. V. Lundstedt, *Legal Thinking Revised*; A. Ross, *On Law and Justice*.

[4] And between any one of them and other Scandinavian writers, e.g. F. Castberg, *Problems on Legal Philosophy*.

[5] See *Enquiries into the Nature of Law and Morals* (trans. C. D. Broad) (1953).

the idea of duty had no logical meaning. It was no more than the expression of a feeling which could be explained psychologically but which had no place in the logic of a legal system. In so far as such feelings are discovered in society, as they are, and are important to the working of a legal system, they cannot be said to be reasons for enforcing a law for they are the consequences of the operation of the law and have no existence independently of the law. By an examination of Roman Law, Hägerström sought to show how much 'word magic' was used in traditional legal forms to evoke feelings of duty or obligation. He insisted that arguments from justice and such general notions were merely emotional and were neither scientific nor of any objective or logical value.

His followers, in their various ways, carried that approach into an examination of law as they found it, seeking an objective and scientific explanation of the nature of law divorced from judgments of value and emotional attitudes. They said that they wanted to see what law was and how it worked as a social fact. This sounds rather like the language of American realism, and there are in truth some similarities between the two schools, particularly in their tendency to speak of rules of law as being properly tested by asking how well or ill they serve to predict the decisions of the authoritative agencies of the legal system. But there are wide differences between them none the less. The Americans, as has been seen, were mainly interested in the work of the courts, and they sought to understand all the factors relevant to decisions made by courts. The Scandinavians, on the other hand, seem to be more interested in developing a formal philosophy of law, seen as a body of rules, which will explain law logically and scientifically as a necessary part of the organization of society as a whole.

Lundstedt was the most extreme of the three writers mentioned and his work is likely to have less influence among English readers partly because of the extreme positions he took; but also because his work in English[1] is so difficult to read. Lundstedt made the mistake of dispensing with a competent translator. The value of his work is further affected by the extreme egotism of the author and the very personal reaction he had to his critics.

Lundstedt laughed at most of the traditional English theories of law. He rejected what he called 'the method of justice' and introduced his own 'method of social welfare'. Law is indispensable for the maintenance of human society. It needs no other basis, no higher

[1] His posthumous *Legal Thinking Revised* (1956).

explanation or justification. Its content should be determined by the requirements of 'social welfare'. Rights and duties are by-products of the maintenance of law and not things which are protected by the law, nor can they explain or justify the law itself. The science of law should treat law as having its own ends, its own logical demands. Only in this way can a true science be developed, and a realistic view of legal and social facts be obtained. Unfortunately, Lundstedt never seems to make quite clear how his 'method of social welfare' is to be used or what the details of the method are.

Olivecrona argues that the law to be understood must be studied as a social fact, but he does not go as far as Lundstedt does in rejecting as fantasy all talk about the normative nature of rules of law. He argues that rules of law have the character of 'independent imperatives' and that as such they do act as causal links in explaining the actual behaviour of officials and citizens working within a legal system. They do not, however, act as imperatives issuing from a formal or a human source carrying with them any binding force. The belief in the binding nature of law, except as a psychological and subjective feeling produced by habit and history in groups of people, is transcendentalism.

> As an example of independent imperatives may be cited the Decalogue. It cannot be said that Moses is commanding us to do this or that. Nor is this supposed to be so. The words are said to be the commands of God. In reality the Decalogue is a bundle of imperative sentences, formulated several thousand years ago and carried through the centuries by oral tradition and in writing. They are nobody's commands, though they have the form of language that is the characteristic of a command.
>
> The rules of law are of a similar character.[1]

The task then of the legal scientist is to study the actual working of a society and its legal system as a matter of objective fact and to understand the relations of cause and effect in the natural world. The real operation of law and of its so-called binding nature can then only be understood by reference to individual and group psychology.

Ross is as vigorous in his rejection of metaphysical thinking, and in particular of any kind of natural law thinking, as any of the other Scandinavians. He is, however, more easily understood and appreciated by English lawyers. He uses more illustrative examples which are familiar to English lawyers, and he shows a greater grasp

[1] *Law as Fact*, 43.

of traditional English legal theory. He examines in a not unfamiliar way a number of problems which have concerned English legal thinkers for a long time. While agreeing with the other followers of Hägerström that it is a fallacy to presuppose notions of justice and of pre-existing rights or duties which will justify particular legal rules, he does show how legal concepts such as 'rights', 'ownership', have a place in the logic of the law as organizing tools enabling simplification of a very large number of complicated conditioning facts and consequences. He sees rules of law, in so far as they have directive operation, as not aimed directly at controlling the behaviour of subjects but as directing the ways in which the official agencies of the legal system should decide issues. Thus, a rule of law is most commonly to be seen as telling a judge how to decide a case, not as telling a subject how to conduct himself.

At the same time he reduces the question of validity to one of predictability.

> The test of the validity is that . . . we can comprehend the actions of the judge (the decisions of the courts) as meaningful responses to given conditions and within certain limits to predict them—in the same way as the norms of chess enable us to understand the moves of the players as meaningful responses and predict them.[1]

He does not fail to see the apparent inapplicability of a predictive test for validity as applied to a judge. How can a judge decide what is valid law by reference to a prediction of what he will do?[2] Presumably, according to Ross, a judge will decide what is valid law by reference to his predictions of what other judges will do in the future. Ross does, however, seem to ignore the internal tests provided by most legal systems which enable judges to decide questions of validity by the application of constitutional rules not of a predictive kind.[3]

§ 11. Comparative Law

Jurisprudence is usually distinguished from comparative law, though it is difficult to see how the former can exist without the latter.

[1] *On Law and Justice*, 35.
[2] Cf. H. L. A. Hart, 'Scandinavian Realism', 17 *Camb. L. J.* (1959), 233.
[3] For more extensive descriptions and criticisms of Scandinavian Realists, see H. L. A. Hart, op. cit.; F. Castberg, 'Philosophy of Law in the Scandinavian Countries', 4 *Am. J. of Comp. L.* (1955), 388; G. Marshall, 'Law in a Cold Climate', 1 *N.S. Juridical Review* (1956), 259; D. Lloyd, *Introduction to Jurisprudence*, ch. vii; W. Friedmann, *Legal Theory* (5th ed.), 304–11.

Legal history is also essential to jurisprudence, but no one maintains that the two are identical. There have been as many debates on the nature of comparative law as on that of jurisprudence—in some of the definitions comparative law is indistinguishable from comparative jurisprudence. Professor Gutteridge[1] emphasizes that comparative law denotes a method of study and research and not a distinct branch or department of the law. He distinguishes (*a*) descriptive comparative law, the main purpose of which is the provision of information, and (*b*) applied comparative law which has a definite object in view, e.g. the pursuit of uniformity of commercial law, or the desire to make the principles of private international law less diverse between the nations.[2] Comparative law is a relatively new discipline and its content is still a matter of dispute.

There is no *a priori* distinction between jurisprudence and comparative law. The two studies overlap the same field, although the point of emphasis is different. A collection of all the rules in the world relating to married women would be a useful piece of descriptive comparative law, but it would hardly be jurisprudence. Holland's view was that the scope of comparative law was practically limited to descriptive investigations—the material was then to be handed to the jurists who would 'set forth an orderly view of the ideas and methods which have been variously realised in actual systems'.[3] But advocates of comparative law have not been content with this lowly task, and the more they delve into the theory of the legal method, the more indistinguishable becomes the product from jurisprudence.

Comparative law is rapidly assuming greater prominence. The creation of the European Economic Community has focused attention on the need to understand the general principles of European law. The tortious liability of the E.E.C. is to be ruled by the general principles common to the laws of the member states. 'A jurist belonging to the Common Market must be a comparatist.'[4] European universities are now taking a much greater interest in this problem.[5] But attention cannot be confined to the European scene alone. The problems of the emerging states of Africa may compel attention to

[1] *Comparative Law*, ch. i.

[2] There is a third category of abstract or speculative comparative law, but Gutteridge thinks that its content, properly considered, would really fall into one or both of the heads set out in the text. See also R. David, *Traité élémentaire de droit civil comparé.*

[3] *Jurisprudence* (10th ed.), 8.

[4] See the survey by D. Tallon, 10 *J. Soc. Public Teachers of Law* (1969), 265 and at 270.

[5] R. H. Graveson, ibid. 273.

be directed to the merging of Eastern systems with the common law.[1] Islamic law governs five hundred million people, Hindu law more that four hundred million,[2] and Chinese law covers about one-fifth of the human race. Moreover, states such as Nigeria show the difficulty of moulding the application of the different strands of law into one system. The problem, therefore, has ceased to be an academic one and has become of the greatest practical importance.

Even considering law reform in England, the Law Commissions Act, 1965, expressly directed that the Commissioners were under a duty to obtain such information as to the law of other countries as would facilitate their task.

§ 12. The Scope of Jurisprudence

We have, therefore, many answers to the problem of the scope of jurisprudence. Kelsen, in his pure science, would divorce jurisprudence from ethics and sociology; Pound would study law in action, and the sociologist would turn to a science of society itself. The teleological school would plumb the depths of metaphysics to discover absolute values on which to build.

It is absurd to suggest that there is only one useful path for the jurist to tread. Each must work according to his own endowment, and individual preference will determine the issue. To the writer functional jurisprudence seems to offer the most useful results, though it is emphasized that these results still lie in the future, for until the social sciences are further developed, the jurist is greatly handicapped. Another major difficulty is the diversity of the actual legal systems and the lack of knowledge of many of the great codes of the past. Even if a complete copy of the Twelve Tables were discovered, we would know little of the life of the people that would explain the working of these rules. The results of the writing of this century are so far mainly destructive. Many false claims have been exposed. It is no longer hoped to discover universal rules of law, to create a rigid scheme of classification into which all legal systems can be fitted, or to discover a few general principles from which the answer to every legal question can be deduced. The real complexity of the problem is at last being recognized, and that at least is a gain. The ground has been cleared and lies ready for useful work in the future. Instead of seeking for immutable principles, jurisprudence attempts to discover

[1] J. N. D. Anderson, ibid. 245.
[2] Ibid. 246.

as much as possible concerning legal method, to study the concepts of the law, and trace the influence of the social forces upon their development. Jurisprudence is not primarily interested in discovering uniformities, for diversity may be even more important. If we put the emphasis not on the concepts of law but on the legal method used by varying societies to create order, to resolve disputes, and to further desired changes in society peacefully, the old bogy of the diversity of legal rules ceases to be a terror to jurisprudence, and becomes a most significant factor. All communities which reach a certain stage of development create a legal system to protect certain interests. As the community develops, the concepts of law will become more refined and the interests protected will change. No two countries will pursue precisely the same evolution, and no universal rules can yet be formulated to explain all legal changes. But although the problem is a difficult one, there is no reason why we should not attempt to answer it.

In short, jurisprudence is a functional study of the concepts which legal systems develop, and of the social interests which law protects. But the element of interest brings in the question of value. It is clear, therefore, that functional jurisprudence cannot be satisfactorily developed without a complementary study of the purposes for which society exists.[1]

[1] *Infra*, Chs. IV, V.

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II

THE EVOLUTION OF LAW

§ 13. The Primitive Community

Jurisprudence for long deserved the taunt that it boasted of universality while treating only of mature legal systems. Today, under the influence of the historical school, the researches of anthropologists are laid increasingly under debt.

Speculation has invented definite and simple lines of human evolution. Thus it was said that men lived first in the Stone Age, then the Bronze Age, and finally the Iron Age; that in marriage promiscuity came first, then one wife with many husbands, then one husband with many wives, and finally monogamy; in economic activity there is a simple advance from hunting to pastoralism, to agriculture, and then to the Machine Age. Anthropological research has shown that this is a fallacious simplification of the problem, which in reality is much more complex.[1] All races have not followed the same lines of evolution. Moreover, although there seems to be some correlation between the economic stage which a race has reached and the social institutions which it enjoys, this correlation is not perfect.[2] Few serious scholars today adopt the view that the whole of social life is determined by any one factor. Economic forces may be important, but they are not all-controlling and sometimes they fail to explain significant differences between two societies the economic basis of which is identical. Sociologists realize that the truth will be achieved, not by setting up one factor as a cause and regarding the rest of social life as a result, but in showing the interrelation between each of the forces which create society. Thus if economic means of obtaining a livelihood influence the social structure, social doctrines also influence economic forces.[3] The simple view which regards economic forces as all-powerful is now falling into that disfavour which has already

[1] The Aranda tribe in Australia is split into groups, some of which are matrilineal and others patrilineal; there seems no reason for this difference between societies with such economic and geographic similarity: T. G. H. Strehlow, *Aranda Traditions*, 71.

[2] L. T. Hobhouse, G. C. Wheeler, and M. Ginsberg, *The Material Culture and Social Institutions of the Simpler Peoples.*

[3] P. A. Sorokin, *Contemporary Sociological Theories* is an excellent survey.

become the fate of the religious interpretation of legal history. As yet, generalization is fraught with danger, for the lesson of modern social research is a critical attitude to all hypotheses.

Thus we must treat with suspicion any bold claim to plot a definite correlation between law and the culture of a society. That there is some relationship is obvious, for law is but a result of all the forces that go to make society. But there is a definite time-lag between the creation of new material culture (such as the machines of the industrial age) and the development of new social methods of control.[1] Law adapts itself slowly to new conditions—sometimes the development will be so retarded that a violent revolution is necessary. In other cases, one race may be able to draw on the experience of another and thus effect a comparatively rapid change. The variation in the 'cultural lag' of different systems can be explained only by an intensive study of each society in question—the answer cannot be found in economic forces alone.[2] Again, there are sometimes rapid jumps in legal evolution, because of direct borrowing—Japan has adopted modern commercial codes without passing through the intermediate stages which mark European law.[3] Some neo-Hegelians write as if there were immutable laws of legal evolution. Maine's generalization that the progressive societies have developed from status to contract ceases to be a convenient summary of certain features of legal history and is elevated to the rank of an historical truth.[4] Nineteenth-century individualism regarded all law as inevitably evolving towards greater freedom for the individual, but today the growth of collectivist theories shows that the legal pendulum is at present swinging back. Some have been so struck by the opposing tendencies in legal history that the theory of a cycle has been put forward. Legal institutions do not develop continuously along a single line, they grow and then decay. But the factors which create a cycle and the evidence that the decay of a society is inevitable are not yet clearly shown. Man develops and dies, as have many societies in the past, but there is no conclusive evidence that the social body must necessarily deteriorate.[5]

[1] K. Renner, *Institutions of Private Law*, is the classical exposition of the slowness of law in adapting itself to social change.

[2] Huntington Cairns, *Law and the Social Sciences*, 163–4, discussing the work of W. F. Ogburn, *Social Change*, and F. S. Chapin, *Culture Change*.

[3] As have so many other countries in recent years, e.g. India, Pakistan, and the other newly independent countries of Africa and Asia.

[4] *Infra*, § 87. Maine was careful to emphasize that he was speaking of what had happened 'hitherto'.

[5] P. A. Sorokin, op. cit. 728 et seq.

One warning may be given: there is always danger in interpreting primitive law by the use of categories or concepts suitable to a developed system. Native customary law may be unintentionally changed by the use of common law concepts in applying it.[1] However aware we are of the danger, the language which is the tool of the common lawyer deforms to some extent the explanation of the rules of primitive systems. We ask questions which would never have occurred to a primitive man.

A useful classification of types of societies adopts as a criterion the method employed in earning a living. What is called 'primitive law' covers communities in the following categories: Lower Hunters, Higher Hunters, Pastoralists, Advanced Pastoralists, First Agricultural Grade, Second Agricultural Grade, and Third Agricultural Grade. The most ambitious attempt to discover if there is any correlation between the economic stage which a tribe has reached and its culture and legal institutions is that of Hobhouse, Wheeler, and Ginsberg.[2] The main defect of sociology and historical jurisprudence is what has been termed the method of 'illustration'. A theory is invented and then the pages of human experience are searched for favourable examples. No theory can be proved by this method, since unfavourable examples are merely ignored. In order to obtain an objective result, these authors carefully classified all the data available on more than four hundred tribes. The results are very interesting, but certainly show the danger of rash speculation. In analysing the problem of the extent of self-help the tables show that although the use of a regular system of justice increases as the society develops, it is impossible to say that every tribe in the third agricultural grade has reached the same level of development.[3] There is no close correlation between the economic form and the legal institution—all that can be said is that most of the tribes that are advanced economically have also correspondingly developed their legal systems. But a much greater field of evidence must be available for scrutiny before any conclusive findings can be advanced.[4]

Bearing in mind all the difficulties that have been enumerated, we

[1] See J. L. Montrose, *Precedent in English Law and Other Essays*, 74 at 79.

[2] *The Material Culture and Social Institutions of the Simpler Peoples.*

[3] Thus in the case of the lower hunters, 40 per cent of the tribes have pure self-help and none of them have public justice as a regular system. In the third agricultural grade, 11 per cent have pure self-help and 41 per cent a regular system of public justice.

[4] The most valuable characteristics of the work of Hobhouse, Wheeler, and Ginsberg are the scientific detachment and the caution in drawing conclusions from data that are often shown to be exceedingly difficult to classify.

now proceed to discuss some of the most striking features in the evolution of law. The object is not to set down universal laws of legal evolution, but rather to study particular types of law: viz.

(*a*) Primitive law.
(*b*) Middle law.
(*c*) Classical law.
(*d*) Post-classical law.

§ 14. Primitive Law

(*a*) *Before the Era of Courts*

It was once thought that the primitive native was automatically law-abiding and, therefore, had no need of a system of law. The *mores* of a tribe were regarded as a confused mass of usage, custom, and religion; it was said that there was no law, no individual property, no real means (save self-help) of enforcing any 'right' which an individual might think that he possessed. What keeps the community together is fear of the unknown, of the strange spirits that may punish man. What has been done once without evil result may be done again, but to innovate is to risk a supernatural sanction. Hence the native has no desire to break the customs of the community. Early law, therefore, springs from a religious sanction, the fear of the unknown, of the spirits that dwell everywhere.

But modern research has shown that this view needs correction. It is true that public opinion is always more powerful in a small community—it exercises much more influence in a tiny village than in a world capital. But Malinowski asks whether it is not contrary to human nature to accept any constraint as a matter of course.[1] All customs are not on the same level—some are followed because men choose to follow them either as a matter of convenience or because they have never dreamt of doing otherwise, but others cut across human desires and passions and hence require an effective machinery of enforcement. A member of a race that dwells in round huts would probably never think of constructing a square one. If he did build in a new style, his whim would not endanger the community life. But rules concerning adultery or rape may need a powerful sanction.

[1] *Crime and Custom in Savage Society* (1932), 10. An interesting survey is William Seagle, *The Quest for Law*; see also K. N. Llewellyn and E. A. Hoebel, *The Cheyenne Way—Conflict and Case Law in Primitive Jurisprudence*.

Malinowski considers that this is the germ of primitive law. There is no sanction in the Austinian sense—a penalty imposed by a determinate body—but the law does rest on a greater force than the vague pressure of public opinion. The very organization of the community protects the law. Apart from the community primitive man is helpless, and the ultimate sanction for the 'unclubbable' (not in the literal sense) man is expulsion or death—a sentence that will not be imposed by a predetermined tribunal but carried out by some members with the active approval of the rest. Even at a much later period when courts are fully developed, we still find a relic of the primitive expulsion in outlawry, which Brunner has described as the sentence of death pronounced by a community which has no police constables or professional hangmen.[1] The enforcement of economic obligations depends on a primitive anticipation of the 'stop list'—if one churlishly refuses to make a customary payment, no other member will help such a defaulter. If the Cheyenne Indians have a rule against individual hunting and it is broken, the offender is excluded from the tribe.[2]

> There must be in all societies a class of rules too practical to be backed up by religious sanctions, too burdensome to be left to mere good-will, too personally vital to individuals to be enforced by any abstract agency. This is the domain of legal rules and I venture to foretell that reciprocity, systematic incidence, publicity and ambition will be found to be the main factors in the binding machinery of primitive law.[3]

At a very early stage the native distinguishes between a payment which is obligatory and one that is the result of generosity. There is undoubtedly here the germ of law, but whether such rules are strictly to be called law or not we leave for subsequent discussion.[4]

Before the advent of courts the sphere of pre-law (if we may invent the term) is fairly small. There are few rules concerning property but some concerning inheritance on death. There are rules of marriage (sometimes extraordinarily intricate as in the case of the Australian aborigines) which lay down the classes within which marriage may take place. Private wrongs are sometimes avenged by the victim,[5] in other cases compensation is payable. There are a few offences which are regarded as an outrage on the community as a whole, such as

[1] Outlawry was abolished in civil proceedings only in 1879, 42 & 43 Vict. c. 59, s. 3.
[2] K. N. Llewellyn and E. A. Hoebel, *The Cheyenne Way*, 9–10.
[3] B. Malinowski, *Crime and Custom*, 67–8.
[4] *Infra*, § 19.
[5] H. I. P. Hogbin, *Law and Order in Polynesia*, ch. VI.

incest, witchcraft, and general 'incompatibility of temperament'. A simple economic structure requires few rules for its regulation.[1]

(*b*) *Courts*

About the end of the first agricultural grade institutions begin to appear which perform, often among others, functions which we would now recognize as those proper to courts. Before this it is rare to find definite institutions for the settlement of disputes, though a chief or patriarch may exercise a general control over the community. With the advent of the court the sphere of law becomes more definite, and the rules gradually more precise. The future history of law is largely bound up with the creation of definite institutions, which have power not only to apply the law to the settlement of disputes but also to create new law, and to secure the effective enforcement of such law as exists. Nevertheless, it is a long and slow evolution before there are institutions with the effective powers of the courts, legislatures, and the police mechanism of the modern State. If private violence is to be overcome, then the law must be enforced; but if law is to remain acceptable, then there must be machinery for its reform.

The orthodox theory is that the first task of the court is to moderate the blood feud and regulate self-help.[2] The *lex talionis* limits the aggressor to inflicting an injury similar to that which he received. Then appears the doctrine that the victim or his family may if they wish accept compensation, but that if it is not paid, physical violence may be inflicted. 'Buy off the spear or bear it.' As courts grow in power, the acceptance of compensation is made compulsory, save for certain offences which are regarded not as a mere private wrong but as an outrage against the community and deserving of punishment. Criminal law thus is definitely separated from civil law. For example, Roman law in 450 B.C. was in a state of transition from optional to compulsory composition.[3] Courts existed, but the methods of enforcement were still primitive, e.g. a claimant must himself secure the attendance of his opponent (apparently in the last resort by violence).[4]

[1] This is clearly brought out by K. N. Llewellyn and E. A. Hoebel, op. cit.

[2] For an account of a blood feud in 1914, see T. G. H. Strehlow, *Aranda Traditions*, 62; for self-help among the Cheyennes, see K. N. Llewellyn and E. A. Hoebel, op. cit. 194–5. Criminal procedure by way of appeal for murder was really a relic of the blood feud: Pollock and Maitland, *History of English Law*, i. 31.

[3] H. F. Jolowicz, *Historical Introduction to the Study of Roman Law*, 175.

[4] Similarly in Assyrian law. See G. R. Driver and J. C. Miles, *The Assyrian Laws*, 335.

Such institutions as *pignoris capio* and *manus iniectio* are obvious relics of an age of self-help. An analogy may be seen in the position of international law today—there are courts, but they do not have compulsory jurisdiction. Even if two nations submit their dispute to judicial decision, there is no machinery for the effective enforcement of decisions. In primitive communities the State finds difficulty in extending the control of the courts over the passions of men. Sometimes in order to persuade citizens of the value of the judicial process a bribe is offered, as in the fourfold damages awarded by Roman law against a thief caught in the act. In Assyria the State benefited itself by the forced labour imposed on criminals, gave as a *solatium* to the injured party a monetary compensation, and satisfied the desire for vengeance by the infliction of stripes.[1] But the ultimate reason for the triumph of royal justice is its efficiency, and the protection which it grants to those who would be too weak to stand alone.

In some respects this orthodox theory of legal evolution must be corrected. The distinction between civil and criminal law appears much earlier than is suggested.[2] But here once again we are faced with a difficulty of terminology. If the marks of criminal law are sentence by a court and the execution of the sentence by state officials, then it is a late development. But if we adopt as the test whether the wrong is regarded as a matter for a private individual only or for the community as a whole, then the distinction between criminal and civil injuries appears at the very birth of law. In some primitive communities definite rules of criminal law are enforced by superstitious practices—sorcery, or the supernatural consequences of taboo. To avoid confusing the issue by using our modern clear-cut terminology it would perhaps be preferable to speak of public and private delicts. Even in the most primitive tribes the community itself takes action against any one guilty of certain offences, e.g. incest, witchcraft, or bestiality. What is confusing is that modern man regards murder as *the* crime and therefore, if we find that murder is only a matter of private compensation, the conclusion is erroneously reached that there are no offences which the community itself punishes.[3]

Another criticism of the orthodox view is that of Diamond, who

[1] G. R. Driver and J. C. Miles, op. cit. 360. But, as is pointed out by the learned authors, the text says, 'they shall beat', etc., without specifying what 'they' means. The phrase apparently means that the stripes shall be inflicted by a person who has a right to do it—sometimes an officer of the king, sometimes the witness, sometimes an accuser (366). The Hebrews never seem to have had a public executioner (367).

[2] D. Daube, *Biblical Law*, 103.

[3] G. R. Driver and J. C. Miles, op. cit. 298.

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denies that the *lex talionis* preceded the payment of compensation.[1] He considers that early law emphasized compensation for civil injuries and that corporal sanctions began to appear only in the codes of the middle period. Is not the truth somewhere between both views? The *lex talionis* in the sense of loosely regulated self-help belongs to primitive law and applies both to civil and criminal acts. But the direct infliction of corporal punishment by officials of the State belongs to a much later period.[2]

At first there is little notion of *legal duty*—the concept is rather that of *physical liability*.[3] At first it is the community rather than the individual who is responsible—it is only gradually that an individual's obligation is distinguished from that of the group to which he belongs. A debtor gives a hostage as security; if the debtor defaults, it is the hostage who is liable and not the debtor. Liability for debt does not mean execution against goods as in modern systems, but the physical liability of the hostage to be cut in pieces or sold into slavery —in a very real sense can a creditor 'take it out of the hide' of the debtor. When a debtor is allowed to give his own person as security, the creditor may take vengeance for any default directly upon him. The law of contract is not yet born—the debtor is regarded as one who wrongfully detains the creditor's property.[4] In early English law, debt (the action for money owed) was hardly distinguishable from detinue (the gist of which was that the defendant wrongfully refused to surrender a chattel to which the plaintiff had a right to immediate possession). The notion in early law is not so much one of legal obligation (that a person ought to do something) as that of liability (that he must pay or suffer punishment). In the law of delict we see the analogous notion of 'thing liability'. Deodand illustrates

[1] A. S. Diamond, *Primitive Law* (2nd ed., 1950), 304.

[2] For example see G. R. Driver and J. C. Miles, op cit. 346–7. Even when the State inflicts punishment, it may make the punishment fit the crime, e.g. a man loses his lips for kissing a married woman, the wife of a man who has seduced a virgin is delivered to the seduced girl's father for prostitution. Closely related are the 'mirroring' punishments: punishment of arson by burning, coining by boiling, removal of a boundary stone by ploughing off the offender's head. Cf. H. F. Jolowicz, *Cambridge Legal Essays*, 204. 'The Assyrian principle is talion, the child of the blood feud of which it restricts the ferocity, and the parent of the doctrine that the punishment must fit the crime': G. R. Driver and J. C. Miles, loc. cit.

[3] Cf. H. F. Jolowicz, *Historical Introduction to the Study of Roman Law*, 162–3.

[4] For sheer barbarity, see the dictum in *Dive* v. *Maningham* (1551), 1 Plowden 60 at 68: 'For if one be in execution, he ought to live of his own, and neither the plaintiff nor the sheriff is bound to give him meat or drink. . . . And if he has no goods, he shall live of the charity of others, and if others will give him nothing, let him die in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill-behaviour brought him to that imprisonment.'

this tendency. If Paul took John's sword and slew Peter with it, the sword was forfeited. Later in English law, instead of losing the *res*, the owner could pay its value to the Crown. As late as 1842 in England a railway company was forced to pay deodand because of deaths resulting from a locomotive accident.[1] Deodand was independent of all notion of fault in the owner, for liability attached to the inanimate *res*. Where a slave or an animal was a 'wrongdoer', it was even more natural to attach liability. The noxal surrender of ancient Rome and the distress *damage feasant* of modern English law[2] illustrate this approach. The rules are far removed from any modern notion of fault. Wigmore cites the story of the killing of Baldur. All things had been sworn not to injure Baldur and the gods in sport threw missiles at him. But Loki was jealous, and learning that the insignificant mistletoe had not been sworn, he put a twig into the hands of Hodur the blind god and guided his aim; Baldur was killed and the innocent Hodur paid the penalty of death.[3]

There has been a gradual change from liability of the person to liability of the goods which a person possesses. This evolution of the law of execution against property is rather slow—thus in Roman law the right of *pignoris capio* is at first exercised only to put pressure on the debtor to pay his debt, for there is no right to sell or to use the *res*. When a court begins to grant execution against property, the tendency is for all the defendant's chattels to be seized, even if only a small sum is owing—to take only sufficient property to cover the debt seems an obvious procedure, but one that develops slowly.[4] Today, now that imprisonment for debt has been so largely restricted, liability is in effect limited to a man's property and future earning power. By the device of the limited company a man's loss may be confined to his investment in a particular venture, for the creditors can call on the funds of the company alone.

Primitive law is not rigid and inelastic, nor is it largely concerned with procedural details. It is in the middle period that excessive formality develops. Law begins with rather vague and elastic rules;[5]

[1] *Queen* v. *Eastern Counties Rly. Co.* (1842), 10 M. & W. 58. Deodand was abolished in England by the Deodands Act, 1846, 9 & 10 Vict. c. 62.

[2] Glanville Williams, *Liability for Animals*, 108.

[3] *Select Essays in Anglo-American Legal History*, iii. 483.

[4] H. F. Jolowicz, op. cit. 221.

[5] F. Pollock and F. W. Maitland, *History of English Law*, ii. 27, speaking of the *forma doni*, point out that it is a mistake to suppose that 'our common law starts with rigid, narrow rules about this matter . . . and rejects everything that deviates by a hair's breadth from the established models. On the contrary, in the thirteenth century it is elastic and liberal, loose and vague.' The common law of this period

technicality is really the result of a long period of development. Ehrlich points out that whether in art, religion, or law, whenever we find rigid forms and we are able to trace their history, we find that there has been a hardening of what was originally soft and flexible.[1] Although there was a natural tendency, in order to secure greater reverence for the law, to emphasize its antiquity, it is an exaggeration to say that primitive man regarded the law as unchangeable.[2] Indeed, a long period of discussion and indecision may precede action if a custom is broken: only slowly does the community evolve a practicable rule of enforcement. When technicalities appear in commercial transactions, in property, or in legal procedure, they 'mark the end of the period of primitive law'.[3] For example, the law of contract begins in a simple way and it is only in the middle period that it becomes technical and relatively fixed. Moreover, some legal systems remain relatively free from technicality even at a late stage of development.[4]

It may also be questioned whether primitive law was secreted in the interstices of procedure. Maine's dictum[5] has more reference to the middle era. A certain period of legal evolution is necessary before procedural rules can be developed, and indefiniteness rather than precision seems to be the mark of primitive proceedings.

(*c*) *Codes*

Codes begin to appear, usually, at some period after the third agricultural grade. If they are classified not according to their chronological date but according to the degree of internal development, early codes may be represented by the Salic law; the middle codes extend from the *Leges Barbarorum* of the reign of Charlemagne to the more developed laws of the Pentateuch and the Twelve Tables; finally, as an example of a late code we have that of Hammurabi (which incidentally is very early historically, the date being about 1914 B.C.).[6]

can hardly be regarded as primitive law, but it shows that fluidity may exist even in the early middle period.

[1] *Fundamental Principles of the Sociology of Law*, 259.

[2] Ibid. 344.

[3] A. S. Diamond, op. cit. 205.

[4] Chinese law, for example, is much less formal than Western systems. It is not sharply distinguished from ethics, but is regarded as the practical fulfilment of it. *Dura lex, sed lex* seems a strange maxim to the Eastern mind: J. Escarra, *Archives de phil. du droit* (1935, 1–2), 70. Lord Cooper emphasizes that Scots law is less formal than English: 28 *J. Comp. Leg.* (1946), Part III, 3–4.

[5] *Early Law and Custom*, 389.

[6] This is the arrangement adopted by A. S. Diamond, op. cit. 179.

Maine emphasized the influence of religion on early codes: 'there is no system of recorded law, literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance.'[1] A study of materials which have become accessible since Maine wrote shows that this view is too broad.[2] The codes of Hammurabi and of the Assyrians[3] are predominantly secular in character. It is true that in the Hebrew Pentateuch, in the Hindu Code of Manu, and in the Roman Twelve Tables religious sanctions are to be found.[4] Diamond, however, submits the Hebrew Code[5] to a precise analysis and shows that the early code was secular and that the sections showing religious influence are priestly additions of a later date.[6] The doctrine that the community punished certain offences only because of the religious notion that the community is thereby polluted may be supported by the Hebrew text that 'the land cannot be cleansed of the blood that is shed therein but by the blood of him that shed it',[7] but this text is probably also a late addition. Driver and Miles conclude that the Assyrian theory of punishment did not have a religious origin, nor is there any trace of the doctrine that crime is a pollution of the community.[8] The evidence is too meagre, however, to allow of dogmatic generalization.[9]

Proof, which Diamond attempts to give, that there is little or no direct religious influence in some early codes, does not determine the question for primitive law prior to the era of the codes. The question of the definition of religion in primitive times is nearly as difficult as that of law, but religion undoubtedly was one of the forces that went to create society and therefore the law. Maine's dictum is undoubtedly too wide, for he refers specifically to codes.

In all probability the codes did not create much that was new and were largely the result of a consolidation of scattered legislation. The view that all law is based on the work of one legislator is frequently accepted by primitive people, for example, Hebrew law was traced to Moses. But it is inconceivable that such a system was created by

[1] *Early Law and Custom*, 5.
[2] A. S. Diamond, op. cit., chs. vii and viii.
[3] G. R. Driver and J. C. Miles, op. cit. 346. Both the Roman pontiffs and the Indian Brahmins combined the characteristics of jurist, lawyer, and aristocrat.
[4] A. S. Diamond, op. cit. 85.
[5] Exod. 21: 1.
[6] His theory is that there was at first a clear-cut division between the jurisdiction of the priest and the ruler, but as the powers and wealth of the priesthood increased not only did they seize secular powers, but they also made priestly additions to what had been a secular code: *Primitive Law*, ch. xi.
[7] Num. 35: 33.
[8] *The Assyrian Laws*, 346–7. One possible trace of the doctrine that crime is a pollution is seen in relation to abortion.
[9] D. Daube, *Biblical Law*, 62.

one act. The codes are the result of gradual accretions to a short and primitive statement of the law—occasionally, to remove doubts, an authoritative version with some new matter is published by a law-giver.[1]

The use of writing has an important influence, for the sphere of law becomes more definite and there springs up a new professional class which is more numerous and more active than those who were the guardians of the oral tradition of the law.

§ 15. Middle Law

There are still relics of self-help in the middle period, but there is a tendency to prohibit it even more extensively than in mature law. 'Perhaps we may say that in its strife against violence [the law] keeps up its courage by bold words. It will prohibit utterly what it cannot regulate.'[2] 'In our own day our law allows an amount of quiet self-help that would have shocked Bracton. It can safely allow this, for it has mastered the sort of self-help that is lawless.'[3]

In this period we notice a gradual growth of rigidity and technicality. What are the causes of this curious love of formalism? It has been suggested that the formalism is a relic of traditional ceremonies of religious ritual,[4] that the parties desire a religious sanction, or that some ceremony is considered necessary to create a binding sense of obligation in the minds of the parties, or to impress the witnesses so that they are likely to remember the transaction. Vinogradoff suggests that we must go back even farther to the early agreements between the clans which were almost in the form of international treaties.[5] But no really adequate explanation of that curious love of formalism has ever been vouchsafed. The basic explanation may perhaps be found in the fact that most human beings find it much easier to learn a formal way of performing a complicated process, than to learn why the process must be complicated or to understand the complications.

'When primitive law has once been embodied in a code', Maine writes, 'there is an end to its spontaneous development', and there-

[1] 'Although English princes issued written dooms with the advice of their wise men during nearly five centuries, it seems all but certain that none of them did so with the intention of constructing a complete body of law': Pollock and Maitland, *History of English Law*, i. 26.

[2] F. Pollock and F. W. Maitland, op. cit. ii. 572.

[3] Ibid.

[4] H. J. S. Maine's theory was that the formalism of the Roman lawyer could be understood only if it is realized that the jurisconsult sprang from the pontiff or priest: *Early Law and Custom*, 26.

[5] *Historical Jurisprudence*, ii. 232–3.

after law is brought into harmony with society by three instrumentalities, legal fictions, equity, and legislation, which appear in the historical order in which they are enumerated.[1] This dictum needs some correction. It may be true that the *frequent* use of legislation to change, or to create new, law is a late phenomenon, but legislation appears very early. What are codes but legislation, and frequently they are mere consolidations of prior legislation.[2]

The use of fictions and equity is not confined to any one period. The fiction is useful at a time when legal stability is desired, but change in the application of the law is felt to be imperative. Maine defined the fiction in a very broad sense: 'any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.' Thus in the *Actio Publiciana* of Roman law the formula ordered the *iudex* to assume that the period of prescription had already elapsed in order to give to the possessor in good faith a remedy which strictly was confined to him who was already *dominus*. The procedural fictions by which the English courts extended their jurisdiction are well known. But fictions are not confined to the past, for they still have their use today. What is quasi-contract but a legal fiction?[3]

Why do judges use this method? It is not, as Bentham suggests, a desire to deceive, for the fiction deceives no one. Nor is it an unbridled lust for power, although some of the fictions used to extend the jurisdiction of particular English courts are hard to defend. Partly it is 'economy of thought'—the desire to use old devices that have worked well instead of running the risk of innovation. Thus, under Scots law, dissolution of the marriage confers upon the wife a *ius relictae*, which is calculated as if the husband were already dead.[4] This device of the 'as if' can be used to extend new rules to old situations with a minimum of intellectual effort.[5] There is less apparent violence to accepted doctrines than direct reform would produce and, therefore, it is a useful weapon to a judiciary which wishes to maintain the view that its task is but to declare the law.[6]

[1] H. J. S. Maine, *Ancient Law* (ed. F. Pollock), 26, 29.
[2] A. S. Diamond, op. cit. 346.
[3] An interesting example of a recently developed 'fiction' in the form of an imputed licence—and of its demise in Australia—is to be seen in *Commissioner for Railways (N.S.W.)* v. *Cardy* (1960), 34 *A.L.J.R.* 134, particularly per Dixon C.J.
[4] *Selsdon* v. *Selsdon*, 50 *T.L.R.* 469. See also the discriminating speeches in *United Australia Ltd.* v. *Barclays Bank Ltd.*, [1941] A.C. 1.
[5] J. Dabin, *Technique de l'élaboration du droit positif.*
[6] Lon. L. Fuller, *Rec. Gény*, ii. 157.

Moreover, the legal fiction may prove a very useful agency of development. 'The fiction is the algebra of law and a picturesque form of algebra besides.'[1] Much law may be reduced to a heap of fictions piled one on top of another. Marriage may be regarded as a sale;[2] the first method of bequeathing an estate to one who is not a blood relation may be by adoption, then in the next stage a fictitious adoption may be posited as the legal basis of a will.[3]

The fiction serves its purpose, but it has serious defects. Firstly, sometimes sight is lost of the conditions under which the fiction was created and it is used to reach results that were neither contemplated nor desired.[4] On the whole the common lawyers used the device well, understanding the purpose for which the fiction was created and allowing it no further effect.[5] Can a wife, under the Scots fiction, after the death of the husband, claim a life interest belonging to her husband? If the fiction is applied logically she cannot, since, if the husband were already dead, the life interest would have ceased to exist. The House of Lords decided that the fiction should not be used beyond its real purpose—that is, to give the wife a right to share: the quantum of the share should be determined by the husband's actual wealth at the time of the divorce.[6] Secondly, it makes the law cumbrous and difficult to classify—thus an action for the seduction of a minor depends at common law on the fiction of the father's loss of service due to the resulting illness. Historically, the action gives compensation only for material loss, but today, if an action does lie, damages may also be given for the outrage to the family honour. The fiction of an implied contract was useful historically in creating a remedy for certain cases of unjust enrichment, but Lord Wright considers that the time has now arrived at which the fiction should be abolished and the law placed on the firm ground of a reasonable prin-

[1] Pierre de Tourtoulon, *Philosophy in the Development of Law* (trans. Read), 385.

[2] Historically the institution of marriage, however, probably preceded the development of the law of sale.

[3] 'At bottom all law is reduced to a series of fictions heaped one upon another in successive layers': Pierre de Tourtoulon, op. cit. 387.

[4] 'The danger attendant on all doctrines which are founded on presumptions, implications or fictions originally thought to be equitable is that they are apt to be extended by a process of logical development which loses sight of their origin and carries them far beyond the reach of any such justification as they may have originally possessed. This has been the case with the doctrine of common employment': per Lord Macmillan, *Radcliffe* v. *Ribble Motor Services Ltd.*, [1939] A.C. 215 at 235. See also note, 28 *Camb. L. J.* (1970), 213, discussing *Re Rodwell*, [1969] 3 W.L.R. 1115, which deals with the canonical fiction that an initially valid marriage, if avoided, is to be treated as void *ab initio*.

[5] Cf. Lord Wright, 6 *Camb. L. J.* (1938), 324.

[6] *Selsdon* v. *Selsdon* (*supra*).

ciple of unjust enrichment.[1] The difficulty is to determine the exact time when, and the method by which, fictions should be abolished—thus today there are three schools of thought concerning the utility of the fiction of the implied contract.[2] Sometimes the fiction is so firmly embedded that only a statute can destroy it—other fictions may slowly give birth to a new rule of law and then become only historical relics.

So far we have been dealing with the part played by the fiction in the evolution of law. But the term has uses other than its historical sense. Thus the brocard or legal maxim is sometimes called a fiction, e.g. the dead give seisin to the living. Although not legal principles in the true sense, these maxims play a real part in organizing legal knowledge. Especially before the days of writing, the use of 'catch phrases' minimizes the burden upon memory and a host of particular examples may be covered by the one generalization. Although these maxims are useful at a certain stage in legal evolution, they are very likely to be misused,[3] and a true basis for classification cannot be discovered until a theoretic study creates legal principles which can afford both cohesion and a capacity for development.

Somewhat akin to the maxim is the 'dogmatic fiction' which is used to classify law that already exists[4]—this clearly distinguishes it from the function of the 'historical fiction' which is to extend the law by bringing a new case within an old rule. Dogmatic fictions may range from the crude generalization of early times to such a developed concept as that of corporate personality. Some writers go to the extent of treating all legal concepts as fictions or tools of thought. A materialist approach suggests that everything which does not exist in the physical world is an invention of the mind—a fiction. The legal technique of creating concepts, rules, and principles is discussed below,[5] and this topic is mentioned here only for the sake of clarity. It saves confusion to confine the term fiction to its historical sense, to speak of maxims to convey the second sense, and to use 'legal constructions' as a general term to cover the tools of thought which the law creates in order to organize and classify its rules.

[1] 'Another generation of lawyers will have forgotten it, or if they ever remember it, will wonder why people troubled to discuss it except as matter of obsolete history': per Lord Wright, 6 *Camb. L. J.* (1938), 324.

[2] *Infra*, § 109.

[3] Per Lord Wright, *Lissenden* v. *Bosch Ltd.*, [1940] A.C. 412 at 435. The legal maxim that husband and wife are one person in law is very misleading, unless the necessary qualifications are made: Glanville Williams, 10 *Mod. L. R.* (1947), 16.

[4] J. W. Jones, *Historical Introduction to the Theory of Law*, 175.

[5] *Infra*, § 48.

Equity

In every system of law there is a conflict between two types of judicial mind—one glories in a strong decision which upholds the logical elegance of the law even at the cost of injustice or inconvenience,[1] another emphasizes that law exists for man and not man for law and that the rules must be so adapted that injustice is avoided.[2] If we like to use other language, we may emphasize the contrast between *strictum ius* and *aequitas*. In the early period the logical structure of the law has not yet sufficient rigidity to make this conflict prominent, but, once the era of formalism and technicality begins, we see the commencement of strife. Legal technique may become so absorbing that the game is played for its own sake, as in the heyday of the formalistic rules of English pleading.

In England lawyers are so accustomed to think of equity as the province of a separate court that the opposition between *aequitas* and *strictum ius* is perhaps exaggerated. Yet as late as the reign of Henry VII a Chancellor could, over the dinner table, suggest to the common law judges that, if they set their own house in order, the injunction which they feared would become unnecessary.[3] But the increasing technicality of the common law rendered the existence of the powers of the Chancellor a real necessity.[4]

In Rome the work of the praetor in modernizing the law, enforcing the requirement of good faith, emphasizing the intention of the parties rather than the form of the agreement, is somewhat similar in effect to that of the English Chancellor.[5] If we generalize from English and Roman law we may think with Maine of equity as any 'body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles'.[6] There is no doubt that the interference of equity with the law is more 'open and avowed' than in the case of the fiction which pretends to leave the letter of the

[1] In *R.* v. *Walcott* (1696), Shower 127, an attainder for treason was reversed because the words *ipso vivente* were omitted from the sentence. In 1908 in the U.S. a conviction for rape was annulled because the word *the* was omitted from the indictment: *State* v. *Campbell* (1908), 210 Mo. 202, noted 60 *Harv. L. R.* (1947), 406, and see *Internal Revenue Commissioners* v. *Hinchy*, [1960] A.C. 748.

[2] Cf. *In the Matter of Davy*, [1935] P. 1, where the court refused to apply a technicality when it would have defeated the plain intention of a statute, and *Raybould Pty. Ltd.* v. *Dodgshun*, [1953] *V.L.R.* 84.

[3] W. S. Holdsworth, *History of English Law*, v. 223.

[4] Ibid. ii. 345.

[5] But only somewhat: W. W. Buckland, *Equity in Roman Law*.

[6] *Ancient Law* (ed. F. Pollock), 12.

law as it is. But in other systems we do not find distinctions as clear cut as the English contrast of law and equity, and the Roman separation of *ius civile* and the praetorian law. In most continental countries the same word is used for law and justice.[1] Equity, so far as it operates at all, is a force working through and not in opposition to the law, and the continental lawyer finds it hard to grasp the exact relationship between equity and the common law. But let us not be too hasty in reaching conclusions, for even on the Continent we find a fundamental contrast made between positive law and natural law.[2]

§ 16. Classical Law

The classical stage is marked by a sudden flowering of legal genius. The community is economically well established, but rapid social developments have left the law far behind. The primitive rules, in spite of the use of the fiction, in spite of 'interpretation' which solemnly lays down that a sacred text means what it does not mean, are too undeveloped to serve the needs of the period. There is a danger that law may become a mere chaos of specific precedents, for, although rules are many, principles are few. There is need of classification, analysis, and synthesis. The dead law of the past must be cut away in order to allow future growth to be unhampered.

Hence the search for general principles which will explain the actual rules in force and provide a ground for future development, hence the analysis of the concepts which the law uses in order to achieve clarity. This was the work performed by the Roman jurists of the classical era and by the English judges and writers of the nineteenth century. The desire for a fully developed theory which can stand as a justification behind particular rules is not prompted only by an academic desire for completeness. A law that has a proper theoretical basis is more easily understood, applied, and extended than one which lacks such a foundation. Developed jurisprudence begins in the classical age.

The text-book shows the desire to organize, to classify, to search for the *ratio legis* which will explain and unify law instead of leaving it a mere collection of specific rules. The English law of tort, for example, was greatly developed through the influence of the writings of Pollock

[1] Cf. T. Leivestad, 54 *L.Q.R.* (1938), 95, 266, for the influence of this on the development of Norwegian law.

[2] *Infra*, Ch. IV.

and Salmond. But the search for principle may be carried out by a court as well as by an academic writer. Thus Blackburn J. explained several isolated rules of strict liability by a new principle which has shown great capacity for development—that he who uses his land in an unnatural or abnormal fashion which casts an excessive risk on his neighbour is strictly liable for any damage caused by the escape of dangerous things from his land.[1] But, where there is a legal concept which is used in many parts of the law, it frequently happens that there is no uniform development, for each court is interested mainly in the phase of the problem that directly concerns it. Thus the law of possession is very confused in English law, partly because it applies to real property, chattels, larceny, and prescription. The courts did not attempt a complete analysis and, unfortunately, before a leading text-book appeared,[2] a slipshod use of terminology was already too firmly entrenched to be dislodged. The law of bailment is in even a sorrier plight.[3]

The classical period cannot hope to stabilize the law entirely. But if the search for principle has been successful, the law can be adapted and modified to suit new conditions. The problem of reconciling stability and flexibility is discussed below[4]—here it suffices to remark that this is an ever-present problem for every age of legal evolution. But the classical period begins the creation of a developed *system* which is sufficiently mature to stand the strain of adaptation. This was the secret of the influence of Roman law upon European legal history. The Roman jurists were not gifted with speculative powers, but they did create a legal scheme of classification and a set of legal terms and concepts which were of great service to races whose native law was less mature. Moreover, the jurists had tested their legal principles, as they developed them, by applying them to hypothetical cases, so that there was a convenient intermixture of practical decision and logical theory. Paradoxically enough, had the *Digest* been a more perfect production, its influence would have been less. It represented, not a perfect set of rules, but the efforts of the classical jurists to show the reason behind the law. A study of it was an excellent training in legal technique, and the mind thus trained could apply the same method in the development of other systems.

[1] *Rylands* v. *Fletcher* (1866), L.R. 1 Ex. 265.
[2] F. Pollock and R. S. Wright, *Possession in the Common Law.*
[3] See G. W. Paton, *Bailment in the Common Law.*
[4] *Infra*, § 47.

§ 17. Post-classical Law

In the post-classical period society becomes more complex, and rapid development of the law is inevitable. We are too close to the evolution of the common law to make valid judgments, but in Roman post-classical law we find certain definite characteristics. Jolowicz[1] mentions: firstly, increasing reliance on equity at the expense of legal principle—there is lacking the desire to think out a new principle in place of the old and consequently a tendency to solve the issue merely by relying on phrases such as *benigne tamen dicendum est*. The desire to achieve justice is commendable, but there is too much of a tendency to take the intellectual short cut. Secondly, he finds a desire to protect the weak at the expense of the strong, even at the expense of general security and credit. This was obviously due in part to the influence of Christianity and a growing appreciation of the value of the human personality. Thirdly, there is the increasing emphasis on intent at the expense of form: an impatience of mere technicality which may defeat the ends of justice. Thus the bonds of precedent are loosened.[2] These tendencies are observable to some extent in our modern system of law.

It is easy to exaggerate the value of the analogy from the human organism which grows, reaches maturity, and then decays. Roman law after the post-classical period received a new lease of life through the reception and has left its mark deep on the modern world. But there is a tendency in mature systems, as economic and social conditions become more complex, to deal with new situations by statutes designed for a particular mischief only. A flood of such remedies leaves the law in a somewhat incoherent state. It is the task of the lawyer to point out how much the old order has changed and what reforms are necessary to make the body of the law again consistent with itself. It is easy to sneer at the desire for legal elegance, but if a system loses its underlying unity it becomes hard to teach and difficult to apply. Hence in the post-classical period there is a challenge to lawyers to study the basis of statutory law, as in the classical period attention was concentrated on the basis of case law. Otherwise law may cease to be a system and become a collection of *ad hoc* rules.

[1] H. F. Jolowicz, *Historical Introduction to the Study of Roman Law*, ch. xxix.

[2] e.g. the decision of the House of Lords in 1966 not to be bound by its own decisions; Lord Denning's view that the C.A. should not be bound by its own decisions; see in general R. Cross, *Precedent in English Law* (1968); *Bativala* v. *West*, [1970] 1 All E.R. 332, where Bridge J. distinguished a decision of the House of Lords.

At present the challenge is the stronger because of the influence of new social theories of collectivism and planning. How much of the classical conception of ownership remains, so far as real estate is concerned, in the light of statutes dealing with town and country planning? Has the nature of contract insensibly changed? Is the law of tort now more concerned with adjusting social risks than awarding damages on a basis of fault? These questions cannot be answered in a word, but they do demand examination if there is to be real understanding of the functioning of the law. Leaving aside debates of terminology, it is dogmatically stressed that no jurisprudence can be adequate unless it gives a better understanding of law, its evolution, and its social purpose. Legal purists may label the post-classical eras as degenerate: but that does not preclude us from studying the real nature of the world in which we live and attempting to make of law a more effective tool to achieve the ends which society demands.

The earlier Soviet jurists attempted to write the epilogue of the story of law. The thesis was based on the German individualist school which argued that the essential purpose of law was the protection of individual rights. Law existed to provide the basis for 'commodity exchange' between equals, and to protect property rights. Pashukanis deduced from this, firstly, that law, being merely the reflection of capitalism, would wither away when capitalism was destroyed, as its essential *raison d'être* had disappeared: secondly, that under socialism the whole national economy becomes the private business of the State—in other words, mere administration and not law.[1]

There was a lack of historical sense in this approach, which is curious because it claimed to be based on a study of history. Law as a weapon of society has served many ends and it was ridiculous to suggest that, because individualism disappeared, so would law. Moreover, there was a failure to appreciate that from a practical point of view the State cannot survive on a mere theory of administrative discretion—both the State and the citizen need some elements of predictability and certainty. The substance of law may change, but the need for a core of certainty still exists. Indeed, this was soon admitted by Soviet jurists and in 1934 Pashukanis fell into disgrace.[2] The only hypothesis on which we could conceivably imagine the

[1] R. Schlesinger, *Soviet Legal Theory*, ch. v. As Engels put it, with the abolition of classes rule over men would be replaced by administration over things: ibid. 161.

[2] Thus, recodifications of law began in the latter part of the 1950s—see W. Friedmann, *Legal Theory* (5th ed.), 375. Private property is increasingly allowed, so long as it does not relate to ownership of the means of production.

disappearance of the law would be the advent of the millennium. If every human being were perfect, there would be no need to use the crude compulsions of law to make social life possible. Until then, the more we have collectivism the greater the sphere of law. The instrumentalities set up by the State at least need the certainty of legal rules in their relations with each other. Moreover, important as the property element may be, it is not the sole sphere with which law deals. Even if no one covets his neighbour's possessions, he may still covet his neighbour's wife. Law may change its function in the socialist state, but no community can exist without it.

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III

THE DEFINITION OF LAW

§ 18. Introduction

The problems of definition are not as simple as they were once thought to be. According to a widely accepted method, the first task is to discover the genus to which a *res* belongs and then the particular characteristics which distinguish it from other species of the same genus. This method was combined with the notion that each *res* has an essence distinguishable from its other characteristics or mere incidents. The first step towards clarity, however, is to distinguish between the occasions when we are referring to words and those when we are referring to things or concepts.[1] This is frequently difficult because usually we are using words on both occasions. Robinson[2] asks '*Do we define things, or words, or concepts?*' In other words, are we to be *realists*, or *nominalists*, or *conceptualists*, about definition?

'When the notion of definition was invented by Socrates and Plato, only "real definition" was thought of. That is, it was always a *res* or things that required definition, never *nomina* or words or concepts.'

The first thing to notice about words and language is that their function is to aid communication between human beings. To describe and classify things is essential for the acquisition and communication of knowledge, but the definition of terms used or to be used is needed for the communication itself. It is convenient to distinguish between the two tasks in the interests of clarity. This is not to say that the traditional process of 'real definition' is not of value. But it has often caused puzzlement and fruitless argument by confusing the identification, description, and classification of things with arguments about the use of words. 'Real definition' (i.e. the assumption that when asked for a definition, what we are to define is a thing and not a word) has been valuable, although productive of confusion when applied to tasks to which it was not suited, because definition is perhaps most often seen as a matter of drawing lines or distinguishing between one kind of thing and another when language marks them off

[1] *Supra*, § 4. [2] *Definition*, 7.

by using separate words to refer to them or so that language may do so in the future.[1] And the very word 'definition' suggests that the process is one of drawing lines or distinguishing.

It makes for clarity to distinguish between the definition of words on the one hand and the description or classification of things on the other, for a number of reasons. It is necessary to see that definition, even if confined to the definition of words, may be pursued in a number of different ways and for different purposes. For present purposes the mere equating of two words from different languages as having the same meaning may be ignored.[2] A clear distinction, however, should be drawn between what may be called lexical definition (reporting the meaning of words as actually used, or as they have actually been used), and stipulative definition (the 'explicit and self-conscious setting up of the meaning-relation between some word and some object, the act of assigning an object to a name (or a name to an object), not the act of recording an already existing assignment').[3] Both kinds of definition are constantly pursued in the ordinary work of the law, but confusion results if the differences between them are not kept in mind. Both kinds of definition, for present purposes, may be treated as nominal or word-thing definitions—that is, the assigning of a meaning to a word and in many cases the relating of a thing to a word which is said to refer to that thing. If that is the case then one method, and in many cases the most common method, will be to assign the meaning by describing or identifying the thing by one means or another.[4] Such description *may* be performed by assigning the thing to a well-recognized genus and specifying the distinguishing characteristics which it bears as contrasted with other things which fall within that genus.

Two things must be noted at this stage, however. First, that there are many words which are not in any real sense names for things which can be recognized as entities in the external world,[5] and whose meanings cannot be satisfactorily elucidated by this method; and second, that if this method goes to the traditional search for an essence on the assumption that all things have a simple essence which, once

[1] H. L. A. Hart, *Concept of Law*, 13.
[2] R. Robinson's 'word-word' definition, pp. 16 and 17.
[3] R. Robinson, p. 59.
[4] R. Robinson lists seven distinct methods for word-thing definition: (1) the method of synonyms, (2) the method of analysis, (3) the method of synthesis, (4) the implicative method, (5) the denotative method, (6) the ostensive method, (7) the rule-giving method, op. cit., ch. vi.
[5] See *supra*, § 4.

discovered, marks them off from all other things, then the method is bad.

It is bad because it is now realized that the nature of the external world is not Platonic. It cannot be explained by discovering a finite number of pure forms whose essence provides the classification for things; it is an infinite continuum. This is not to say that an essence may not be stipulated for clearly it can; but then it will be the product of a human decision. It will not be something discovered merely by observation and analysis. As the purpose of one observer differs from that of another so will his emphasis on different aspects of the thing observed. To a zoologist a horse suggests the genus mammalian quadruped, to a traveller a means of transportation, to the average man the sport of kings, to certain nations an article of food.[1] When a definition is produced which picks on one aspect as the essence of the thing in the light of the interests or purposes of the definer, then what has happened is a form of stipulation. The test of such a definition is whether it is useful for the particular purpose which the writer has in mind. The realization of this has led some to assert that to argue about definitions is merely to argue about words because you may define any word any way you please and you cannot be shown to be right or wrong in doing so.[2] But this goes much too far and may defeat the very purpose of the exercise, for the task is to enable communication to be improved and there are real limits to the practical acceptance of new language. And further, it goes too far because the mere reporting of the meaning of words as actually used is important in the work of the law. Many words used in the law are not names for things at all, but carry meanings which can only be understood, as has been pointed out,[3] by examining their use in the context in which they are used and by remembering that their meanings may vary strikingly in different contexts. 'The infinite diversity of human relationships with which the law has to deal transcends the limited resources of language, which is always trying to overtake the complexities of life and business and reduce them to categories.'[4]

[1] C. Morris, *How Lawyers Think*, 91–2.

[2] See Glanville Williams, 'International Law and the Controversy Concerning the Word Law', *British Year Book of International Law* (1945), 148; 'Language and the Law', 61 *L.Q.R.* (1945), 71, 179, 293, 384, and 62 *L.Q.R.* (1946), 387.

[3] *Supra*, § 14.

[4] Lord Macmillan, *Law and Other Things*, 149; see also W. A. Wilson, 32 *Mod. L. R.* (1969), 361. Thus a moving machine may be considered not in motion when it is moved by hand. Questions of degree always cause difficulty, as they sometimes raise mixed questions of fact and law.

Within a particular legal system, if we are asked: 'Is this particular rule law?', it may be possible to answer the question by reference to rules for identifying laws in that system. The question will be answered by reference to the rules of that system, and by putting the word 'law' in a sentence which can be tested as to its validity or invalidity as a conclusion of law. For example, it is the law that you must drive on the left-hand side of the roadway. This is a valid proposition of law in England because that rule is established under legislation made by Parliament and all rules established by Parliament are recognized as law. Thus the system may, and most systems do, include within itself rules which enable other rules to be recognized as legal or not. When someone asks 'What is law?' as a general question, however, he is asking something different. He may be familiar with the use of the word in ordinary language and he may be clear that there is in existence something called law; but he may be puzzled to know how to distinguish a system called a legal system from one not so called, or to distinguish a rule called law from a rule not so called, or to distinguish an institution called legal from one not so called. Or again he may really be asking a question about the nature of law so that he may understand it better, or about the purpose or purposes of law, or the history of law, or the source of law, or the content or form of law. A dispute over the answers to be given to such questions may spring from differing views of legal philosophy. Is law the whim of a despot or the protection of the liberty of the subject? This may be an argument over words, but it is a most important one. Many of the disputes in the past carried on as disputes over definition were really disputes over such questions of purpose or function or value.

If we pursue the task of defining law by the process of 'real definition' we find the method leads us into difficulties. 'There is no familiar well-understood general category of which law is a member.'[1] The attempts to find some common characteristics, or an essence, enjoyed by all the instances of what in ordinary uses of the word are accepted as laws, have all broken down at one point or another. Austin took the word 'law' and distinguished it, as applied to rules in systems which he recognized as legal, from its use in other contexts—as in Divine Law, laws of physics or chemistry. As has been seen, he fixed on the command of the sovereign as its distinguishing characteristic. But even to do this, of course, he had to recognize a legal system.

[1] H. L. A. Hart, op. cit. 15.

The problem of defining the term 'law' may be approached from the point of view of the theologian, the historian, the sociologist, the philosopher, the political scientist, or the lawyer. Most lawyers will approach the problem from inside a particular legal system. It is not surprising therefore that for the lawyers' purposes the investigation may stop at the point where that legal system provides authoritative tests for recognizing law from not-law. Those tests will be applied by some agencies of that legal system and hence we find lawyers defining law as 'the rules recognized and acted on by courts of justice'.[1] For lawyers working within a legal system such an answer may be sufficient for their purposes. But it does not assist those puzzled from a view outside a legal system as to the nature of law or the nature of legal systems. Hart says that for such people there have been three recurrent issues: 'How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?'[2]

Much may be learnt about law by describing it in terms of its basis in nature, reason, religion, or ethics; by reference to its source in custom, precedent, or legislation; by its effects on the life of society; by the method of its formal expression or authoritative application; or by the ends that it seeks to achieve. But no definition in terms of any one of these provides an exhaustive means by which an inquirer could distinguish legal systems from other systems in all cases or legal rules from other rules in all cases. Pound has carried out an analysis which reveals the difficulties facing those who like their terms to be simple and clear cut.[3] Many attempts have been made to examine the problems relating to the definition of law.[4] It is futile to attempt to be exhaustive, but an analysis of a few typical definitions is a useful approach to the problem.

In preface, it should be pointed out that the word *droit* is even more ambiguous than the English term *law*. In its wide and objective sense *le droit* means the totality of the rules of law, and we sometimes find *droit objectif* (or natural law) opposed to a particular rule of positive law. Even when *droit* means positive law, the word carries an undertone of right or justice which is not present in the English term *law* to

[1] J. W. Salmond, 12th ed., 5.
[2] 'Legal Essays in Tribute to MacMurray', 513.
[3] Op. cit. 13.
[4] Most recently see H. Kantorowicz, *The Definition of Law* (1958), and H. L. A. Hart, *Concept of Law* (1961). Professor Hart's examination is probably the most penetrating presently available.

the same extent. In addition to these usages there is a purely subjective sense—thus *le droit d'auteur* means the right of an author. Hence particular caution must be used in translating any phrase in which *droit* occurs.

§ 19. Law, Ethics, and Positive Morality

A definition of law should establish clear distinctions between rules of law and rules of ethics, and between rules of law and such social rules as those of positive morality and of etiquette.[1]

To distinguish between law and ethics is fairly easy. Ethics is a study of the supreme good—an attempt to discover those rules which should be followed because they are good in themselves. Law tends to prescribe what is considered necessary for that time and place. Ethics concentrates on the individual rather than upon society; law is concerned with the social relationships of men rather than the individual excellence of their characters and conduct. Ethics must consider the motive for action as all-important, whereas law is concerned mainly with requiring conduct to comply with certain standards, and it is not usually concerned with the motives of men. It is too narrow, however, to say that ethics deals only with the individual, or that ethics treats only of the 'interior' and law only of the 'exterior', for ethics in judging acts must consider the consequences that flow from them and it is not possible to analyse the ethical duties of man without considering his obligations to his fellows or his place in society. It is equally misleading to concentrate upon those aspects of the law which are concerned directly with conduct and with 'exterior' factors in man's social relations,[2] to the exclusion of those which, explicitly or implicitly, are aimed at intention, motive, and the ends which men seek.

It is true, however, that law is more concerned with the social consequences of actions than with their effect on the character of the actor. Even when law bases liability on intention, there is a tendency to infer the intention from the conduct and to take a somewhat external view of the problem.[3] Law, in elaborating its standards, must not try to enforce the good life as such; it must always balance the benefits to be secured by obedience with the harm that the crude instrument of compulsion may do. There are many ethical rules the

[1] N. M. Korkunov, *General Theory of Law*, 41 et seq.
[2] See H. L. A. Hart, op. cit. 168–9.
[3] *Infra*, §§ 68, 82.

value of the observance of which lies in the voluntary choice of those who attempt to follow them. But there are other rules which it is essential for law to enforce for the well being of the community. Ethics thus perfects the law. In marriage, so long as love persists, there is little need of law to rule the relations of husband and wife—but the solicitor comes in through the door, as love flies out of the window. The *homo iuridicus*[1] who performs only his legal duties would be neither a pleasant neighbour nor a gracious friend—indeed, one would need to be exceedingly careful in doing business with him.[2]

Law thus lays down only those standards which are considered essential, whatever be the motive of compliance. In one sense law may be a 'minimum ethic', but frequently law has to solve disputes on which the rules of ethics throw very little light—where two persons, neither guilty of negligence, have suffered by the fraud of a third, who is to bear the loss? Ethics may suggest that the loss should be equally divided, but this is not a very practicable rule for the law which requires more definite rules for the passing of title and the performance of contracts.

The argument that the spheres of law and ethics are different, while it contains much truth, cannot be pushed too far, for while the sphere of ethics may remain the same, that of law will widen or narrow according to the particular social philosophy adopted by the community. What are today regarded as purely religious duties were once enforced by law; conversely, modern law will enforce many rules designed to save the individual from himself in a way that would have seemed absurd to a disciple of *laissez-faire*. There is no immutable boundary to the area of the operation of law.

Man is free to accept or reject the obligations of ethics, but legal duties are heteronomous, i.e. imposed on the individual without his consent. If a rule of ethics, which is in accord with positive morality, is broken, there may be the effective sanction of the pressure of public opinion, but ethical rules which are in advance of the views of a particular community are imposed by no earthly force.

It has been suggested that law creates both duties and rights,

[1] G. Del Vecchio writes interestingly on the concept of the legal man, the one who is guided only by his legal obligations, just as the economist treats the economic man who is guided only by self-interest: *Droit, Morale, Mœurs* (Inst. int. de phil. du droit), 1.

[2] This is illustrated by 'working to rule' in industrial disputes. Technical compliance with the letter and not the spirit may slow down any industry. The law operates effectively only if it is infused with a spirit of co-operation.

whereas ethics can create only duties.[1] This, however, may easily become a mere matter of terminology. If Jones is under an ethical duty to support his father, why cannot we say that the father has an ethical right to be supported? This right will not, or course, be enforced merely because it is decreed by ethics, and neither will breach of the duty be punished, but logically even in the case of ethics it is hard to conceive of a duty unless there is a corresponding right.

Positive Morality

Ethics deals with the absolute ideal, but positive morality is made up of the actual standards which are adopted in the life of any particular community. Positive morality, like law therefore, emphasizes conduct rather than states of mind; it is also similar to law in that it is imposed on the individual from without, for it has behind it the effective, if unorganized, sanction of public opinion. How many men would rather break the law than wear the wrong tie with a dinner jacket? Here we see the sanction behind a mere rule of etiquette, and the fear of ridicule or social ostracism protects strongly the more important rules of positive morality.

Various tests have been suggested to distinguish a rule of law from a mere dictate of positive morality. Firstly, a rule of law is imposed by the State; secondly, while there may be a sanction behind the rules of positive morality, it is not applied by an organized machinery, nor is it determined in advance. These two points are taken by Austin and we shall discuss them below.[2] Thirdly, some argue that the content of law is different from that of social morality: but, while it is true that law, having a different object, covers a different scope, there is no immutable boundary to its operation. Law, positive morality, and ethics are overlapping circles which can never entirely coincide, but the hand of man can move them and determine the content that is common to all or to two or confined to one. Ethics condemns murder, but it was once accepted both by positive morality and law. We do find a close relationship between the rules of law and those of positive morality, for the latter determine the upper and lower limits of the effective operation of law. If the law lags behind popular standards it falls into disrepute; if the legal standards are too high, there are great difficulties of enforcement. Thus the law has been ineffective in

[1] Thus the rules of law are said to be imperative-attributive, i.e. they impose duties and grant rights; cf. N. S. Timasheff, *Archives de phil. du droit* (1936, 1–2), 132; L. Le Fur, *Droit, Morale, Mœurs*, 56 et seq.

[2] *Infra*, § 20.

controlling monopolies and trusts, because it has not evolved a technique which can be effective against the strongly entrenched habits of business. The close relationship between law and the life of the community is shown by the historical school,[1] and if we admit that positive morality influences law, it must also be recognized that law in its turn plays a part in fixing the moral standards of the average man.[2] Fourthly, it has been suggested that the method of expression should be used as a test—rules of positive morality lack precision, whereas rules of law are expressed in technical and precise language. There is much truth in this, but the distinction is only relative; for early law is fluid and vague, and some social usages may be expressed very precisely, for example, the modes of address of those bearing titles.

Theoretically there may be some difficulty in determining the exact distinction between positive morality and law. In practice, however, the legal order provides machinery for the determination of difficult cases. If a sick relative, dependent on Jones for the needs of life, is so neglected by Jones that death results, is this a breach of a legal duty or merely an infringement of positive morality? In the modern State the court will supply the answer to this problem and draw exact lines of legal duty. For any legal system to be effective there must be provision for the clarification of these issues. Hence, in any given case, the practical distinction between morality and law is determined by the hypothesis laid down in the legal order itself. Logically it would be possible for a legal order to declare that all rules of positive morality should be regarded as law, and in that case the boundaries of each would be identical—but it would be absurd for the law to burden itself with multitudinous rules, many of which would be impossible to enforce.[3]

§ 20. The Imperative Definition

In his well-known analysis Austin first attempts to define the genus law and then to mark the *differentiae* which distinguish law as the subject-matter of jurisprudence.[4] In the broadest sense in which the term 'law' should be used, it signifies a command which obliges a person or persons to a course of conduct. Being a command, it must issue from a determinate person or group of persons, with the

[1] *Supra*, § 6. [2] Cf. A. V. Lundstedt, *Legal Thinking Revised*, 217–68, 322–7.
[3] In China there seems to have been a less clear-cut distinction between morals and law than in most Western systems: for a discussion of the Chinese conception of law see J. Escarra, *Archives de philosophie du droit et de sociologie juridique* (1935, 1–2), 7.
[4] *Jurisprudence* (5th ed.), Lectures, I, V. (This work is hereafter cited as Austin.)

threat of displeasure if the rule be not obeyed. The person who receives the command must realize that there is a possibility of incurring some evil in the event of disobedience. This element of command clearly distinguishes a law from a mere rule of positive morality, since in the latter case the rule is not laid down by a determinate person, nor is there a *definite* threat of punishment.[1] But every command does not create a law, for we must distinguish between a particular order ('call me at dawn tomorrow') and an order laying down a general course of conduct ('call me at dawn every morning').[2] Austin, therefore, suggests that a statute issued by Parliament that corn then shipped and in port should not be exported would not be a law, since it relates merely to a specific case—but he agrees that in popular speech it would be called a law.[3] Generality is a normal mark of law because of the impossibility and undesirability of issuing particular commands for each specific act. Moreover, a law is normally general in another way, since we think of it as applying not merely to one person but to all members of the community or at least to all members of a particular class. Indeed, in the popular mind the notion of generality and uniformity in law is so accepted that the term law is metaphorically applied to the course of nature—thus we speak of the law of gravitation. Clearly this is quite a different use of the term, for the scientist attempts to describe what actually takes place, whereas a positive law prescribes what ought to be. Natural events were not affected by Newton's discoveries, whereas a positive law is designed to, and does, affect the wills of men. What is common to the two conceptions is the sense of order and uniformity. But it is difficult to prove *a priori* that order and uniformity are the marks of all positive law, for, if the leader of a small community decided each case not by rules but by his subjective sense of justice, few would go so far as to say that there was no law in the community.

Having thus discovered the genus law, Austin distinguishes the species which is of interest to the jurist—*positive law*, as he terms it. Positive law is laid down by the sovereign either mediately or immediately—it is a rule laid down by a political superior for a political inferior. Austin's theory of sovereignty is discussed below;[4] here it

[1] Although the unorganized pressure of public opinion may provide a fairly effective sanction.

[2] A law determines *acts of a class*, a particular command determines merely a specific act: Austin, i. 94.

[3] W. Markby, *Elements of Law* (6th ed.), 3, agrees with this approach.

[4] *Infra*, § 76.

is enough to say that he postulates, firstly, a political society, secondly, a superior in that society who is habitually obeyed by the bulk of the community and who is not in the habit of obedience to any other person or body.[1] The sovereign, of course, may consist either of one person or a number of persons.

Into a detailed criticism of the Austinian definition we do not propose to go, but there are three major points:

(*a*) Should law be defined by reference to the State?
(*b*) Is a definite sanction necessary before a rule can be regarded as law?
(*c*) Should a definition of law contain a reference to the purpose of law?[2]

(*a*)

The definition of law in terms of the State possesses certain advantages. It gives a clear-cut and simple test. It solves in an easy manner conflict between various juridical orders, for example between Church and State. If only the State can create positive law, then the Church can have only such legal rights as the State grants to it. It gives an easy answer to the problem of the validity of law, since law is valid for the simple reason that it has been laid down by the sovereign. It is easy to mark the moment when primitive rules become law, for we have only to ask whether there is a determinate sovereign body that has issued a command. In the prevailing confusion of modern jurisprudence, clarity and simplicity are virtues to be prized.

There are, however, many critics of this solution. The historically minded have argued that the State is an incidental product of mature systems of law rather than the distinguishing characteristic of all law as such. It is said that historically law is older than the State and that, while mature systems normally develop a machinery for creating, applying, and enforcing the rules, law may exist even in the absence of such machinery.[3] In the Middle Ages an application of the Austinian definition gives a very small compass to law, for the innovating forces were the law of the Church, the law of the merchants, the law of the fief, and Roman law, and 'not one of these was Law in the Austinian sense'.[4] Del Vecchio suggests that those who define law in terms of the State should be forced to study history before writing

[1] Austin, i. 227.
[2] *Infra*, § 23, for a fuller discussion of this last point.
[3] Cf. F. Gény, *Méthode*, i. 202; G. Del Vecchio, *Justice, Droit, État*, 282.
[4] E. Jenks, *Law and Politics in the Middle Ages*, 62.

jurisprudence.[1] Austin, of course, can logically reply that he is entitled to define the term 'law' as he pleases. In the continuous evolution since primitive times some point must be chosen as that which marks the emergence of law. A monkey is not necessarily a man because he is descended from the same anthropoid ancestors, and we should not confuse the early beginnings of law with law itself. This is true, but the real issue is whether it is useful for jurisprudence thus to limit the use of the term 'law'. Anthropologists urge that primitive law serves the same function in early communities as does mature law today, and that the essence of law is its *function*, rather than the *form* in which it is created or the method by which it is enforced.[2] Law should be defined by the part it plays in the life of society, not by the historical accident that it is sometimes laid down by a sovereign. Must we deny that there is law where no sovereign exists? Malinowski argues that even in primitive societies there are rules behind which the community throws the whole weight of its organization.[3] The very structure of society is such that primitive man suffers if these rules are disobeyed. Although there is no intricate system of courts or police, nevertheless the community directly interests itself in securing the observance of those rules which it considers essential. If primitive man does not meet his customary obligations, then he knows that in future no one will help him. A primitive anticipation of the 'stop-list' can afford a very useful sanction. Apart from the community, primitive man is helpless, and the threat of expulsion or death is a salutary one for prospective offenders. Because in so many cases the community leaves primitive man to enforce his own rights by *self-help*, we must not leap to the conclusion that there are no rules breach of which is regarded as fatal to the community life.

Thus the thesis of the anthropologist is that law should be defined by function rather than form, by the part it plays in the life of society rather than by the method of its creation—in short, that law can be truly understood only if it is regarded as one of many means of social control.

The argument whether primitive law is law properly so called may easily become one of mere logomachy. What is more important is that jurisprudence should study primitive beginnings for the light they throw on mature law. It may be primarily a question of

[1] *Justice, Droit, État*, 320.

[2] *Supra*, § 14. H. Kelsen also rejects the definition of law in terms of the State. A primitive tribe may have a legal order long before it has developed a state: 55 *Harv. L. R.* (1941), 66–7.

[3] *Crime and Custom*, 58.

convenience whether the term 'law' should be so widened as to include all societies traditionally described as primitive. The view taken in this work, however, is that it is more than a mere matter of convenience that the term 'law' should be used so as to include the enforceable normative rules of such primitive societies as have them. The view advanced is that law exists when rules can be articulated not merely as descriptions of what actually happens, but as accepted prescriptions for what ought to happen, and when they can be seen to be backed by some degree of enforcement by the community. The notion of enforcement by the community implies some mechanism for securing compliance with the rules in key cases—something more than individual redress even if such redress is approved by the community at large. Whether this mechanism must provide a specific sanction for each rule of law we now proceed to discuss.

(*b*)

Must the specific mechanism behind law be essentially a sanction? Austin emphasized that the sanction must consist in a fear of some evil. This is perhaps a natural conclusion if we define law in terms of command. Much law, however, is enabling rather than restrictive; although one law may abridge liberty, a second may give powers which otherwise a citizen would not possess. No man can surpervise the distribution of his estate after his death, but the law has granted power to a testator to determine, within limits, the destination of his wealth. Hence the observance of many rules is secured by the promise of reward (e.g. the fulfilment of expectations) rather than by a lurking sanction.[1] Bentham admitted the force of reward in securing the observance of law, but cynically observed that it was not as effective as pain, for the sources of pleasure are few and soon exhausted, whereas the sources of pain are innumerable and inexhaustible.[2] It is true that by the use of ingenuity the rules relating to wills may be expressed in terms of command—the order to the executor to carry out the provisions of the will, to the court to supervise the distribution, to strangers not to interfere with the property—but the most significant feature of testamentary law is the increased power given to the testator.

Psychologically, the sanction does not fully explain why law is

[1] B. Malinowski, introduction to H. I. Hogbin, *Law and Order in Polynesia*, p. lxv; A. L. Goodhart, *Transactions of the Grotius Society* (1936), xxii. 33.
[2] *Limits of Jurisprudence Defined*, 226, note.

obeyed. The sanction can be successful only if it is not necessary to employ it in all but marginal cases. Universal disobedience will rapidly destroy the whole basis of the legal order.[1] Law is obeyed because of its acceptance by the community, and while the sanction plays its part in dealing with a recalcitrant minority, the reasons for that acceptance lie deeper. Habit, respect for the law as such, and a desire to reap the rewards which legal protection of acts will bring—these are factors that are equally important. Hence, some define law in terms of rules that are mentally accepted by a population as binding. Academic preoccupation with the sanction leads to a false view of law. The idea of health does not at once suggest to our minds hospitals and diseases, operations and anaesthetics, however necessary these things may be to maintain the welfare of a community. The best service of medicine is the prevention of disease, just as the real benefit of law is that it secures an ordered balance which goes far to prevent disputes.[2] Austin's reply to this argument would be that he is attempting to define the formal mark of law and that, however interesting a discussion of the psychological reasons for the acceptance of law, that matter is germane to a sociological study of sovereignty rather than to jurisprudence.

There are some rules for which it is difficult to find a particular sanction. If one of the conventions of the constitution is not observed, it is not easy to find a precise penalty. Austin would not regard these conventions as law, since obedience cannot be enforced by court process. Some of these conventions,[3] however, are the foundation of the accepted legal order, and it is rather narrow to refuse to call them law merely because a specific sanction cannot be discovered. In fact these rules are effective because it is recognized that, if they are flouted, the legal order itself will break down. Indeed, if we take the sanction theory literally, there would need to be an infinity of sanctions. There should be a sanction against the judge if he does not apply a rule and a sanction against the official who should enforce the sanction against the judge, and so on.[4]

[1] Speaking of the law as applied to trade union members, O. Kahn-Freund, 33 *Mod. L. R.* (1970), 241, writes: '... sanctions cannot be applied to counteract the spontaneous conduct of amorphous masses. They can, however, be applied to regulate the conduct of organisations.'

[2] P. Vinogradoff, *Common Sense in Law*, 52.

[3] Conventions vary in strength. Roosevelt easily defied the convention that no President should serve more than two terms. But the conventions on which responsible government rests could be abandoned only by destroying the system itself: A. L. Goodhart, *Interpretations of Modern Legal Philosophies*, 296–7.

[4] J. P. Haesaert, *Theorie générale du droit*, 97.

Some of those who hold that the existence of the sanction is a necessary test of the existence of the law meet these objections by broadening the meaning of the term 'sanction' so as to include all forms of social pressure. This is wider than Austin would approve, since to him the sanction must be a definite threat by a determinate person. Moreover, such a wide use of the term means that the sanction does not provide a precise criterion, since even the rules of etiquette have public pressure behind them.

In the modern State the distinction between the sanctions of law and those of other social rules can, in the vast majority of cases, be clearly drawn. The sanctions behind positive morality are vague and indefinite, while those of law are usually pre-determined both in their nature and their conditions of application. Moreover, while a serious breach of a social rule may lead to exclusion from a particular set, the machinery of law possesses sanctions that are more effective—the defendant may be compelled specifically to carry out his duty, or he may be forced to carry out a subsidiary duty such as paying damages, or he may be branded as a criminal and sentenced to a fine, imprisonment, or death.[1]

In conclusion, it may be said that while it is difficult in theory to determine the precise nature of the sanction which must be attached to every rule of law, in practice there is no difficulty, for the legal order itself provides a method by which the boundary line is drawn between law and other social rules and in so doing determines what sanction is available. In the modern State the machinery of law is clear cut, but the farther back we go, the more confused the problem becomes. It is difficult to conceive of any legal system operating effectively without a sanction in the background—the weakness of international 'law' clearly illustrates this. But once a community is taught to observe the law, particular rules may be obeyed, even though there is no particular sanction attached to them. We cannot say *a priori* that a particular rule is law only if it has a specific sanction—the test is whether the rule is regarded as law by the particular legal order in question. Thus, it is universally admitted that the judge is bound by the law in deciding disputes, but there is no specific sanction in English law, save the rather drastic one of removal.[2]

The fundamental weakness in Austin's doctrine was his selection

[1] A. Desqueyrat, *L'Institution, le droit objectif et la technique positive*, 202; L. R. Siches in *Droit, Morale, Mœurs* (Inst. int. de phil. du droit), 160–1.
[2] A. L. Goodhart, *Interpretations of Modern Legal Philosophies*, 297.

of the notion of command as his basic test, instead of the wider notion of a 'rule'. If the difficult notion of a 'rule', with its dependent notion that things *ought* to be done or not done, is examined, 'the important similarities (hidden by Austin's concentration on the notion of a command instead of a rule) between primitive and developed systems and between municipal and international law could then emerge; and those who have been agonized by the question: "How can a fundamental constitutional law be law?" might be content when it is shown that a defining characteristic of a legal system just is that it includes a fundamental rule for the identification of the other rules of the system.'[1]

(*c*)

The third main criticism of Austin's definition is that it is superficial to regard the command of the sovereign as the real source of the validity of law. Many regard law as valid because it is the expression of natural justice,[2] or the embodiment of the spirit of a people.[3] A favourite conundrum asks whether law is valid because it is enforced or enforced because it is valid. The answer to both questions is 'Yes'; but to explain this paradox we must distinguish between a system of law as a whole and a particular rule.

If we are considering the legal validity of a system of law, it is clear that its positivity depends on acceptance, which may in turn depend directly or indirectly on enforcement. If I draw up an ideal code for Utopia, no degree of logical perfection or sweet reasonableness will give it the force of law—to deserve that description it must be applied in a particular community. Thus Kelsen recognized that his initial premiss must have a certain measure of correspondence with reality, and Austin's sovereign is not only *he who must be obeyed* (by the individual) but *he who in fact is obeyed* (by the bulk of the members of a given community). If a monarch, who by the constitution has the sole power to create law, flees, owing to revolt, and a new government is set up, the monarch loses the power to make new laws. A code drawn up in exile would not have the force of law, for the old legal order has been entirely destroyed. The validity of a legal system as a whole depends on the fact that it is accepted by, and therefore capable of enforcement over, a given community.

[1] H. L. A. Hart, in his introduction to Austin's *The Province of Jurisprudence Determined* (Library of Ideas, 1954), pp. xii and xiii; and see H. L. A. Hart, *Concept of Law*.

[2] *Infra*, Ch. IV.

[3] *Supra*, § 6.

On the other hand, if we are considering a particular *rule*, it is clear that it will be enforced only if it is valid, that is, in accordance with the structure of the legal system as a whole. The mere fact that a particular statute is ignored for a century does not (according to English notions) deprive it of the force of law: no court would listen to an argument that, since it had not been enforced, it was no longer binding. But, where a legal *system* is concerned, we can escape basing validity on effective operation only if we define law as the realization of natural justice or some other ideal. Law, however, is not only an ideal set of values, but also values which are applied in the life of a given community.[1] To say that a rule which is actually applied is not law because it conflicts with natural justice,[2] or to argue that an ideal which is nowhere applied is law, leads only to confusion. In emphasizing that positive law is such only if it is in effective operation in a particular community Austin makes an important point.

There are many incidental criticisms of Austin's definition which are discussed in the course of this work. Kelsen refuses to define law in terms of the State, for he regards law and the State as being essentially the same.[3] Public law and international law also raise difficulties. *Ex hypothesi*, in Austin's view, the sovereign cannot be legally bound by law—this problem, however, is best discussed in dealing with the relationship of law and the State.[3] At this stage the problem of international law will alone be discussed.

§ 21. The Problem of International Law

According to Austin's view international law is not positive law since there is lacking a determinate sovereign whom the nations of the world habitually obey. Perhaps on no point has Austin been so criticized as on his approach to this problem. But his conclusion follows irresistibly from his premisses,[4] and many who criticize

[1] A. Ross, *Le Problème des sources*, 167. Austin, ii. 656, relates Murat's story that in some American states the judges and the bar met at the beginning of every term and decided what statutes of the preceding session they would enforce. Without accepting the story, we may use it as a test of the definition of law. Austin said that in this case a statute would not be law unless it was accepted by the court. If this power of the courts was tolerated by the community, the courts would be the sovereign in the Austinian sense.

[2] H. Krabbe, *The Modern Idea of the State*, denies the validity of a rule that conflicts with the instinctive sense of right of a community.

[3] *Infra*, § 76.

[4] C. A. W. Manning, *Modern Theories of Law*, 224, points out that in the end Austin agreed that international law was law properly so-called, although he still denied that it was positive law.

Austin show a disinclination to follow the only logical course and adopt a broader definition of law.

It is a question of degree whether any body of rules deserves the name of law. After the institution of the League of Nations and of the Permanent Court of International Justice, there was a tendency to over-estimate the effectiveness of international law, but the series of flagrant violations that began in the thirties of this century led to exaggerated pessimism. It is certainly inconvenient to follow Austin and deny the term law to the rules that apply to nations *inter se*, for there is a clear-cut distinction between international morality and international law. International courts use the language and technique that is employed by systems to which all admit that the adjective 'legal' is properly applied. There is the same reliance on authority, development of principle, discriminating use of analogy, and distinction—in short the same endeavour to build up a body of rules organically interrelated.[1]

The question whether the rules followed by primitive tribes are properly termed law may proceed in an atmosphere of academic calm, but the determination of the nature of international law has important practical results, for an admission that it is properly called law carries with it a greater sense of binding obligation. It is difficult to see how any community of nations can exist, save on the basis of rules of law —*ubi societas, ibi ius*. All these arguments of international lawyers contain some truth, but international law suffers from serious defects. It is very weak on the institutional side—there is no legislature, and, while a court exists, it can act only with the consent of the parties and has no real power to enforce its decisions. It may be possible to compare war to the self-help of primitive times, but as soon as law begins, the community regulates the cases in which self-help may be resorted to and the manner of its exercise. In international law the claimant of the right must still take the law into his own hands. Attempts have been made by the Covenant of the League of Nations, the Kellogg Pact, and the Charter of the United Nations to reduce the area of self-help, but humanity must travel far before there is an effective reign of law in international affairs.[2] It is true that the international law of peace is seldom broken, but once grave issues arise we see flagrant disregard of accepted rules. The public opinion of the world may be

[1] H. Lauterpacht, *Function of the Law in the International Community*.

[2] The theory of the just war is accepted by H. Kelsen, but even he recognizes the difficulties: *General Theory of Law and State*, 334. See also A. Nussbaum, 42 *Mich. L. R.* (1943), 453.

a factor not lightly to be ignored, but it is harder to deal with a nation that is a law-breaker than to expel a primitive man from his community—hence while primitive and international law both lack institutional machinery, the sanctions of the former are really more effective, since they are brought to bear on the individual and not on the nation. Law can be effective only if there is a community with an accepted scale of values. Nazi Germany denied that the State was bound by law in its dealings with states of another colour:[1] the same doctrine was originally put forward by Soviet thinkers, but the reality of international law is recognized by contemporary Soviet theory.[2]

One significant advance has been the setting up of courts to try war criminals.[3] This step has been hailed in most quarters as a vindication of the effectiveness of international law and the dawn of a new era when sanctions will be applied against law breakers.[4] It is certainly encouraging to see the attempt made to secure the observance of certain minimum rules, but optimism must be tempered by the following considerations.[5] Firstly, it is unlikely that the threat of a prosecution for a crime against peace (the waging of aggressive war) will ever deter a nation bent on conquest, for a crime against the peace is deliberately planned only where victory is expected. Secondly, so far as the rules of war are concerned, the principles are so uncertain that the individual is placed in a position of great difficulty. These rules are always obsolete as the machinery of international conferences is too cumbrous to develop them with sufficient speed. The submarine, the aeroplane, and the atom bomb were not envisaged when the earlier rules were laid down. Moreover, there is no international criminal court which can state the law authoritatively. For a submarine commander to kill survivors of a torpedoed vessel is a war crime:[6] the use of the atom bomb has been justified by the doctrine of military necessity. The defence of superior orders must inevitably be rejected: but the prosecution of a private for carrying out a specific order given by his superior reveals the dilemma in which the humble soldier is placed. If he disobeys the order, immediate punishment follows: if he obeys, he may be punished if his country is

[1] e.g. E. H. Bockhoff cited W. Friedmann, 2 *Mod. L. R.* (1938), 194 at 199.
[2] R. Schlesinger, *Soviet Legal Theory*, 285.
[3] The most authoritative account is the *History of the United Nations War Crimes Commission and the Development of the Laws of War* (H.M.S.O.). See also *Law Reports of Trials of War Criminals*, vols. i–xv.
[4] Lord Wright, 62 *L.Q.R.* (1946), 40; 19 *Temple L. Q.* (1946) contains a symposium.
[5] The writer discusses these problems more fully in 3 *Res Judicatae* (1947), 122.
[6] 'The Peleus Trial', *Law Reports of Trials of War Criminals*, i. 1.

defeated. Thirdly, the trials were conducted not by international courts in the full sense of the term, but by victors' tribunals. It is difficult to see what other policy could have been followed in the circumstances, but until there is a permanent international criminal court we cannot expect the defeated to have full confidence in the verdicts.[1] Fourthly, the real breach of order is the use of war itself. It is impossible to fight a modern war and observe the Christian principles of morality. We must be realistic and take account of the principle of military necessity, but that is a dangerous argument because it may be carried so far as to destroy all rules. All agree that the unnecessary infliction of death, suffering, and destruction of property should be forbidden, but that principle must be thoroughly worked out before it can create rigid rules.

Before international law can be effective, a reasonable alternative to war as a solution of international problems must be found. If international law is to be developed by the judicial method, we cannot criticize the courts for creating new rules. But the decisions in the war trials should be used as the foundation for further action and not left to stand as isolated instances. The rules of war must be codified and enforced by an impartial international tribunal. The United Nations realizes these problems. It is endeavouring to create an international community by such institutions as UNESCO, but progress is necessarily slow. Politically there is still a divorce between Russia and the western world and the iron curtain leads to misunderstandings which hinder or prevent creative effort.

The interest of these problems for jurisprudence is that they emphasize that law is ineffective without a real sense of community: that there must be machinery capable of developing the law speedily to meet new conditions: that there must be an authoritative tribunal which has the confidence of those subject to it and which has the command of force to back its decisions. It is too narrow to say that international law does not exist:[2] but in the present state of civilization it is tragically ineffective.

[1] F. B. Schick, 11 *Mod. L. R.* (1948), 290.

[2] The argument may easily become one of words, for whether international law is such depends on our definition of law: Glanville Williams, 22 *Brit. Y.B.I.L.* (1945), 146. While it may be futile to engage in terminologica debates, it is essential to grasp the defects of the present system of international law. A brilliant treatment is that by the same writer, 61 *L.Q.R.* (1945), 71, 179, 293, 384; and 62 *L.Q.R.* (1946), 387.

The Relationship between International Law and the Law of the State

If we deny the existence of international law, then there is no real problem—the State possesses a body of law, while the rules binding nations are customary only. But, if international law is not a misnomer, what is the relationship between it and the law of the various states? Dualists solve the problem by saying that there is no conflict between them, since international law applies to states, and municipal law to individuals. But, as international law develops, this analysis is becoming increasingly difficult to apply.[1] The war trials showed that the sanctions of international law could be used against individuals. Monists argue that there cannot be two valid systems of law without some method of adjusting conflicts between them; thus Kelsen points out that a desire for a unified theory may lead either to the view that international law is supreme or else to the doctrine that the law of the State is the governing force and that international law is based merely on the consent of national sovereigns.[2] Enthusiasts for international law object that the doctrine of the supremacy of state law leaves little scope for international law. If the latter binds only because of consent, why may not that consent be withdrawn at any time? Moreover, the accepted theory is that international law binds a state even after a new government has been set up as the result of a revolution. There is no need for consent, any more than in the case where two new states are created by the partition of what was previously one state—the new states are bound by international law as a condition of their entrance into the family of nations.[3]

Theoretically, the view that international law is supreme is much more satisfying, since its tenets would then decide conflicts between states as to the extent of the operation of their particular legal systems. But, if we adopt the analogy of a federation,[4] we see that what is really supreme is the constitution itself which distributes certain powers to the central authority and others to the states or provinces. In the international sphere there is no constitution, but may there not be certain primary rules which mark out the sphere both of the laws

[1] H. Lauterpacht, 63 *L.Q.R.* (1947), 438; 64 *L.Q.R.* (1948), 97.

[2] *Annales de l'Institut de droit comparé* (1936), ii. 55. Finally H. Kelsen supports the theory of the primacy of international law, stating that the theoretic base for the primacy of international law was first discovered by the pure theory of law: 55 *Harv. L. R.* (1941), 68.

[3] J. G. Starke, 17 *Brit. Y.B.I.L.* (1936), 66; E. M. Borchard, *Rec. Gény*, iii. 328.

[4] For a scheme of federation for the democracies of the world see Clarence Streit, *Union Now*.

of the states and of international law itself?[1] Thus when the relationship between the legal systems of two states, or between the law of England and international law, becomes a matter of conflict, the primary rules (or the constitution of the world) could supply legal material according to which the conflict would be solved.

These abstract arguments have only a limited use. If the dogma is advanced that law can have no other source than the sovereign will of a state, then it may be justifiable to show that there is no *a priori* reason why other sources should not exist. But if we wish to discover the precise standing of international law today our analysis must be more concrete. Radbruch says that the primacy of international law is indispensable, since it is impossible to think of a 'space empty of law'. The answer is, not only that it is theoretically possible to conceive of this, but that the facts show that it may exist. Kelsen, finally, goes far beyond his premisses in supporting the primacy of international law and really gives to his formal theory an ethical core—the ideal of the legal unity of mankind at large.[2] We must not warp our analysis by wishful thinking. The notion of what ought to be undoubtedly affects what is, since if all men believed that international law should be given further scope, it would in fact soon develop. But to admit that the law carries into effect many of the purposes of ethics must not blind us to the distinction between the law that is and the law that ought to be, between the sordid realities of life as we know it and the vision that occasionally flies into the minds of even the most mundane of men. Whether at any given period there is international law, whether it is superior to state law, depends on an analysis of the facts—is it effectively in operation and does a specific mechanism exist for securing compliance? We cannot decide whether international law is supreme by weaving finely spun theories, for it may well be that there is no real international law in the fifteenth century and a very effective system in the twenty-first century.

§ 22. Definition of Law in Terms of the Judicial Process

In America today the definition of law in terms of the judicial process is very popular. Holmes J. has said: 'the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean

[1] J. G. Starke, op. cit.
[2] J. W. Jones, 16 *Brit. Y.B.I.L.* (1935), 5 at 12.

by law.'[1] This definition has been seized upon by the realists and has coloured their whole approach to jurisprudence.[2] To Frank J. the law for any lay person with respect to a particular state of facts is a decision of a court, and 'until a court has passed on those facts, no law on that subject is yet in existence'. Prior to such a decision, the only law available is 'a guess as to what a court will decide'.[3] The realists push this approach to what they regard as its logical conclusion and law is treated as a collection of decisions and not as a body of rules.

Cardozo J. is on safer ground when he emphasizes that law is a basis for prediction rather than a mere guess: 'a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged is . . . a principle or rule of law.'[4]

The practical advantage of such an approach is that it emphasizes the fact that law is a process, that it is not a series of particular commands, but rather a body of principles slowly evolved by the decision of concrete cases. Cardozo's definition is slightly wider than the definition of law in terms of the State, since a court may exist even where there is no sovereign. Two points arise concerning this approach. Firstly, although useful as a description, it can hardly be accepted as a definition. Much law today never comes before the courts because recourse is prohibited, as can be seen in the rapidly growing body of administrative law. We are so accustomed to the development of law by the courts that we tend to forget that it may be developed and applied in other ways without ceasing to be law. It may be enforced according to the whim of a Minister who by statute is given the right to determine such questions with absolute finality. Secondly, the definition is but a modified form of Austin's, for it defines law in terms of the organ which creates it.

§ 23. Definition of Law in Terms of its Purpose

Salmond retains the emphasis on the judicial process, but considers that a reference to the purpose of law is essential. 'The law may be defined as the body of principles recognized and applied by the State in the administration of justice.'[5] Justice is the end of law, and it is

[1] *Collected Papers*, 173. [3] *Supra*, § 7.

[2] *Law and the Modern Mind*, 46. On this theory the U.S. Supreme Court has been called 'the court of ultimate conjecture'.

[4] *Growth of Law*, 52; E. W. Patterson, 88 *Univ. of Pa. L. R.* (1939), 71.

[5] *Jurisprudence* (12th ed.), 5.

only fitting that an instrument should be defined by a delineation of the purpose which is its *raison d'être*. This raises the question of the relationship of law and justice. One theory defines law in terms of justice, but from this it follows that an unjust law cannot exist, for if it could, then on the premisses there would be a fatal self-contradiction. Many writers have fallen into this simple trap. Thus earlier theories of natural law put the emphasis on justice and denied the validity of a law if it was opposed to natural justice. But slavery, condemned by natural law, yet existed in the legal systems of the time, and, though the Romans recognized this difficulty, they never succeeded in solving it.[1] Law does not cease to be such merely because it is unjust—if it did, who is to supply the criterion of injustice? Even our modes of speech contain truths—the phrase *unjust law* has a meaning, whereas the term *square circle* has not.[2] Is it accurate then to define law by reference to a quality which actual laws in force may lack? Is only that law which embodies what I like?

A second means of solving the problem of the relationship of law and justice is to place all the emphasis on law and regard justice as mere conformity to law.[3] But then we are depriving ourselves of a criterion which may not be wholly subjective by which we may test the operation of a legal system. In this sense law cannot be unjust, since the term 'just' is defined only as that which is legal.

Each of these approaches is founded on false premisses; we must distinguish clearly between justice and law, for each is a different conception. Law is that which is actually in force, whether it be evil or good. Justice is an ideal founded in the moral nature of man. The conception of justice may develop, as man's understanding develops, but justice is not limited by what happens in the actual world of fact. It is wrong, however, to regard law and justice as

[1] *Infra*, § 29. E. Bodenheimer, *Jurisprudence*, 19, regards law in its purest form as that which reduces to a minimum the possibility of abuse of power by private individuals as well as by the government. The logical result of this is that law hardly exists at all in a totalitarian state. Is not this a case of defining law as 'that which achieves what I want'? Just because law is used for a purpose of which I do not approve it does not cease to be law. Cf. G. M. Bergman, 57 *Yale L. J.* (1947), 55 at 71, who defines law in terms of the will of the majority. The thesis is that justice is what the community accepts and, as law is based on the majority will, law is founded on justice.

[2] A. Desqueyrat, *L'Institution, le droit objectif et la technique positive*, 199. Is an unjust law the negation of law? *Droit, Morale, Mœurs*, 48. N. S. Timasheff, *An Introduction to the Sociology of Law*, 270, defines law as the overlapping part of ethics and power.

[3] Jethro Brown, 32 *L.Q.R.* (1916), 180–1, suggests that justice as a concept of jurisprudence is mere conformity to law.

entirely unrelated. Justice acts within the law as well as providing an external test by which the law may be judged, e.g. justice emphasizes good faith, and this conception has greatly influenced the development of legal systems.

Salmond's point really is not that law is justice, but that law is an instrument by which justice can be achieved.[1] It is not an adequate definition of medicine to describe it as a drug administered by a doctor because this ignores its real function (that of curing) and because medicine does not cease to be such just because it is prescribed by a layman.[2] But is the purpose of achieving justice as closely linked to law as is the desire of curing to the administering of medicine? Is defining law in terms of justice like defining a franc as a piece of money to be given to the poor? From the abstract point of view, it is possible to conceive of a legal system the dominant purpose of which was the infliction of injustice to satisfy the neuroses of an all-powerful tyrant. But such a ruler could make his rules effective only if he secured the co-operation of a sufficiently large part of the community to aid in enforcement. Some consideration must be paid to the desires of an army and the tolerance of a community. Moreover, if we leave the realm of the barely conceivable and study actual legal systems as we know them, we find that the most powerful rulers wisely left the *private* law of their subjects almost untouched. As the French adage has it, we can do everything with bayonets but sit on them. Law is one, and perhaps the most important, of the instruments for the achievement of such social purposes as win acceptance or tolerance from a sufficiently large section of the community to render enforcement possible.[3] We agree with Salmond that the purpose of law is essential to an understanding of its real nature; but the pursuit of justice is not the only purpose of law: the law of any period serves many ends and those ends will vary as the decades roll by.[4] To seek

[1] 'I am not afraid of being accused of sloppiness of thought when I say that the guiding principle of a judge in deciding cases is to do justice; that is, justice according to law, but still justice. I have not found any satisfactory definition of justice . . . what is just in any particular case is what appears to be just to the just man, in the same way as what is reasonable is what appears to be reasonable to the reasonable man': per Lord Wright, *The Future of the Common Law*, 114.

[2] Cf. P. Vinogradoff, *Historical Jurisprudence*, i. 117 n. 2.

[3] R. M. MacIver, *The Modern State*, 99, points out that every state has, as it were, a double framework—a code and a constitution, the thing administered and the agency of administration. Law grows quietly underneath, while the storms rage above. The most violent revolution may leave the bulk of the code untouched, although the power that administers it is changed.

[4] *Infra*, Chs. IV, V: cf. B. N. Cardozo, *Paradoxes of Legal Science*, 4: 'Nomos, one might fairly say, is the child of antinomies, and is born of them in travail.'

for one term which may be placed in a definition as the only purpose of law leads to dogmatism. The end that seems most nearly universal is that of securing order, but this alone is not an adequate description;[1] indeed, Kelsen regards it as a pleonasm, since law itself is the order of which we speak.[2] Dias makes the interesting point that when we are considering the concept of law at a definite period of time, the formal test is the most convenient, for it tells how a court on that day will decide. But if we are considering the historical sweep, natural law and ethics are just as useful in tracing the future evolution of law.[3]

§ 24. Formal Definitions of Law

Since the time of the ancient Greek philosophers, many writers have emphasized the relativity of law—there is scarcely a rule of today which may not be matched by its opposite of yesterday. A study of actual systems makes many despair of finding universal elements on which a definition of law can build. Kant attacked this problem by the application of his 'critical method'. It is not possible in a short section to expound one of the most difficult systems of philosophy ever conceived. All that can be achieved is to point out the bearing of Kant's method on the problem of defining law. To Kant the world of sensible experience is full of diversity and can of itself produce no principles which are universally valid. To define law we must distinguish between form and matter; the first being 'the complex of universally valid principles presupposed in any legal judgment, and the latter the changing world of social experience which those principles construe legally'.[4] To define law we should not study actual legal systems, but rather retire to the world of pure thought and discover those elements without which it is logically impossible to conceive of law at all.

[1] Many other ends have been suggested, e.g. security, order, the general good, the greatest happiness of the greatest number, the reconciliation of the will of one with the liberty of another. H. Lévy-Ullmann, *La Définition du droit*, 116–17, regards the definition of law in terms of its end as a surrender to subjectivism and to the individual arbitrariness of authors.

[2] 57 *Yale L. J.* (1948), 377. In his argument, however, there is a double use of the term *order*.

[3] R. W. M. Dias, 28 *Camb. L. J.* (1970), 75. There is not really such a gulf between L. Fuller and H. L. A. Hart as is sometimes supposed—see Hart, *Concept of Law*, 199. See also King, 24 *Camb. L. J.* (1966), 106, who distinguishes between the *law concept* used by the jurist to identify what is law, the *law idea* which explains law, and the *law theory*.

[4] F. Hallis, *Corporate Personality*, 31. For a concise account of Kantian legal philosophy see W. Friedmann, *Legal Theory* (4th ed.), 106–11.

The method may be illustrated by turning to the work of Rudolf Stammler.[1] He regards the philosophy of law 'as the theory of those propositions about law which have universal validity'.[2] The natural world shows us the working of cause and effect: law belongs to the realm which chooses ends and determines means. His first emphasis, therefore, is that law is a type of volition; or, to put it in other words, that inherent in law is the notion of purpose. Law exists to bind together the community; it is sovereign, and cannot be violated with impunity. Since by definition law exists to harmonize the purposes of individuals, law itself strives towards justice. The fundamental basis of law and of just law are, therefore, the same. The form of human society is external regulation, as social co-operation cannot be thought of in the absence of control—since law exists to co-ordinate, it can operate only by unifying all possible acts of men. This analysis does not depend on any particular theory of ethics or on postulates drawn from actual legal systems. When Stammler works out his theory he does not examine an actual society but postulates an ideal community in which everyone accepts as his own all those purposes of others which can be objectively justified. These principles of just law are based on the doctrines of respect (one must not treat another arbitrarily) and of participation (all must be allowed to share in the legal community). This picture of society is regarded as a determining form which will condition the rules in any particular group of men.

It is unfair to attempt to describe a great system of learning in a few lines. But despite all the skill and vigour of Stammler's work, it is hard to resist the conclusion of Gény[3] that his conclusions do not really depend on his premisses—they are suggested by his particular prejudices and social views. Jurisprudence, in the hands of the formal theorist, is always faced with a dilemma: if it is true to the premisses on which it is built, it remains in the pure heaven of logical concepts; if it attempts to descend to earth, then these concepts are explained according to the social picture of the writer. Thus Stammler has not really solved the relationship of just law and law. Does he

[1] *Rechtsphilosophie: Die Lehre von dem richtigen Rechte:* The Theory of Justice (trans. Husik). [2] *Theory of Justice*, xx.

[3] *Science et technique en droit privé positif*, vol. ii, ch. vi. 'Stammler was apparently torn between his desire as a philosopher to establish a universal science of law and his desire as a teacher of civil law to help in the solution of actual cases. The result is an "Idea of Justice" which is a hybrid between a formal proposition and a definite social ideal, kept abstract and rather vague by the desire to remain formal'; W. Friedmann, *Legal Theory* (5th ed.), 185.

mean that just law effectively dominates law in every society? If so, the conclusion is demonstrably false. The abstract formulae produced are very subtle, but after all they are merely affirmed without being proved. The unity of the ideal community is merely a formal one in which there is logically no contradiction between the ends of each legal subject.

Whether we adopt the Kantian theory or not, there are points in Stammler's theory which any discussion of law must note. He rightly emphasizes that the notion of community is inherent in the nature of law: law could exist as a theory if Adam were the sole inhabitant of the globe, but law can exist only in fact if an actual society exists. Secondly, the realm of law and of the natural world are distinct. A natural law cannot be broken since it is merely a description of what invariably happens, whereas law is essentially normative in that it sets up a standard which men ought to follow. But while the dictates of law may be disobeyed, they cannot be disobeyed without risk. It is true that a wrongdoer may escape punishment, but the very notion of law is that it imposes itself on the will of the individual. In this sense law is autonomous and inviolable, for while man may be free to break the law, he is not free to evade its penalties. Thirdly, most systems do assume that law is a complete and exclusive system in itself. This raises the issue of *non liquet*—no judge is free to refuse to decide a case on the ground that legal authority provides no precise answer. The theory of the common law is that implicit in its legal principles is the answer to every conceivable legal problem.[1]

But we do not find that the legal systems of the world follow any *a priori* logic. The striving for justice may be the mark of ideal law, but it is not always the characteristic of actual systems. Stammler correctly emphasizes that inherent in law is the notion of purpose—but this purpose is determined, not by the logical principles of the academic jurist, but by the actual struggles of flesh and blood. The purpose of law is hardly a conditioning form which determines the rules of every community.

Del Vecchio follows the same Kantian method, but his writings are easier to follow.[2] He defines law as the objective co-ordination of possible acts among men, according to an ethical principle which determines them and prevents their interference.

[1] *Infra*, § 43.
[2] See the translation by J. Lisle, *The Formal Bases of Law*.

§ 25. Definition of Law as Social Fact

Duguit makes a determined assault on many of the traditional theories of jurisprudence.[1] He emphatically rejects any *a priori* method and prefers to draw his theories from an investigation of the facts of life itself. He wishes to separate jurisprudence entirely from ethics and metaphysics. Instead of beginning with a concept of the individual man and considering his rights against society, he thinks of man as living in society, bound by his own necessities to share the common life. Hence the foundation of law is not the right of the individual but the essential requirements of community life. Law arises because men live together and can only live together. Law does not depend on the will of the sovereign. Duguit rejects the notion of the personality of the State and says that a realist examination shows merely that certain persons govern and that others obey. But the governing class does not create law, for it arises directly out of the facts. Law does not lay down an absolute but only an hypothetical imperative: it does not say (as does ethics) that 'this end must be pursued because it is good in itself', but rather 'if such an end is not sought, this will cause a social reaction and lack of harmony'. The ruler is bound hand and foot by a law which he cannot change. You do not need to submit to the laws of rugby but, if you want to play, you must; if you break a rule, you may be sent off the field.[2] So it is with social life, with the important difference that, while a person may exist happily without playing rugby, no satisfying existence is possible for man save in the society of his fellows. Man must realize that, if he does not observe the canons of social life, he will suffer from the displeasure of his fellows. Society rests on the need for satisfying common interests (*solidarité par similitude*) and the need for division of work (*solidarité par division du travail*).

The actual rules which any society regards as fundamental will differ according to its state of development. There are, firstly, the economic norms which lay down the conditions under which a man may acquire wealth. Secondly, there are the moral norms. (In this sphere, however, we at once notice a difference from the orthodox approach which sharply separates the field of morality from that of law. To Duguit the only difference between morality and law is the

[1] *Archives de philosophie du droit* (1932, 1–2) is devoted to a study of L. Duguits' work; H. J. Laski, *Modern Theories of Law*, 52; C. K. Allen, *Law in the Making* (6th ed.), 574; J. W. Jones, 47 *L.Q.R.* (1931), 62.

[2] M. Réglade, *Archives de phil. du droit* (1932, 1–2), 21–67.

extent of public acceptance. Moral rules accepted by the whole community are rules of law; moral rules accepted only by the intellectual élite are potential rules of law.) Thirdly, there is the legal norm which has behind it an organized sanction. If, however, we limit rules of law to those which are recognized by the government, we are basing law on the will of the State, and this Duguit does not desire to do. The State must be limited by law. Hence Duguit considers that a rule becomes law, even before it is recognized by the State, if it has behind it the effective support of the community. Legislation does not really create law, but only defines that which already exists. The prohibition of homicide was a rule of law before it was recognized by the State; it was also a legal rule that the State must feed the starving even before this humanitarian duty was embodied in legislation. Conversely, a statute does not create law until it wins popular acceptance.

The foundation of law thus depends on the sentiment of solidarity. But Duguit also recognizes a sentiment of justice which arises merely out of the facts, and he describes it as a recognition by man, acquired through a study of his own personality, of the necessity for fairness and equality in the imposition of the rules on others. Solidarity, therefore, leads us to realize that a certain rule is essential to the life of the community, justice that the rule should be enforced. Only a little change of wording is necessary to transform this into the natural law theory that the basis of law is in the reason and the moral nature of man. Duguit refuses to admit this, for the sentiments of solidarity and justice are not universal ideals but mere facts of which the jurist takes note as he studies social life. Law, therefore, does not depend on the will of the sovereign or the will of man, but on social realities. If we postulate a general will as the foundation of law, Duguit thinks it is too easy to make a transition to the will of the sovereign, and he desires a law which will bind the ruler as well as the ruled.

But how is the sentiment of a community to be discovered? Duguit grandiloquently declares that if law is only the will of the majority, it is not worth the effort of study[1]—but as, save on simple issues, unanimity is unlikely, what other method is possible if we are to avoid despotism, benevolent or otherwise? Ultimately Duguit must fall back on some system of majority rule—morals are translated into law when they are effectively accepted by the bulk of a community.

The main criticism of Duguit is that, in founding law simply on the facts, he fails to understand the true nature of ethical forces.

[1] L. Le Fur, *Archives de phil. du droit* (1932, 1–2), 197.

Sir Carleton Allen, after recognizing that Duguit has done good service to jurisprudence by emphasizing that law is essentially the product of social facts, adds: 'But he goes far beyond any sociological theory of law which has yet been advanced when he attempts to evaporate all ethical content out of law. . . . To banish the notion of *right* wholly from law, as M. Duguit seeks to do, is to make it meaningless, and to violate an instinct which is deep-seated in human nature.'[1] Solidarity may be filled with any content we desire, for it is not an end in itself but a mere means to the purposes which man wishes to achieve. Men may join together to collect the scalps of their neighbours or to preserve the peace of the world. A community of masters and slaves may have greater cohesion than a democracy. Again, while law is based on the facts, it is created only when men use their wills to choose between one set of facts and another. Rules are created because men say 'this is better than that', and because they agree to place their wills at the service of the chosen end. No theory is satisfactory which divorces law from the wills of men, the mainspring for the life of society.

In truth, as Duguit matured, he gave increasing emphasis to the sentiment of justice, and some of his own followers expressed regret that in the end he became entangled with that metaphysic which he had sworn to eschew. Although he denies that there are absolute ideals of justice, he really postulates as the basis of his theory the greatest possible co-operation of men for the highest possible ends. So interpreted, his doctrine is an unconscious natural law theory that law is based on the reasonable needs of the community life. But this phrasing uses terms which Duguit would have scorned.

§ 26. Conclusion

Lévy-Ullmann aptly says that a definition of law should have two aims: firstly, to make precise the meaning of law, and secondly, to call up in the mind of the reader a true picture of law and its operation.[2]

The existence of law presupposes a community. Implicit in the notion of community is the acceptance of a set of values dealing with the fundamental issues on which the existence of that society

[1] *Law in the Making* (6th ed.), 580, (this passage not in 7th ed.).

[2] *La Définition du droit*, 132 et seq. But this may be asking too much. Perhaps the most that can be asked is that the elucidation of the meaning will provide the tests which will enable a 'true picture' to be drawn.

depends.[1] In the absence of such agreement, men cannot act together effectively. When it reaches a certain stage of development the community sets up a legal order which determines the methods by which law is to be created, declared, and enforced. This machinery is naturally used by the most strongly organized section in order to effect their ends. Law is never ideal justice, but human justice defined by those who control the machine. What ends law has served is a question for legal history: what ends it should serve is a question for legal philosophy.

But in order to be really effective law demands, not only an active machinery for securing compliance with its rules, but also a method by which the changing conceptions of justice and the transfer of power from one class to another may be mirrored in the law itself. The sanction is a normal accompaniment of mature law, but it is impossible to lay down *a priori* that no rule of law can exist without a sanction. Certain constitutional conventions are normally regarded as an important part of the legal order although no precise sanction can be found. The sanction which exists is merely a realization that the convention lies at the foundation of the legal order itself.

Moreover, while the sanction may be important in order to explain why a particular rule is observed, it rarely explains the acceptance of the legal order itself. Terrorism, or the domination of a small community by a ruthless neighbour, may succeed for a time, but normally the sanction is effective only if it is necessary to use it in a limited number of cases.

There are thus two sides to law: from one side it is an abstract body of rules, from the other it is a social process for compromising the conflicting interests of men.

Law may shortly be described in terms of a legal order tacitly or formally accepted by a community. It consists of the body of rules which are seen to operate as binding rules in that community, backed by some mechanism accepted by the community by means of which sufficient compliance with the rules may be secured to enable the system or set[2] of rules to continue to be seen as binding in nature. A mature system of law normally sets up that type of legal order known as the State, but we cannot say *a priori* that without the State no law can exist.

[1] Compare A. L. Goodhart, *Trans. of Grotius Society* (1936), xxii. 40–1; F. W. Eggleston, *Search for a Social Philosophy*, 114.

[2] H. L. A. Hart, *Concept of Law*, 90–1, 228–31.

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