

LAW AND PHILOSOPHY

Just how closely allied are the pursuits of law and philosophy? To what extent can a student of law benefit from the study of philosophy? These two questions delineate the scope of the problem I wish to consider. It is not claimed that what follows is a final indisputable answer. Indeed, it is doubtful whether such an answer can be given to a question of this nature. Since differing opinions may be held on exactly what Law is, and what Philosophy is, it is inevitable that it will remain, to this extent at least, a matter for opinion and argument what relation, if any, exists between these two disciplines of social life.

This should not be taken to imply that nothing is to be gained from an examination of the issues involved, that for every step forward we take one (or two) backwards. For nothing would be further from my intention than to suggest that any opinion (in this or any other matter) is as good as any other. Opinions may be sound or unsound, and they are to be supported by reasons, which will be good or bad reasons. One cannot say just *anything* at all (e.g. "Law is a crocodile, and that's that."). What is important in such matters is that we should have *some* opinion and that our arguments should be examined, and supported by good reasons.

At first sight, one might think that nothing could be further from the domain of law than philosophy, and vice versa. The philosopher, it might be thought, wants to know the reason for his existence, to construct theories about the nature of the universe, of man and of man's place in the universe. Along with poets, musicians and others, his concern is with the world of abstractions, theories, and metaphysics. The lawyer, on the other hand, moves on a different level—his concern is with the world of hard facts, where particular cases have to be determined here and now by practical men with their feet planted firmly in the real world. After all, it was no lesser authority than Judge Oliver Wendell Holmes who remarked that the light of the law has been experience and not logic. And so, the same "one" might conclude, the "lawless science of our law" had best depart hence from philosophy and matters philosophical.

I wish to argue that to adopt this position in any but a highly qualified manner is to simplify the problem to the point of distortion, involving, *inter alia*, a gross misunderstanding of the nature of philosophy and philosophical procedure as practised today in the Western world. The trouble is, of course, that while not all philosophers are Pragmatists (John Dewey), or Existentialists (Jean-Paul Satre), or other "Capital-Letter-ists", these are practically the only type of philosopher that non-philosophers hear or read about. The natural mistake, then, is to take as one's model of *all* philosophers, this particular restricted class of philosophers—what one might call theory-builders on the grand scale, or metaphysicians—and reject as irrelevant to Law the study of Philosophy *simpliciter*. In order, then, to show that the model is too neat, too restricted in its application, I must of necessity approach the question which by now will be seen to be unavoidable, namely: What is Philosophy? I submit that, given a clearer

view of philosophy than that which currently exists among non-philosophers, it will be seen that in a number of important aspects, Law and Philosophy go hand in hand.

How then is this view to be obtained? First of all I should make it clear that it is itself a philosophical question just what philosophy "is", and one occasioning much controversy among philosophers today. For this reason I want to give an answer somewhat different to that which might be expected—that is, I shall make some observations *about* philosophy, rather than attempt to provide a straightforward answer to an apparently (though deceptively) straightforward question. I can perhaps start by mentioning the usual subdivisions within philosophy—logic, ethics (the study of values, and the criteria of right and wrong), political philosophy, epistemology (theories of knowledge and knowing), philosophy of religion, and metaphysics. Not all of these branches are taught in New Zealand Universities—in fact, except at Stage III and Honours levels, logic, ethics and epistemology are practically the students' sole concern. Secondly, which philosophers does one study in the philosophy departments of our Universities? Well, here are the main ones studied at Otago: Plato, Aristotle, Locke, Berkeley, Hobbes, Hume, Kant, Leibniz, Descartes, the pre-Socratic philosophers, Mill, G. E. Moore, Russell and Wittgenstein.

All of these, with the exception of Wittgenstein, would probably be described as metaphysicians, though it is not necessarily for their metaphysics that they are studied. Perhaps at this point a brief example of one particular metaphysic might be apposite. Let us take that of Bishop Berkeley, the seventeenth century British philosopher. Berkeley's metaphysic was essentially a reply to John Locke, a contemporary who had postulated that there existed three types of entities—(a) minds, (b) the external world of birds, desks, the moon, etc., and (c) our ideas or perceptions of these things. Since, said Locke, we can only be absolutely certain of the way things appear to us, the ideas we have of them, only these can be *known*. We can never know the things themselves, as distinct from the way they appear to us, but they exist as the cause of our perceptions and ideas. Berkeley's reply was that it was pointless to postulate the existence of this unnecessary third type of entity, since God is the cause of all of our ideas. He therefore abolished Locke's external world, and held that there existed only minds and their ideas. When it was pointed out that one could now no longer talk of something existing which was not being perceived by someone, or of which someone did not have an "idea", Berkeley replied that God is simultaneously perceiving everything whatsoever. Hence a cow does not go out of existence when you are no longer looking at it. The position was rather aptly summed up in the following limerick by Ronald Knox:

There was a young man who said, "God
Must think it exceedingly odd
If he finds that this tree
Continues to be
When there's no one about in the Quad."

Reply:

“Dear Sir,
Your astonishment’s odd:
I am always about in the Quad.
And that’s why the tree
Will continue to be
Since observed by
Yours faithfully,
God”.

Here then is a metaphysic—that is, a system of interpretation by means of which we are to view the whole of experience, a map of the universe and an inventory of its contents. It is with this type of philosophy that I shall shortly contrast analytical philosophy.

Thirdly, is there any common factor which underlies the different branches of philosophy I have enumerated, and unites the writings of the philosophers I have mentioned? Here is one (repeat, *one*) way of looking at it, one way in which an affirmative answer can be given here: In almost every aspect of living one makes assumptions, and does so necessarily, about matters which, by virtue of their generality, underly the rest of the more specific beliefs one holds, and hence form the substrata of all our attitudes, beliefs and opinions. We assume, for example, that some arguments are valid, while some are not; that there is a distinction to be drawn between “right” behaviour and “wrong” behaviour, and that it is to be drawn according to a specified criterion; that the relationship between State and Individual should be settled one way rather than another; that certain items of thought can be known, while others can only be objects of belief, and that the line between the two is to be drawn in a particular place; that there is (or is not) an entity higher than mankind; that the frame of reference according to which we interpret any problem which may confront us, the map by which we steer in life, should be constructed one way rather than another. These are some of the assumptions we all make, every second day, and which are dealt with, respectively, by logic, ethics, epistemology, political philosophy, philosophy of religion, and metaphysics. Within each assumption there are alternative attitudes and answers, and the task of the philosopher (according to the point of view I have here adopted) is to examine these alternatives and their relative merits. It has been said that if Plato and Newton came to Otago University, Plato would take the chair in Philosophy, while Newton would enrol for Stage I Physics. The point being made, I presume, is that the problems of philosophy, unlike those of the specialized sciences, change little if at all from age to age. (And it is for this reason that Stage I students can very profitably spend half of their course studying the dialogues of Plato, written 2,500 years ago.) But what *has* changed and significantly so for my purposes, is not so much the answers given, as the way in which a problem is treated. In this important respect Western philosophy is far from being a dead subject, and consequently it is especially dangerous today to take as one’s model of philosophy the metaphysics so popular among earlier philosophers. In the last three decades of this century, especially since the work of the Austrian philosopher, Ludwig Wittgenstein, a revolution has taken place in philosophy, the crux of which is a shifting of emphasis from *synthesis*

to *analysis*. I here use "synthesis" to characterise the "theory-building" or metaphysical school, in which attention is predominantly focused on achieving a synthesis (or "putting together") of the diverse elements of experience into a unified whole. The analytical philosopher, on the other hand, analyses a problem into its compound parts, concentrating on the complexity of the situations which confront him for solution, and the diversity of the elements therein. Suspicious of the all-encompassing answer, he wants to know exactly what is being asked. The meaning of a word, writes Wittgenstein in "Philosophical Investigations", is in most cases the use which a word is given in our language, and it follows that if a word is used in a number of ways, it will have a number of meanings. Philosophers since Wittgenstein have suggested that many of our philosophical "problems" disappear once we distinguish these meanings and ascertain exactly what is being said. (And thus, for example, the philosopher who says that one can know with certainty only something true by definition, may not be in any way contradicting the man who says that he knows the distance between the earth and the sun, for "know" is used in different senses in these two instances.) Because of its concentration on words and their meanings, analytical philosophy has also attracted the label of "linguistic" philosophy, one carrying with it, however, unfortunate associations. It would be unfair to accuse modern philosophy, as a school, of pedantry or mere quibbling over terms, as some have been wont to do. Even if smaller things are said today, they are said with far greater clarity and lucidity than before. And furthermore, as the late Professor J. L. Austin pointed out, "we are looking not merely at words . . . but also at the realities we use words to talk about. *We are using a sharpened awareness of words to sharpen our perception of the phenomena.*" (emphasis added).

It should be made clear that whether one is a metaphysical or an analytical philosopher is largely a matter of emphasis. The metaphysician cannot avoid analysing experience, nor can the analytic philosopher avoid at least an implicit metaphysic, and to this extent it may be unfair of me to talk in terms of a dichotomy which is far more blurred than I may have suggested. Synthesis often requires analysis, and analysis often leads into synthesis. I might give one example of the latter phenomenon which is of general importance and widespread implications. Wittgenstein, the father of modern analytical philosophy, examined the concept of a rule, and on analysis decided that except on the sense of habitual behaviour (e.g. "he does x, y, z as a rule"), all uses of the word "rule" involve, and have as their point, the notion of a *right* and *wrong* way of doing things. The rule acts as a standard, criterion, or basis for evaluation, and in fact makes possible any talk in terms of a "right" and "wrong" way of carrying out the performance in question. It follows that if there could be no point in talking in terms of a correct, right, or proper performance, then the notion of a rule cannot get a foothold. Wittgenstein then suggests that it *will* be pointless to talk in these terms where there is no possibility of an *independent* check on the performance in question. If I could never check up as to whether or not I am following a particular rule, there is no *sense* in describing my behaviour as following that particular rule—any description would be as good as any other, and anything I do in performance of the supposed rule would be as good as any other. For example, I stand in front of you, hands in

pockets, performing all manner of facial acrobatics, and you ask me just what I am doing. I reply, "I'm imitating the expression on the face of the cook's mate on the good ship 'Venus' two days after ship and crew disappeared on July 12th, 1912, without a trace. Have I got it right?" You would probably treat me with understandably cautious respect, but if I insisted on your telling me whether or not I had got it right, your reply would probably be: 'What do you mean, "got it right"?!?', How would I know?' And if I insisted that I had got it right, you would wonder what on earth I could mean, since anything at all might count as a correct performance, which is to say that it becomes *pointless* to use evaluative terms at all. The conclusion to be drawn at this point is that following or obeying a rule is something which makes sense only within a social context or against a social background, for only then does one obtain the possibility of an independent check on one's behaviour. Now since it is a distinctive characteristic of human beings that they can act on principles, a human being is dependent for his existence as a human being upon a society. It is the society of family, church, or other group that *teaches* the child not only what *is* right and wrong but also the very notion of right and wrong itself. The individual human being is something that is created in and by society, though the possibility of the same is there from birth. But it need not always be realized. A seven or eight year old child was discovered who had been brought up from infancy by wolves. She ran on all fours, growled, and tore at meat like her guardians. On being taken into civilization she lived only another seven or eight years, and when she died she had a vocabulary of less than a dozen words, and had only just learned to move about on two feet.

The conclusion that one might draw—viz. that man is a *social* animal—was held by Aristotle 2,500 years ago, illustrating my statement that while the philosopher's answers might not change a great deal, the approach they adopt has changed.

I observed that analysis often leads into synthesis, and I offered Wittgenstein's treatment of rules as an example of this. However, the fact that these two approaches are inter-related should not blind us to the facts that the philosophical landscape has altered, and considerably so, within one generation of philosophers, and that any suggested fundamental opposition between law and philosophy must be reviewed in the light of this change. For in both pursuits today there is an insistence upon clarity and precision in the use of words. At the admission of barristers and solicitors to the Supreme Court at Dunedin earlier this year, Mr Justice Henry made the subject of his address the importance of words to the lawyer. They are, he said, the lawyer's "tools" and "stock-in-trade", and require and deserve the greatest of care in their use. So it is for philosophers, and today's teachers require from their students a similarly exacting standard of care in this respect. A close tie has been recognized between thought and the expression of thought in language. By and large we think in words, and expertise in expression is not merely something auxiliary to clarity in thought—it is rather part of it. In the vast majority of cases, a student who cannot express himself clearly has not achieved the required clarity in his ideas. The training which philosophy provides in precision and clarity in expression is thus at the same time a training in clear thinking. These are two sides to the one coin, and this coin is the currency of both lawyer and philosopher.

I have by now covered the first two of the main points of contact between law and philosophy to which I wished to draw attention— (1) the concern with the spoken and written word, and (2) the role of analysis. In the second aspect the histories of law and philosophy are not unlike, in that the “craving for generality” (to use Wittgenstein’s characterisation) which bedevilled earlier philosophy is not entirely absent from the judgements of one and two hundred years ago. In Family Law, for example, enormous difficulties and complications have resulted from attempting to state *the* purpose of marriage, and then applying this single criterion to a number of different factors—consummation, the possibility of procreation, etc. If on analysis we reject the presupposition that there is one and only one purpose of marriage (and due credit must be given to the case of *D v. A* (1845) 1 Rob. Ecc. 279, where two principles of marriage were allowed—“a lawful indulgence of the passions to prevent licentiousness, and the procreation of children”), then one will be less likely to apply one criterion to very different considerations (the synthetic approach).

The ground which has been covered this far prepares the way for a briefer statement of the third point of contact—logic.

Logic’s concern is to formulate and examine the *form* of thought—the form, that is, as against the content, the skeleton as against the flesh. Logic endeavours to elucidate the basic rules of valid argument, by means of which one can determine whether or not, *given* the premises, the conclusion follows. In formal logic (as developed mainly by Aristotle and Bertrand Russell), these rules are given algebraic expression, and the different types of proof and fallacy are examined. In semantic logic, on the other hand, one deals with such topics as meanings, ambiguity, vagueness, and definition. It would seem to me that the value of a grounding in logic for law students is unquestionable, but for the fact that lawyers and judges occasionally claim that logic has got nothing whatsoever to do with law. “Law follows experience, not logic” is a contention not uncommonly advanced in the legal world. It is implicit, for example, in Lord Wright’s statement in *Liesbosch Dredger v. Edison Steamship* [1933] A.C.449, that in “the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons”. (at p.460). With the greatest of respect I would submit that one here runs the risk of regarding logical thinking as an alternative way of thinking, which it is not. Any use of argument whatsoever involves the use of logic, be it good or bad. I find it difficult to see what would count as “pure logic”, except perhaps something like this—

1: $p \vee (q.r)$

2: not r

Therefore: p .

But nobody would be expected to talk in the jargon of formal language; the skeleton is always clothed with the substance of the argument, and there is no reason why this content or substance should not be practical considerations. Rather than viewing logic and experience as mutually exclusive alternatives, they should be thought of as providing two ingredients in argument. To choose a certain course of action because experience has taught us that this is more satisfactory than

a given alternative is a perfectly logical thing to do, and one should be immediately suspicious of the logic of the proposed alternative. The mere fact that it has a logical flavour does not mean that it *is* logical. There is no necessary incompatibility between logic and experience.

In the practice of law, rather than in the learning of the law, ethics should be of considerable importance to the lawyer. At the judicial level, decision-making merges into policy-making at that point at which a court has a choice as to which of two precedents of equal weight will be followed. Of necessity questions of human values arise and the battleground of moral philosophers, ethics, is in full view. In practice too, ethics cannot be avoided. For example, there is a clear need for a knowledge of human beings and human values in dealing with the practical side of divorce. Admittedly studying ethics will not *guarantee* success in this field, for nothing can do that, but it can help to a large extent by providing a critical appreciation of the different ethical systems the great thinkers of the past have evolved.

Finally, there are certain specific topics in the philosophy course which are of direct interest to the law student, punishment and political philosophy being the two most obvious. The former is treated in the ethics course, while the latter raises questions concerning the philosophy of law. I would place less emphasis, however, on this somewhat more direct assistance provided by philosophy, since such topics are covered in any case in Jurisprudence, and may be perused in general reading. The first four points of contact (language, analysis, logic and ethics) are, on the other hand, rather a training of the mind in away of approaching and dealing with a problem, a training invaluable to the law student which a University course in philosophy is particularly suited to provide.

There are therefore, particularly today, very good reasons for giving serious consideration to the replacement of English I by Philosophy I as the compulsory Arts unit in law courses, which is the conclusion with which I would leave you. The two main benefits to be obtained by law students from English I are (1) an ability to understand and write decent English, and (2) an acquaintance with some of the great minds of the past and present. In one's capacity as a law student, one gains from philosophy both of these advantages, *as well as* those of the other features which I have discussed. And for those interested in philosophy for philosophy's sake, there is the satisfaction of knowing that one has answered Socrates' challenge: "The unexamined life is not worth living."

F. W. M. McELREA, M.A.