Michigan Law Review

Volume 6 | Issue 1

1907

Recent Legal Literature

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THE AUSTINIAN THEORY OF LAW. By W. Jethro Brown, Professor of Comparative Law in the University College of Wales. London. John Murray. 1906.

This book is "An Edition of Lectures I, V, and VI of Austin's 'Jurisprudence,' and of Austin's 'Essay on the Uses of the Study of Jurisprudence,' with Critical Notes and Excursus."

The chief object of the author is to present a statement and a critical interpretation of the theory of Sovereignty and Law, which has been traditionally associated with the name of John Austin. In several respects, he defends Austin's views. In others he criticises them. He discusses also the doctrines advanced by more recent writers. The main portion of the book is in the exact words of Austin, taken from the sources named. There is, however, much and useful condensation. Austin often repeated himself. The lectures, as condensed by Professor Brown, show still needless repetition. The author covers what he thinks is "the most valuable and characteristic part of Austin's work." It is, however, but a small part of the whole. If the most characteristic, it does not appear to me the most intelligible, or the most instructive. There are many other less controversial subjects in which Austin may be read today with great profit. Among them are, discussions of the Roman Law, and its divisions, the Sources of the Law, Judiciary Law, Equity, its history and meaning, and Codification. There is little of Austin contained in his published works which does not appear to me worthy of study.

Professor Brown has done his work well, and produced a book which will greatly aid the student of his author. There is no doubt of the usefulness of the book, as an aid to exact thought. To understand and to keep in mind the distinctions made requires the closest attention. How far these distinctions are of practical value is more doubtful. The lectures given consist mainly in definitions and inferences therefrom. Where does Austin get his definitions? Certainly not from general usage or previous authors. He quotes the definitions of others mainly to show their defects. He nowhere tells us the source of his definitions. He defines as though he were an absolute law-giver, authorized to fix the meaning of words, without appeal. It is some excuse that most writers on these subjects appear to follow the same course. And the practice is not confined to writers on jurisprudence. It is found in every department of science. The facts of the universe are endless and in some fields they seem ever changing. In order to think about them clearly, we must divide them into classes. But it often happens that nature does not divide things into divisions with clear boundaries. Hence there comes an attempt to make artificial classes; and, when a class has been defined, there is a strong tendency to make everything in nature correspond to the division, and to deny the character, if not the existence, of anything which does not come within the definition. The attempt to systematize is necessary. The evil of untrue classification is great. Men come to think the

system and not nature the final authority. The history of Christian theology, probably of all theology, and of all philosophy, shows many illustrations.

The theories of science not based on experiments, which can be repeated, often illustrate the same fact. The usefulness of general definitions depends on the accuracy of their application to the facts which they attempt to cover. This accuracy is best shown by the adoption of the definitions by all who understand the subject. Austin's definitions do not well stand this test. Many of their limitations are pointed out by Professor Brown. Others suggest themselves. He says (p. 6): "Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified." It follows, that there is no duty where there is no command. All commands, according to Austin, are given either by God, or a state or some subordinate authority. If an atheist were thrown with companions on some island beyond the jurisdiction of any state, would he have no duty to his companions? Surely there is a sense of duty in many men which is not traceable to any command, divine or human. And the nobler the type of man, the more his acts proceed from love of the right because it is right.

Austin's test of the goodness of any law is its general utility, and he rejects any other test. He says: "To the adherent of the hypothesis of a moral sense, a human law is good if he likes it, he knows not why, and a human law is bad if he hates it, he knows not wherefore." (p. 37.)

Granting that usefulness is the best standard for judging a law, the question is, usefulness to whom? Is it usefulness to the people of a state irrespective of the interests of other nations? Is it usefulness to the present inhabitants of a country to the exclusion of all immigrants? Is it usefulness to some classes in a state, and not to others? It will probably be said, nowadays, that the usefulness meant is usefulness to all the classes in a state, but what if their interests conflict? In this country, probably in all countries, there is a constant struggle for political power between parties and men, each professing the general good, but rewarding chiefly those who give them power. The theory of general utility leads to little agreement in opinion, even among those best qualified to judge. Is free trade for the general good? Is universal suffrage best? Ought women to be allowed to vote? Is municipal ownership of public utilities for the public good? These and almost all the questions which occupy the public mind would be as unsettled as ever if Austin's test of the goodness of law was universally accepted. To suppose that most men, or even the ablest men, can generally agree in the application of this test is to know little of life.

Austin defines law generally as "a rule laid down for the guidance of an intelligent being by an intelligent being, having power over him;" and political or human law as a "law set by political superiors to political inferiors." (p. 1.)

This leads to an attempt to define sovereignty, to find the parties in a state in which political superiority is lodged, and the states, which are politically independent. He finds great difficulty in applying his distinctions to existing states, in showing when a state is to be deemed politically independent,

and in what organs of the state the supreme power is vested. Yet he holds that, in every independent state, unlimited power must exist somewhere; and this view is adopted by recent writers of eminence. (p. 142 et seq.) It is criticised by Professor Brown in his notes and in Excursus B. Professor Brown thinks Austin led into error by confusing political power with legal. I cannot see much in this distinction. The supreme power in the state is equally supreme whether it be called legal or political. Professor Brown comes to the conclusion that "the state itself is the true sovereign," and that the governing powers are the organs of the state. (p. 286.) This does not appear to throw light on the question in issue. Nobody doubts that the state is supreme; but the question is on what organs it has conferred its supremacy. A state can only act through its organs, and, if absolute power is not conferred on these collectively or on some of them, it exists nowhere.

There are states where the supreme power has been purposely so much divided that radical changes are very difficult. All states having written constitutions, limiting legislative power, and giving the judiciary power to enforce those limitations, find their supreme power partly in the organs in which the right of constitutional amendment exists. If all the organs in which power is vested agree, then any change can be effected; but if they do not, then it is easy to conceive that a particular change cannot be legally brought about. There is no supreme power in the state for the purpose. No constitution has given the theorists more trouble than that of the United States.

The chief difficulty comes from the very complicated provisions for its amendment, contained in Article V. Austin says on this point (p. 146): "I believe that the common government, or the government consisting of the Congress and the President of the United States, is merely a subject minister of the united states' governments. I believe that none of the latter is properly sovereign or supreme, even in the state or political society of which it is the immediate chief. And, lastly, I believe that the sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the states' governments *as forming one aggregrate body;* meaning by a state's government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature, and which, the union apart, is properly sovereign therein."

I do not see what the states can do under the present constitution save to amend it, that is, authorize the organs of government to do something more or less than they now do. It is not conceivable that the present constitution authorizes the conventions or legislatures of the states to so amend it, that they can exercise legislative power themselves. I cannot, therefore, see how absolute power can be held to be vested in the people of the various states. Absolute power appears to me to reside in all the various organs, through which the public will may be expressed, and not in any one. The chief purpose of our constitutions, state and national, is to divide the whole power into several parts. It was thought that liberty was best preserved in this way. If these parts agree, they can do everything. If they do not agree, the power of each is so limited by that of the others, that there is no absolute power.

Austin's remarks (p. 175) on liberty are interesting: "Political or civil liberty has been erected into an idol, and extolled with extravagant praises by doting and fanatical worshippers. But political or civil liberty is not more worthy of eulogy than political or legal restraint." Each is to be judged by its effect on the public good. Liberty is based on restraint. One cannot be free unless his liberty is protected by the restraint of others from interfering with it. All governments, without reference to their form are absolute, and may be despotic. Nor can it be said that a government is better than another because it gives the people greater liberty. The liberty given may be pernicious. Those who defend popular government must do it on the ground that the interests of the governing class more nearly coincide with those of the public than under monarchies or aristocracies, and hence that popular government is most useful.

Austin discusses the "Origin or Causes of Political Society" (p. 195 et seq.) He shows that the theory of an original compact as the basis of government has no foundation historically, and as a theory cannot support the conclusions based upon it. He does not much consider the historical way in which governments and societies have arisen and grown. The subject is full of interest. A probable theory appears to me to be derived from the condition of savage tribes, political history and the passions of men, as everywhere shown in the working of existing governments.

Man is a social animal. He loves to live with his fellows. Men associated have common objects of pursuit. They hunt together, fish together, defend themselves against their enemies, unite in schemes of conquest, etc. Joint objects require leaders. The more difficult the enterprise, the greater the need. War can be successfully waged only under good leadership. The love of superiority, the love of power, is universal. All seek it. Some win. As property develops and society is divided into classes, the need of government increases. The greater intelligence and wealth of some individuals give them control. Tribes cease their wanderings. With settlement in a fixed place and increase of wealth, greater stability in government is required. In war, power tends strongly to concentrate in one individual, since success depends on unity of action, and in many rulers there are different minds. An individual who has gained power in war seeks to keep it in peace. Where a country has been large and held by conquest, the concentration of power in one man has been almost inevitable. A monarch desires to perpetuate power in his children. The right to inherit a kingdom came from the fact that the heirs of the monarch were on hand to seize the throne on his death, and that, save for this rule of inheritance, civil war must follow on the death of a monarch. The inheritance of the kingdom was confined to one child to prevent war between the children. Devotion and loyalty attach more readily to one person than to many. Aristocracies and democracies have grown up where many struggling for power have been so nearly equal that no one could become supreme. Until modern times they have been confined to cities or small countries. If these by conquest have subdued other countries, the ruling power has continued in the victors.

Governments, whether one or many, have generally tried to strengthen

their power by the aid of religious institutions, and by appeals to the moral ideas which grow up around the accustomed.

The extension of political power in modern times by a suffrage, extending to almost all males, has come from the greater diffusion of intelligence and property and the device of representation. Men generally in European nations have grown stronger and have made successful claims to a participation in political power. The cry under which they have made their contest with the classes is their right to liberty; but the great motive for this contest is probably the desire for power. The love of superiority, the wish to rule, which appears to exist among all animals, is today, as it has always been, the strongest motive in political contests.

Knowledge of the past in government is to be gained by a study of the forces now acting in politics, and by assuming the existence of such forces in the remotest past.

The compact theory of the origin of government was never based on history, but was an attempt to assume an origin which justified the existence of government today. The attempt was as foolish as baseless. Government is justified by its necessity. Moral rules must conform to this necessity.

In Excursus C., Professor Brown criticises sharply an address of the late James C. Carter before the American Bar Association. He quotes from Carter's address a passage in which he shows the course of judges where they find no statute and no precedent to determine a case. Mr. Carter says, in substance, that a rule is found in the analogies of previous cases, or in established principles and customs. Professor Brown says (p. 289): "To discuss all of the fallacies in which this statement abounds, would be superfluous." Again, (on p. 290): "Mr. Carter implies that the rules of law are of infinite range. If the judge does not make the law, but only declares it, it must have existed before. The practical result follows that the law of our time, though in great part unrevealed, provides for every case that can possibly arise."

This criticism appears to me unwise. Mr. Carter undertakes to state a fact: how judges in want of a statute or previous case, as a rule of decision, undertake to *find* one. The statement appears to me to be accurate. How else can a judge get a proper rule? Out of his notions of wisdom? These notions are based on the rules in which he has been educated. So far as they are peculiar to himself, they are likely to appear unwise to other men. But Mr. Carter does not say that the rule, when found, does not modify the law, does not make a new rule of law.

In an age which prides itself in believing that all the innumerable forms of animal and vegetable life have been developed out of one germ, which must have potentially contained all that has developed out of it, it cannot be extravagant to say that all the law of the future may be contained in existing law, and that all present law has been developed out of past law. It is impossible that it should be otherwise. No man is wise enough to originate a system of law radically new. And if such a thing were possible, it were most unjust. There is no element of justice so vital as that cases should be

determined by the law, under which litigants have properly acted, or, if there is no such law, then by rules as near the old as possible.

I have touched but a small portion of the thoughts suggested by the book under consideration. It is full of interest to those who like the study of the fundamental divisions of all law and their proper limits.

It is of little value to one who regards the law chiefly as a means of winning or deciding cases. C. A. KENT.

THE PRINCIPLES OF GERMAN CIVIL LAW. By Ernest J. Schuster, LL.D. (Munich), of Lincoln's Inn, Barrister-at-Law, Oxford: The Clarendon Press; London and New York: Henry Frowde, 1907, pp. xlvi, 684.

The author in his preface tells us "this book is intended (1) to assist the study of English law from a comparative point of view; (2) to give an insight into the latest and most perfect attempt to systematize the whole of the private law of a country; (3) to give some practical help to the increasing number of practitioners who in the course of their daily work have to deal with questions of foreign and private international law."

The work follows in general the arrangement of the German Civil Code, even in what Holland calls the "inconvenient inversion of the order of treatment" of that code (JURISPRUDENCE, 10th Ed., p. 162, Note 1). Full references are given to the authorities used by the editor, including: a "Table of German Codes and Statutes," "The Civil Code," "The Commercial Code," etc., and tables of "English Statutes" and "English Decisions." Dr. Schuster does not, however, attempt to give us an exegesis of the entire Buergerliches-gesetzbuch and Handelsgesetzbuch but rather a systematic exposition of the basic principles of law as illustrated in the German system, with full reference to English statutes and cases bearing upon the same points. The Introduction gives an historical sketch of German law, an account of the component parts of German private imperial law, of the relation of imperial law to state law, and of codes and statutes to customary law, of the sources of German private law, of the arrangement and characteristics of the new codes, and of methods of interpretation.

The attitude of the British lawyer and of his American legal cousin toward comparative law is so aptly expressed in the statement, attributed to a "learned jurist," that the "comparative jurist is one who knows a little about every system of law but his own," that it seems no one can write on the subject without at least referring to this sarcastic definition. The author of the present book quotes this mouth filling if not soul satisfying description of scholars of his own class, but turns the definition on the definers by asserting that some of the most honored men in the history of English jurisprudence, including not only writers on English law but also most successful practical lawyers, are known to have a deep and comprehensive knowledge of Roman law or of modern continental law or of both. It seems to the reviewer after a careful perusal of Dr. Schuster's work that the book itself is the author's best defense on this point, for he has succeeded in producing an

exceedingly valuable handbook on comparative law, useful to the German or the English student alike, who may desire accurate and usable knowledge of the system other than his own.

The author constantly contrasts the two systems in particular points and occasionally makes extended comparisons of legal institutions in English and German law. We find, for example, such treatment of the themes of domicil, circumstances affecting liability, special liabilities of particular employments, impossibility of performance, custody of movable things, possession, the effect of impediments to marriage, the position of the wife in the modern law, inheritance, etc., etc.

The work will be as valuable for the practical English lawyer, who needs some point of departure in his excursions into the field of foreign law, as it is interesting to the student of comparative law, for the reference to continental codes and to English legal sources will put the practitioner on the right track in his pursuit of information. It seems, however, rather a matter of regret that the author has refrained from giving us more bibliographical material, though his reason for this omission—urged in the preface—that such material may be found in the fuller German text books, is possibly sufficient excuse for not unduly increasing the size of his book.

The author's device of inclosing in parentheses the equivalent in the original of English paraphrases of the technical German terms avoids possibly ambiguities that might arise from this source. The mechanical execution of the book shows the customary high standard of excellence of the press from which it comes, though the form "rocovered," § 345, line 2, has escaped the proofreader.

Dr. Schuster is to be congratulated on having done well a much needed piece of work. For the use of college and law school classes in modern Roman law, the book will serve as an excellent supplement to the equally well done Institutes of Classical Roman Law issued from the same press some years ago: J. H. D.