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Book Review

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LEGAL PHILOSOPHY FROM PLATO TO HEGEL. By Huntington Cairns, Baltimore. The Johns Hopkins Press, 1949. Pp. 567.

The author's plan is a statement in separate chapters of each philosopher's ideas, followed by his discussion and criticism of such ideas. The footnotes give complete references to the authorities so that any interested scholar can judge whether or not, in his opinion, the work has been well done. Though I am not competent to express a professional opinion on the work of philosophers, the author's work is, in my opinion, outstanding. To those who may be skeptical of my view, I suggest that they test his plan and its execution by reading Chapter XII on Kant.

Philosophy began with the Greeks as an attempt to satisfy man's rational curiosity about the world in which he lives. A philosophy of law is an attempt to discover universal principles in law, and thus far the greatest of legal philosophers have failed in this task. The difficulty lies in the inability of law as compared with the physical sciences to conduct hypothetical experiments and thereby test the validity of the hypotheses. Thus the difficulties are all too apparent. Especially difficult is the test of "value", and here we must either consider that we are at the mercy of blind impulses or attempt by the methods of science to discover the ethical and moral aspects of jurisprudence (566). What is value, truth, law, right, happiness? Jurisprudence is an attempt to answer these difficult questions in terms of universal applicability (421, 452, 455, 462, 470, 476, 501, 507, 509, 511, 515, 535, 537, 548, 550, 551, 552).

Plato

Law in our sense of a complete system with professional lawyers was unknown to the Greeks (29). Plato's idea was that law was discovered and not invented (37). According to Professor Cherniss of the Institute for Advanced Studies at Princeton, this view was basic in Greek thought. Plato thought that the end of law was to make man good and to have group unity; yet he thought Democracy had gone too far in Athens (50, 57, 92). He played with the idea of the Philosopher King, that all good and all wise one who never existed, and fell back on law as second best (39, 42, 115, 212, 352, 395). The making of men good by law is certainly doubtful (98, 102, 181, 185, 274). Law, Plato

thought, should be a "rigid rule adapted to the average man and the general situation and incapable of dispensing equity in the particular case" (40). Here we touch on the danger of equity unless its application is also governed by rules. "Individualization," which Pound suggests in his "Interpretations of Legal Thought", gives us no rule and seems to lead in the administrative agencies to uncertain if not capricious results (40, 58, 108, 112, 117, 185, 196, 210, 216, 219, 234, 264, 368, 445, 543). Russia today, having departed through gradual stages from pure Marxism, in which there was to be no law, has now come to law and has put into effect a code of laws based, in part, on the civil law of Europe. But as a part of this law there are escape techniques by which arbitrary and capricious decisions can be made. (See "The Challenge of Soviet Law", by Harold J. Berman, 62 Harvard Law Review, 220 et seq. and 449 et seq.) Our duty would seem to me to be to take our stand for the rule of law laid down by Plato and then to focus our efforts on the application of equitable rules and on exceptions, which would prevent hardship but which should be divorced from the arbitrary, and which should be predictable. We cannot too often repeat to the Marxists in our midst that our system is one of laws and not of men. Reason, in which Plato believed, is suspect today as being the slave of the passions, but this view has been over exploited by the Marxists, for unless man can fashion his law by reason, how otherwise can he fashion it? (6, 8, 47, 94, 251, 275, 286, 365). As to practice, Plato correctly thought that legal proceedings should be public. He believed, too, in Courts having many judges; which certainly should be the case in all appellate courts.

Aristotle

His systematization of logic with the syllogism is the first example of the use of a precise scientific method in the explanation of legal propositions. His was "the method of hypothesis and verification", which is the method of modern science (78, 79, 84, 96, 124, 228, 232, 554). He divided the sciences into the theoretical, which had as their object knowledge for its own sake, the practical, which sought knowledge as a guide to conduct, and the productive, which employed knowledge for the creation of beautiful or useful objects. Precision, he thought, should not be looked for in jurisprudence. It has to do with human affairs which are contingent and not demonstrable (82). It can be approximate only. His method is accepted today in all empirical

sciences (86). Aristotle thought that good laws tended to make men better, though he knew it was hard to be good (98). While "progress" in the popular sense is largely a myth, yet despite the dreadful events of late years, there has been improvement in time, though there is nothing to show that law helped in this. One need only read Sir John Pentland Mahaffy's "Greek Life and Thought" to be convinced of improvement. That picture of the Hellenistic world with its treachery, its cruelty and its unspeakable vices seems to demonstrate that we do move forward slowly.

Cicero

Cicero was a practicing lawyer, not a legal philosopher, and his views are given because he had read deeply in philosophy and because he filled a gap which otherwise would have been left unfilled (X, 127). He was the first to raise the question of "Why is jurisprudence worth studying?" As a practicing lawyer, he knew and respected the work which day by day was being done by lawyers. But he had larger views, and thought that knowledge was important on its own account (130, 131). He attempted to show the difference between the law of a State, "jus civile", and the law of nature; sometimes confused with the "jus gentium". The law of the State might include unjust provisions, but this could not be so with natural law. This is the difference between what the law is and what it 'ought' to be; and where values are not agreed upon, this latter is hard to define. It is interesting, however, to know that his views are "even today the basis of a revival in juristic thought" (142). Justice, Cicero thought, was the supreme virtue, yet he was never able to give a good definition of it. The theoretical arguments given against Justice are interesting (143). Yet the ideal of Justice, like the ideal of Christianity, while never fully achieved, is great and helpful as an ideal; and so it is with the opposites good and bad. Croce, in his "History as the Story of Liberty", says that the conscience of the human race has never set up other standards than those called, "the beautiful, the true, the useful and the good, together with their obvious synonyms", and he follows with this challenge: "If anyone cares to propose or to discover other standards, let him say so and have a try." It is illuminating to read Cicero's discussion of the rules of interpretation (152, 156). I have always thought that such rules are of but little value except as a frame for the Court's decision. It seems to me in reading

a document or a legislative act thought to be obscure, that two persons of equal ability might well arrive at opposite results as to its meaning. This is subjective, and when such result is reached, then an appropriate rule of interpretation is selected to support the result. The judges, it seems to me, are in no way to blame for such a process in the field of legal interpretation (265, 266, 543). It is, however, a little disappointing to have the author say, "Inasmuch as numerous principles can be suggested as the basis of any particular decision, it is foolish to assert that any particular case decides a principle as its ratio decidendi" (88, 301, 308, 541). To this I do not agree. If the author is right, then what can be said of the legal profession and of our leading law schools which have at great length praised the practice of teaching law by the case system, which Langdell inaugurated at the Harvard Law School. Cicero's ideally educated man must be specially at home in literature, rhetoric, history, law and philosophy (161, 208, 306).

St. Thomas Aquinas

His philosophy of law was founded on a theological basis. It was one of the great achievements of the 13th century, and Von Jhering acclaims him as a mighty thinker (163, 166, 204). For St. Thomas Aquinas law was an ordinance of reason for the common good made by him who has care of the community. To us, today, this is more the description of an ideal, and we now have the ideas of authority, experience, Volksgeist and utility (168, 169). But his insistance on reason exists today in court decisions which decide whether or not in particular cases what is, or what is not, "reasonable". For St. Thomas Aquinas an unreasonable law might bear the title of law but was not a real law. His view of natural law was that man knows the precepts of the natural law, not as a matter of faith, but through a rational examination of his own nature (176). Attractive as the idea of natural law is, and pointing as it does to something which may be fundamental and universal, it still does not give us concrete help in particular situations (175-184). Moral behavior is explained intrinsically in terms of the will directed by reason and habit. But one extrinsic principle inclines to evil and is the devil; the other moves to good and is God (167). But his basic thought is still—"good is that which all things seek after" (178). Man can be trained in virtue, he thought, but it must be done gradually. No attempt should be made—"to impose upon the multitude of imperfect men the burdens

which are borne by the virtuous, viz., that they shall abstain from evil" (191).

Bacon

Bacon put his emphasis on method, saying "the mental capacities of our predecessors were the equal of our own" and so new scientific methods of inquiry are needed (206, 245). Philosophers, he said, make imaginary laws. Lawyers write according to the country where they live and tell what is, but not what "ought" to be, law (205). His "theory of the origin of law and justice rests on the principle that they are produced through the reaction of the group to behavior held to affect the wellbeing of the whole community" (211). This is surely better than Pound's "engineering interpretation", which seems to imply a distant but certain end for law, to which it is moving. Bacon thought that "certainty was the prime necessity of law" (217). "The Courts should not be entrusted to the charge of one man but should consist of many." "Decrees should not be issued silently but the judges should give the reasons for their decrees openly and in full court" (235).

Hobbes

The aim of man, Hobbes thought, was the assurance of a contented life, which he does not define, and such a life, he believed, could only be realized through power. This power, he argues in a persuasive way, is not a mere worship of power itself, "but because he cannot assure the power and means to live well which he hath at present without the acquisition of more" (251). The "contented life" of Hobbes therefore would seem to be largely based on materialism. Again he says that passions move man to "a desire for gain, for safety, and for reputation" (252). Just why reputation should form a part of his system is not plain, for good and evil to him have no particular meaning, and his morality is merely instructed prudence (250, 257). Locks, he thinks, are a practical commentary and criticism of man's nature (252, 258). While Hobbes is best known for his view of the all powerful state, yet he said, "In a way beset with those that contend on one side for too great liberty, and on the other side for too much authority, 'tis hard to pass between the points of both unwounded" (259). Perhaps the attempt at the Golden Mean is our only recourse (106, 121, 162, 197, 282, 318). Hobbes did not believe in the rule of law, but favored the rule of men, a position which seems to me to be absurd

(264). His view of the law as the command of the sovereign, which Austin followed, is certainly correct in its distinction between the law of the State and the ideal or natural law (260, 269).

Spinoza

This great thinker made his livelihood polishing lenses. His life interest was in philosophical speculation, and his ideas are interesting and important. He "was cautious in holding out any hope for improvement of the social lot of man". And who shall say that he was wrong in that position? He thought that "experience had revealed all possible commonwealths which are consistent with men living in unity and also the methods by which people may be guided or kept in fixed bounds" (274). We Americans had thought that our Constitutional system was such as to save us from the eternal circle in which government seems to move from authority to freedom and then from freedom to authority and so on, ad infinitum. Yet in our own time we have seen the great safeguards, which were deliberately put into our Constitution to divide total power, rendered useless, and we seem also to be going in the endless circle. Spinoza's view that it takes great ability and care to form and preserve a society is indeed only too true (278). The end of law, he thought, was "the security of the individual and the State" and the true aim of the State was liberty (287, 289, 290). In a sense he was a "determinist", but he takes refuge in the idea that man is at least the proximate cause of society's decrees (279). He says too that while the laws of a nation are subject to the operation of the principle of determinism, we must act when we devise them as if the principle did not apply (280). Hegel, while realizing that Spinoza's definitions and axioms were a great storehouse of speculative truth, nevertheless objected to his system because of its presuppositions which permit sophistical reasoning (507).

Leibniz

When we get to the German thinkers, deep thought is our fare. Hegel complained that philosophy merely served up rewarmed dishes which were supplanted by each new serving (507). Leibniz, like Bacon, was an experienced lawyer (208). His idea of happiness seems at first to border on the greatest happiness for the greatest number idea, which I think Spencer refuted. For who is to select the kind of happiness which will be such for the greatest number? If, therefore, it means more than a decent scale

of living in the material sense, I think it unsound. It could be used by those who seize the power of the State to force their brand of happiness on the rest of us. Leibniz attempted a scientific system of two principles, the one demonstrable by the principle of contradiction and the other by the principle of sufficient reason (295, 334). He regarded the syllogism as the most fruitful of human inventions, but the difficulty of formulating premises in the philosophy of law remains (300, 305, 311). He was surely right in saying that "Law should be taught both as a science and as a practical discipline". It is hard indeed to see how there could be a creative judge who lacked either of the qualities which should come with such teaching. That Leibniz was not in fact a coarse utilitarian in the sense that Bentham was is clear enough. Power cannot, he saw, answer the question, "Why?" and to put right and might on the same plane is the misconception of the relationship between "is" and "ought" (313). The rules of fairness and decency rested, he thought, on eternal reasons, which usually cannot be known to us (295, 312). Reason and will lead to happiness through pleasure. On the road we may miss the true goal, yet basically, he believed, pleasure is a feeling of perfection, and pain, a feeling of imperfection (329).

Locke

Although Locke wrote on philosophical subjects, yet in his speculations on the State he accepted the views of his time. He made no attempt philosophically to justify the ideas on which his system rested (335, 337, 361). Locke's view was that government must necessarily be limited (347, 355, 357). The rule of established law decided by upright judges and the protection of property he considered important (351, 352, 360). While he insisted on reason, his view of human character made him believe that government was necessary and that it should be limited government (353). Locke said, "Law in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper intent and prescribes no farther than is for the general good under the law . . . so that however it may be mistaken, the end of law is not to abolish or restrain but to preserve and enlarge freedom" (360).

Hume

Philosophy, he complained, had been little more than a succession of endless disputes (362). He agreed with Spinoza that human nature was not modifiable (363). His

attempt was to apply scientific methods in estimating human affairs. This was to be done by a study of history and by using the inductive method. The weakness in this theory appears to be that differing views of history would lead to differing results (364). Reason, he thought, was and ought to be the slave of the passions. Yet he thought that men had a "moral sense" (367). His theory of Justice was a legal rather than an ethical one. General peace and order are the attendants of Justice. Legal rules are intended to serve the public interest. It is impossible for them to prevent all hardships. It is enough if on the whole a balance of good preponderates over evil. Law thus made should be administered inflexibly (368). While he believed that utility was at the bottom of civil society, it was surely not Bentham's idea of utility (366, 374, 375, 376). He was firm in his belief in the right of property (351, 373, 374, 378).

Kant

A great metaphysical thinker, Kant based his system on the will, or rather the "good will". The will, he thought, was autonomous and could legislate for itself, which seems to me to be difficult to fit in with his search for universal laws which control us. The senses and the intellect are confined merely to the world of experience. The idea of "ought" in man is unique and is found nowhere else in nature. "Ought" operates in the inner world of the moral self. Kant's system included two commands: (1) A hypothetical imperative acted on not because of its merit (ought) but to reach some practical end. (2) A categorical imperative acted on because of its own merits and not as a means to something else (392). See, too, Leibniz (313) and Bacon (205). Locke was contra (350). Fitche, too, believed in the categorical command of morality but kept separate the idea of morality from law (473). Yet Kant to an extent was a determinist in thinking that mankind did not advance by a rational conscious purpose. He thought, however, that there was a slow development from man's original capacities pursuant to universal natural laws. It was his belief that an attempt should be made to discover such universal laws (393). Spengler and Toynbee have attempted this task of late years. Kant thought that it is precisely because man is anti-social that law and the State appear, and that because man's anti-social tendencies are controlled by law, leaving him still room for his ambition to work, that he is able to advance (394). Hegel agrees,

saying that if mankind lived in a state of nature, the mental would be submerged in the natural (533). Compare Socrates and Thoreau. Kant concluded, therefore, that the greatest practical problem of the human race is the establishment of a civil society administering "right" according to law (395). His idea was that the best society was one wherein the greatest liberty existed and therefore competition among its members, with an exact determination of the limits of this liberty (395, 410). Public Justice he recognized for what it is, i.e. the most important of the functions of the State; the selection of those to administer justice being a difficult and uncertain task (395). Kant's idea of right was the external act, and he was dubious about equity (402, 407). He strongly believed in the idea of property. His idea was not that a contract "ought" to be kept, but because it was the result of united willing by both sides (425, 429). As to the State, he believed in the separation of the powers (441, 444, 446). He thought the welfare of the group more important than the welfare of the citizens. But this is surely wrong, for the welfare of the State means the welfare of the citizens, and where would Kant's idea of "freedom" be if it were otherwise, and the citizens were mere pawns under the power of the State (438, 448-450)? As to criminal law, Kant's view was that retribution is the only rational plan (453). For those who are confident of their views on crime, a study of the views of the greatest thinkers will make them less dogmatic. See Hegel (494); Peirce, (561).

Fichte

His central thought was that man's thinking is based on experience and this consists of ideas of things, that is aspects both subjective and objective. He thought philosophy had two possible systems—idealism and dogmatism—the first attempts to explain the thing in terms of the idea, and the second explains the idea in terms of the thing. Idealism was Fichte's philosophy, as he thought that dogmatism could not explain the gulf between things and ideas (465). His system of "ego", "non-ego" and "divisible ego" is difficult abstract thought. Yet he was practical enough to hold that even a perfected philosophical system must be adjusted to the facts of experience. His legal system is built on the idea of *relation* between human beings in an organized society. In this relationship each individual must be required to restrict his freedom in recognition of the possibility of the freedom of others (469). Though Fichte

recognized the "ought", he divorced law from ethics and morality (473). Law permits, morality commands categorically, and the rational being, if he disobeys the law, must take the consequences. The end of law is a community of free beings, but this can only be if these free beings are limited in their freedom by the law laid down by the State, and this is "Right" (477). He thought that man could be made happy by law; a theory of the Socialists (480). There must be no poor men and no idlers (492). He rejected democracy and despotism in favor of a representative government and also believed in the separation of the powers (490, 491).

Hegel

His difficult theory is the triad, "being", "nothing" and "becoming". Abstractly, "being", devoid of all qualities, is "nothing", yet there is an assertion that a thing both is and is not, and searching for the unity of opposites we find that a thing both is and is not in "becoming" (506). Philosophy's duty is to establish the rationality of law or "Right". It is an effort to apprehend the actual. Hegel regards caprices of fancy and evil as existent but not actual, which seems to me to be an assumption. Hegel's attempt was apparently to determine whether a law was morally valid. His was a highly abstract theory which includes identity of opposites, also concepts and ideas much too subtle for a mere lawyer to explain. He admitted the equality of men as persons, but with different capacities, so that the amount of a person's possessions was a matter of indifference (522). Contracts are based on external acts and not states of mind (524-525). Hegel thought that legal *principles* should be expressed in a code rather than to have a code as a mere collection of laws. He thought the confusion in English case law was due to the fact that English judges were essentially legislators (536).

In a skeptical age, when young men on the threshholds of their lives are often discouraged, it is heartening to know of the zeal and scholarship of Huntington Cairns. We lawyers in Maryland are proud to know that he is also a Maryland lawyer. In no sense, however, is he parochial. He is in fact an authentic intellectual whose wide learning and depth of thought qualify him as being one to be known and admired in the company of scholars everywhere.

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