The Nature of Law and the Human Condition

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Fernanda Pirie, *Law Before Government: Ideology and Aspiration*, 30 **Oxford Journal of Legal Studies** 207 (2010).

The question of the nature of law lies at the heart of jurisprudence. At the present day, the major sources of debate on the question revolve around acceptance or otherwise of 'legal positivism' and associated doctrines of analytical jurisprudence. Do we reveal the nature of law when we clarify the conceptual presuppositions of certain social practices? Must theories of the nature of law be 'neutral', 'descriptive' or 'detached'? Or are social practices essentially 'interpretive', so that the nature of law is only revealed when it is expounded as the expression of a moral or political idea? How, indeed, are we to tell whether analytically pleasing distinctions (such as that between law and morality) genuinely *clarify* the nature of the object under investigation (law), rather than obscuring it? These debates are clearly capable of exerting their own fascination; but one might suspect them of diverting attention from the traditional concern of jurisprudence, which is to elucidate the nature of law as a social institution, and to throw light upon its place within the human condition. Such inquiries stimulate a specific interest in the significance of law as a distinctive type of social ordering. This is a dimension of understanding that is as lost upon modern critics of positivism as it is upon positivists themselves: for example, in his recent book *Justice in Robes*, Dworkin argues that philosophical significance attaches only to the substance of legal doctrine, there being no philosophically interesting issues relating to law as a social institution (*Justice in Robes*, Harvard, 2006, 2-3).

Pirie's article is refreshing because it avoids the recent debates in favour of an investigation into the nature of law as a social and intellectual phenomenon. Law is not simply a set of practices or a body of norms, but an intellectual system (207). Her concern is to explore the idea of law in terms of its form. We might initially suppose that law can be defined in opposition to forms of negotiated order: a supposition that draws a close association between law and government. Is this anthropologically valid? According to Pirie, law is to be identified 'neither by reference to the negotiation of order, nor by reference to government. It is, rather … identified by its expressive and aspirational qualities and its ideological claims to promote order and justice.' (id.) The central question is then how law is different from other forms of ideological system (208).

The main body of the article is a criticism of narrower conceptions which associate law too closely with government and the maintenance of order. In addition to excluding much that belongs to Shari'a, Indian and Chinese systems of law, such approaches pay insufficient attention to the nature of law as an *intellectual* system (holding forth promises of justice) in addition to its functional and administrative aspects. It is the form in which these promises are held out that differentiates law from other codes of morality or ideology: for in law we tend to find an exact system of penalties attaching to the prohibited behaviour, which taken together embody 'explicit … propositions about how justice and order are to be achieved.' (220). The promissory nature of these propositions serves to differentiate law from forms of 'pure' custom, but equally does not depend directly upon the rise of organized governments.

Later sections of the article develop further the analysis of what specifically belongs to law as an intellectual system, and as a social phenomenon. Its analysis is suggestive rather than comprehensive. Its conclusions offer questions and warnings rather than answers. Law 'comprises phenomena which share a great many attributes—rules, norms, implementation by judges, formulation by government, enforcement mechanisms, links with social order and justice, a jurisprudence—none of which is instantiated in every example of law. We can think of law in terms of its functions, its instrumental aspects or its ideological and symbolic force. If we over-emphasize some of these attributes to the detriment of others, however, we fail to do justice to our own notion of law. We fail to appreciate its complexity and power.' (228)

Pirie's discussion should provide an opportunity for jurisprudential scholars to question some of their deepest assumptions (which is surely essential to the activity of philosophy), and perhaps to recover a sense of the deep and apparently hopeless perplexity that drives philosophical thought. Above all, it may help to refocus attention upon the traditional question of the nature of law, and to reveal rich vistas of inquiry that are untouched by the present jurisprudential debates.

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