

Do we need a legal philosophy? If so, what should it be?

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What should the law be about? Even lawyers seldom ask this question, and it ought to be asked from time to time. So I was glad to attend the inaugural lecture last week, at University College, of London's new Professor of Legal Philosophy, Stephen Guest. In his discourse, 'Why the Law is Just', this young but formidably accomplished New Zealander not only asked the question but gave an emphatic answer. The law, he said, must promote justice, and the most decisive way it can do this is by favouring equality. By equality he meant not just equality before the law (that was taken for granted) but equality in a more general sense. Moreover, he drew attention to John Stuart Mill's argument that one of the worst of tyrannies is the tyranny of the majority, which was legitimised by democracy and often expressed itself in legislation by elected tyrants. Hence the law, that is to say the judges, who have the advantage in this context that they are *not* elected, have a professional moral duty on occasion to correct the majoritarian bias by upholding the principle of equality. I hope my brief summary does not do injustice to a subtle and beautifully crafted argument which left me at the end saying to myself, 'Well said, and quite wrong.'

Lawyers are often condemned, especially by intellectuals, for being too narrow-minded. I am more worried when lawyers become broad-minded and start to set themselves up as legal philosophers, rather than sticking to the law as it stands. I am not happy when lawyers play a determining role in imposing a framework of government. They were prominent, for instance, in shaping Mussolini's Italy in accordance with his formula, 'Everything within the state, nothing outside the state, nothing against the state'. They were invaluable to Hitler in giving legal substance to his race philosophy: the Nuremberg Laws were a classic example of a legal system designed to attain political ends rather than impartial justice. Apartheid in South Africa was another instance of a system of justice being crafted to secure specific ends. It was a philosophical enterprise, being largely the creation of the ideologist H.F. Verwoerd, formerly professor of social psychology at Stellenbosch University. When he became premier in 1958 he made use of his academic colleagues, notably the lawyers, to

unify haphazard forms of legal discrimination into a complete system of law. It is no use replying that the objects of these systems were themselves evil. After all, the Soviet system of law was, and the current Chinese legal code is, deliberately designed to promote equality. Yet Soviet law produced perhaps even greater injustice than the Nazi system, and under the Chinese code more than 60 million individuals have been killed and about 20 million are currently in labour camps. When law strays from jurisprudence into politics, there is always trouble, often of the kind produced by Karl Popper's 'Law of Unintended Effect'.

Nor am I happy with the idea of judges stepping in to make good the failures of the politicians in the pursuit of philosophical or political ends. There is a case of it in Israel at the moment, where the Chief Justice, a judicial triumphalist, is determined to curb the political power of the religious parties. I predict it will end in disaster, of precisely the kind Israeli society can least afford. One of the more disturbing aspects of American life in the last half-century has been the Supreme Court's adventurism in rewriting, as opposed to interpreting, the Constitution. No doubt the more aggressive justices would say equality is their object. That does not justify their usurpation of the legislative power, even if we concede (which I emphatically do not) that equality can be legislated into existence. Supreme Court judges may not be a direct product of the political process, and the best of them have achieved an almost godlike impartiality, but many more have been appointed by highly political presidents for party purposes. Equally, outstanding candidates have been vetoed for the same reason: one thinks of the martyrdom of Judge Bork or the unsuccessful attempt to deny Clarence Thomas his seat on the court, of which he has since proved an exemplary member. Judges are not always objective or disinterested or wise or even sensible, and their wits are more likely to desert them the closer they get to politics. In handling the Pinochet affair, for instance, our law lords covered themselves in ridicule, despite having two shots at a verdict, and in the end had to be rescued by the doctors. It would have been far better for the politicians to have handled it from the start, as they certainly would have done under Margaret Thatcher.

I dwell on Stephen Guest's inaugural lecture not merely because it is important in itself and because he has taken up a highly influential post, but because he represents a powerful new trend in legal thinking, especially in the English-speaking world. I oppose it not only for the reasons I have given but because I fear it will simply lead to more law, and we have too much already. I take my stand on Thomas Hobbes's maxim: 'The freedom of the subject is the silence of the laws.' Law is not about equality. I am not sure it is 'about' anything. But if it is, it is about freedom. History has shown, time and again, that the protection of freedom is incompatible with the pursuit of equality which, if relentless enough, ends by destroying the freedom of the individual and enhancing the power of the state, while leaving everyone as unequal as before, if not more so.

The alternative philosophy of law, which I support, sees it not as a reforming, improving or progressive instrument but as a clumsy though necessary corrective to brutal instincts. Human beings come into collision with each other all the time, and the wrongs thus inflicted inspire horrible passions of hatred and revenge which, if vented, would destroy society and its freedoms. So the law becomes the avenger and arbiter. James Fitzjames Stephen, in his *History of the Criminal Law of England*, argues that the object of the criminal law is to give 'distinctive shape to the feelings of anger' which wrong-doing provokes. 'The sentence of the law is to the moral sentiments of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment . . . Infliction of punishment by law gives definite expression and solemn ratification and justification to the hatred which is excited by the commission of the offence . . . The forms in which deliberate anger and righteous disapprobation are expressed in the execution of criminal justice stand to the one set of passions in the same relation in which marriage stands to the sexual passions.' That is an unusual argument today but it carries more force the more you ponder on it. The object of the law is to civilise our passion for justice and so make it effective. Legal philosophers and reformers ought to concentrate on making this civilising process work better. All the rest is propaganda.