

THE
PROVINCE OF JURISPRUDENCE
DETERMINED.

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BEING
THE FIRST PART OF A SERIES OF LECTURES
ON
JURISPRUDENCE,
OR, THE PHILOSOPHY OF POSITIVE LAW.

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for if the parliament for the time being be sovereign in the united kingdom, it is the author, directly or circuitously, of all our positive law, and exclusively sets us the measure of legal justice and injustice.*

The meaning of Hobbes's proposition, that "no law can be unjust."

* It is affirmed by Hobbes, in his masterly treatises on government, that "no law can be unjust:" which proposition has been deemed by many, an immoral or pernicious paradox. If we look at the scope of the treatises in which it occurs, or even at the passages by which it is immediately followed, we

shall find that the proposition is neither pernicious nor paradoxical, but is merely a truism put in unguarded terms. His meaning is obviously this: that "no *positive* law is *legally* unjust." And the decried proposition, as thus understood, is indisputably true. For positive law is the measure or test of legal justice and injustice: and, consequently, if positive law might be legally unjust, positive law might be unjust as measured or tried by itself. In the passages immediately following, he tells us that positive law may be generally pernicious: that is to say, may conflict with the Divine law which general utility indicates, and, as measured or tried by that law, may be unjust. He might have added, that it also may be unjust as measured by positive morality, although it must needs be just as measured by itself, and although it happen to be just as measured by the law of God.

Just or *unjust*, *justice* or *injustice*, is a term of relative and varying import.

For *just* or *unjust*, *justice* or *injustice*, is a term of relative and varying import. Whenever it is uttered with a determinate meaning, it is uttered with relation to a determinate law which the speaker assumes as a standard of comparison. This

is hinted by Locke at the end of the division of laws which I have inserted in my fifth lecture: and it is, indeed, so manifest, on a little sustained reflection, that it hardly needs the authority of that great and venerable name.

By the epithet *just*, we mean that a given object, to which we apply the epithet, accords with a given law to which we refer it as to a test. And as that which is *just* conforms to a determinate law, *justice* is the conformity of a given object to the same or a similar measure: for *justice* is the abstract term which corresponds to the epithet *just*. By the epithet *unjust*, we mean that the given object conforms not to the given law. And since the term *injustice* is merely the corresponding abstract, it signifies the non-conformity of the given and compared object to that determinate law which is assumed as the standard of comparison.—And since such is the relative nature of justice and injustice, one and the same act may be just and unjust as tried by different measures. Or (changing the expression) an act may be just as agreeing with a given law, although the act itself, and the law with which it agrees, are both of them unjust as compared with a different rule. For example: Where positive law conflicts with positive morality,

But when I affirm that the power of a sovereign is incapable of legal limitation, I always mean by "a sovereign," a monarch properly so called, or a sovereign number in its collegiate and sovereign

Considered severally, the members of a sovereign body are in a state of subjection to the

that which is just as tried by the former, is also unjust as tried by the latter : or where law or morality conflicts with the law of God, that which is just as tried by the human rule, is also unjust as tried by the Divine.

Though it signifies conformity or nonconformity to any determinate law, the term *justice* or *injustice* sometimes denotes emphatically, conformity or nonconformity to the ultimate measure or test : namely, the law of God. This is the meaning annexed to *justice*, when law and justice are opposed : when a positive human rule is styled unjust. And when it is used with this meaning, *justice* is nearly equivalent to *general utility*. The only difference between them consists in this : that, as agreeing immediately with the *law of God*, a given and compared action is *just* ; whilst, as agreeing immediately with the *principle* which is the index to the law of God, that given and compared action is *generally useful*. And hence it arises, that when we style an action just or unjust, we not uncommonly mean that it is generally useful or pernicious.

But though justice is nothing more than conformity to a given law, and though justice is therefore an emanation and not a fountain of law, a justice anterior to law, and of which law is the creature, has been imagined by writers on jurisprudence. For example : In the excerpt from Ulpian which is placed at the beginning of the Digests, *jus* or law is derived from justice, or is made the child of its own offspring. "Juri operam daturum" (says Ulpian) "prius nosse oportet, unde nomen juris descendat. Est autem a justitia appellatum : nam, ut eleganter Celsus definit, jus est ars boni et æqui."*

The probable meaning of this celebrated jargon it is not very easy to detect. But it is likely that Ulpian meant by *justice*, general utility : and that, in deriving law from justice, he meant that every law *is* or *ought* to be fashioned on that great principle of ethics. For (as I have already remarked) *justice* is often synonymous with *general utility*, although it properly signifies conformity to a given law : and (as I shall now demonstrate) "*is*," or "*is not*," and "*ought to be*," or "*ought not to be*," are frequently blended and confounded by writers upon law and morality.

The *existence* of a law is one thing : its *merits* or *demerits* are another thing. Whether a law *be*, is one inquiry : whether it *ought to be*, or whether it agree with a given or assumed test, is another and a distinct inquiry. Although it disagree with a given or assumed test, a law set by the state, or a law

Confusion of "*is*," or "*is not*," with "*ought to be*," or "*ought not to be*."

* It appears from a MS. note that the Author intended to treat "the abstract justice of the Roman lawyers" more at length.—S. A.

body, and
may therefore
be legally

capacity. Considered collectively, or considered in its corporate character, a sovereign number is

imposed by opinion, *is* a law which the state has set, or a law which opinion has imposed : just as a yard or bushel used in a town or province, but differing from the yard or bushel prescribed by the sovereign legislature, *is* a yard or bushel to the inhabitants of the town or province, although it is a false measure in relation to the legal standard.

When stated in general expressions, the difference between "*is*," or "*is not*," and "*ought to be*," or "*ought not to be*," is palpable. But though the difference is palpable, when stated in general expressions, an exposition of the particular cases wherein it has been forgotten, would occupy a bulky volume. Of the numerous particular cases wherein that palpable difference has been completely forgotten, the following may serve as samples.

1. Sir William Blackstone, in the second section of his Introduction, talks in the following manner. He tells us "that the laws of God (whether they are revealed, or are indicated by general utility) are superior in obligation to any other laws : that no human laws are of any validity, if contrary to them : that all human laws which are valid, derive all their force, and all their authority, mediately or immediately, from those divine originals."

The foregoing passage would seem to import, that no human law which conflicts with the law of God, is obligatory or binding : or (changing the expression) that no human law which conflicts with the law of God, is a law imperative and proper. For as every imperative law necessarily imposes a duty, a law imperative, but not binding, implies a contradiction in terms.

If he had said that a human law which conflicts with the law of God, *ought not to be imposed*, he would have said truly. For a human law which conflicts with that ultimate test, and a human law which *ought not to be imposed*, are one and the same object denoted by different phrases.

But to say that a human law which conflicts with the law of God, is therefore not *binding*, or not *valid*, is to talk stark nonsense.

Numberless human laws adverse to general utility, have been and are enforced in every age and nation : and yet such human laws conflict with the law of God as known through the very exponent adopted by Blackstone himself.

In case I commit an act which is innocuous or positively useful, but to which the sovereign legislature has annexed a capital punishment, the tribunal which tries me enforces the law, in spite of its mischievous tendency. If I object to the indictment, "that the law is adverse to utility ;" "that, by necessary consequence, it conflicts with the law of God ;" and "that, by equally necessary consequence, it is not *binding* or *valid* ;" the tribunal demonstrates the unsoundness of my objection, by hanging me up in pursuance of the law which I impugn.