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Il pluralismo giuridico: paradigmi ed esperienze

TOMO I

MARTIN LOUGHLIN

THE POLITICAL JURISPRUDENCE OF HAROLD J. LASKI

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1. *Introduction: The Strange Death of Liberal England.*

In 1935, George Dangerfield wrote a celebrated account of how the Liberal Government of 1906-14 destroyed itself in the course of dealing with the momentous issues of the times, notably reform of the House of Lords, women's suffrage, the Irish question and the growing militancy of the trade union movement ⁽¹⁾. His book became feted as one of the most influential political accounts of the twentieth century. This was not just because of its penetrating insights into the decline of the Liberal party. Analysing a series of violent responses to Victorian liberal order, the book also charts the closing of an era of liberalism in English political culture. The First World War was the watershed. After the War, the extension of the franchise and the rise of the Labour party signalled the beginning of a new age that promised radical reforms. No political thinker embodied these aspirations more than Harold J. Laski. Laski's political writing dominated the inter-war period to the extent that, following his untimely death in 1950, Max Beloff even suggested that historians would come to call the period between 1920 and 1950 « The Age of Laski » ⁽²⁾.

Possessing extraordinary intellectual gifts, an astonishing

⁽¹⁾ G. DANGERFIELD, *The Strange Death of Liberal England: 1910-1914*, New York, Routledge, 1935.

⁽²⁾ M. BELOFF, *The Age of Laski*, in « Fortnightly », 167 (1950), pp. 378-384.

breadth of academic interests and remarkable intellectual energy, Laski's scholarly output over this period was prodigious⁽³⁾. Of particular interest to jurists is his early writing. In 1919, while still in his mid-twenties, he had already published an account of the Liberal era that pre-figured most of what Dangerfield was later to relate. The 1906-14 Liberal Government, Laski wrote, began with immense promise but ended in something « little short of disaster » and « a drift towards bureaucratic control ». Notwithstanding some real progress, its political achievements indicated « a bankruptcy in liberal ideas ». Parliamentary democracy had « broken down », the growth of bureaucracy « gave rise to a doubt whether the regime it involved was compatible with individual freedom », and the new political movements driving women's suffrage and trade unionism had exposed basic fissures in the foundations of the state. From the ashes, he argued, a new type of state was emerging which, being one based on « an unqualified acceptance of political democracy », will be « fundamentally different from anything that Europe has thus far known »⁽⁴⁾.

Laski's ambition was to offer an account of intellectual and institutional foundations of the emerging positive state. This is the focus of my inquiry. Laski pursued his project systematically during the period between 1915 and 1930, laying the groundwork of a system of public law for the positive state. Although Laski was not a lawyer — for most of his academic life he held a chair of political science — he had an acute legal cast of mind and maintained an intense interest in law, legal institutions, and constitutional arrangements. Laski is the founding scholar of modern public law in Britain, I suggest, because he did more than any other jurist to establish the intellectual framework through which public lawyers could develop a distinctive approach to their subject. This, then, is a study of Laski's political jurisprudence.

Throughout his life Laski was a controversial figure. Many claimed that, despite his breadth of learning and keen political

⁽³⁾ For a select bibliography see M. NEWMAN, *Harold Laski: A Political Biography* London, Macmillan, 1993, pp. 415-427.

⁽⁴⁾ H.J. LASKI, *Authority in the Modern State* (hereafter *Authority*), New Haven, Yale University Press, 1919, pp. 111, 110, 116.

insight, he was neither an original thinker nor a clear writer. Some saw him mainly as a polemical writer. Living through an interwar period of considerable social upheaval and political change, he came to national prominence not just as a scholar but also as a political activist, roles that are not easily reconciled. This is undoubtedly one reason why since his death Laski's academic standing has suffered. Yet he always felt that it was wrong to think that a political philosopher could remain aloof from the pressing issues of the day. Accepting that the task was not simply to interpret the world but also to change it, he explained that he had learned more about the challenges of local government as an alderman than from reading countless textbooks and more about political parties by being a member of the National Executive Committee of the Labour Party than from any academic study of the subjects ⁽⁵⁾. In Laski's view, the refusal of the intellectual to play a part « in the social struggle by interpreting it to [...] contemporaries was [...] the real *trahison des clercs* » ⁽⁶⁾.

Scholarly criticisms that he wrote too quickly and not always clearly are of lesser significance for our purposes. Such complaints mainly concern his later work when he became more pessimistic about the possibilities of bringing about radical reform through British parliamentary arrangements. And it is in this earlier phase that we see Laski's scholarly endeavour to link theory with practice, concepts with the institutional arrangements through which they were to work, which reveal the power of his political jurisprudence.

2. *Laski's Intellectual Formation.*

Laski graduated from New College Oxford in 1914 with a first class degree in History and, having been rejected for military service, obtained a teaching post at McGill University in Montreal. Tutored by Ernest Barker and H.A.L. Fisher, it is perhaps not surprising that

⁽⁵⁾ H.J. LASKI, *I Believe*, in W.H. Auden et al., *I Believe: The Personal Philosophies of Twenty Three Eminent Men and Women of Our Time*, London, Allen & Unwin, 1940, p. 168.

⁽⁶⁾ K. MARTIN, *Harold Laski, 1893-1950: A Biographical Memoir*, London, Jonathan Cape, 1969, p. 247.

he was from his earliest years a disciple of Gierke, Maitland, and Figgis (7). But it was an opportune meeting with Felix Frankfurter, then a young administrative law professor at Harvard Law School, that led to Laski's systematic engagement in legal scholarship. Through Frankfurter's influence, Laski was appointed to Harvard as an instructor in history and politics. His teaching duties were in the College, but it was in the law school that he made his closest connections.

When he arrived at Harvard in 1916, the law school was just beginning to break with the legal formalism of Dean Langdell. Signalled by the appointment that same year of Roscoe Pound as Dean, the law school was opening itself to the challenge of examining law as an integral part of the social sciences. In this outward-looking environment Laski flourished. As he wrote in the *Harvard Law Review*, the Law School's « theory of teaching, its method of organization, its conception of the place of the law in university studies, are all of them genuinely novel ». What made them so was that law is studied « as dialectic instead of dogma », such that the objective was not so much to learn a set of rules as to acquire an education in a branch of social life. The coming of the collectivist age, he elaborated, meant that law should no longer be studied in isolation but investigated « in relation to those collateral sciences which throw light upon its meaning » (8).

At Harvard Laski immersed himself in the political and legal milieu of progressive American thought. Rubbing shoulders with such eminent social philosophers as Morris R. Cohen and John Dewey, he wrote regularly for the *New Republic*, then a recently

(7) NEWMAN, *Harold Laski*, cit., p. 39: « Influenced by the work of the German jurist Otto von Gierke (which he translated), Maitland argued that in all societies certain enduring groups or associations arise. Such associations had a collective consciousness and will, over and above that of its individual members, and possessed a real personality. [...] H.A.L. Fisher, who was one of Laski's tutors at New College (and also Maitland's brother-in-law) published Maitland's collected papers just before Laski started history. He was therefore fully exposed to Maitland's work ». I. KRAMNICK, B. SHEERMAN, *Harold Laski: A Life on the Left*, London, Hamish Hamilton, 1993, p. 59: « At New College Barker [...] set him to read the works of the great triumvirate of medieval historians, the German Gierke and the Englishmen Maitland and Figgis ».

(8) HJL, *Review*, in « Harv. Law Rev. », 32 (1919), pp. 976-8, p. 977.

established magazine of the progressive left. Within a year of his arrival, he had also published two articles in the *Harvard Law Review*, and followed those up by a third in 1919 ⁽⁹⁾. These studies, on such aspects of English legal history as the personality of associations, the history of the corporation, and the responsibility of the state, reveal his profound debt to Gierke and Maitland. Having now situated himself at the centre of an intellectual movement driven by pragmatism in philosophy and a democratic politics of political and economic reform, his overarching ambition was to apply that method and that orientation to the central politico-legal issues of the day. For Laski, these issues were those of state, sovereignty, and authority.

Thus began Laski's deep immersion in the character of political jurisprudence. Given how foreign this would appear to an English jurisprudence dominated by legal positivism, his project in carrying forward « the revolt against formalism » ⁽¹⁰⁾ began with an extended analysis of public law in European, and especially French, thought. Early fruits of this project can be seen in his reviews in *Harvard Law Review* of such texts as Levy-Ullman's *La Définition du Droit* and Duguit's *Manuel de Droit Constitutionnel*, which extolled the value of a sociological approach to law and emphasized that « any adequate theory of constitutional law involves also a theory of

⁽⁹⁾ H.J. LASKI, *The Personality of Associations*, in « Harv. Law Rev. », 29 (1916), pp. 404-426; ID., *The Early History of the Corporation in England*, in « Harv. Law Rev. », 30 (1917), pp. 561-588; ID., *The Responsibility of the State in England*, in « Harv. Law Rev. », 32 (1919), pp. 447-472. Laski also became Book Review Editor for volumes 31 and 32, apparently the only ever member of the Review who was not registered in the Law School: See Z. C., Jr. [Zachariah Chaffee], *Harold Laski and the Harvard Law Review*, in « Harv. Law Rev. », 63 (1950), pp. 1398-1400. It might also be noted that on arrival at Harvard Laski initially enrolled in courses at the law school but gave up after a term because: « The Law School was giving me a great course in business jurisprudence where I wanted a course in politico-legal theory »: O.W. HOLMES, H.J. LASKI, *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J. Laski, 1916-1935*, Mark De Wolfe Howe, ed., Cambridge, MA, Harvard University Press, 1953, 21 Jan 1917, p. 57.

⁽¹⁰⁾ M. WHITE, *Social Thought in America: The Revolt Against Formalism*, London, Oxford University Press, 1947.

the state » ⁽¹¹⁾. This message was also advanced through his solicitation for the *Review*, as a member of its board of editors, of papers by Maurice Hauriou and Léon Duguit, the leading French public lawyers of the period ⁽¹²⁾. It was this inquiry into the character of modern public law that culminated in his translation of Duguit's 1913 work, *Les Transformations du Droit Public*, though given the controversy over the concept of public law, he evidently felt it politic to present it to an English readership under the title of *Law in the Modern State* ⁽¹³⁾.

Laski's ambitious project was well underway by the time he accepted an appointment in political science at the London School of Economics and Political Science in 1920. His books on *Studies in the Problem of Sovereignty* (1917) and *Authority in the Modern State* (1919) had already appeared by the time he arrived and a third volume, *The Foundations of Sovereignty*, would be published in the following year. Now at the height of his powers, in 1925 he published his major work, *A Grammar of Politics*. As he noted, the book « completes an effort, begun in 1915, to construct a theory of the place of the State in the great society » ⁽¹⁴⁾. In 1926, and at the unusually young age of thirty-three, Laski was appointed to the chair in political science vacated by Graham Wallas and would remain at LSE for the rest of his life.

3. *State, Sovereignty, Authority.*

For Laski, the concepts of state, sovereignty and authority are the fundamental elements of the modern framework of public law.

⁽¹¹⁾ HJL, « Harv. Law Rev. », 31 (1917), pp. 316-317; HJL, « Harv. Law Rev. », 31 (1918), pp. 498-499 (quotations at « Harv. Law Rev. », 31, p. 499).

⁽¹²⁾ L. DUGUIT, *The Law and the State*, in « Harv. Law Rev. », 31 (1917), pp. 1-185, and H.J. LASKI, *A Note on M. Duguit*, in « Harv. Law Rev. », 31 (1917), pp. 186-192; M. HAURIU, *An Interpretation of the Principles of Public Law*, in « Harv. Law Rev. », 31 (1918), pp. 813-821, and H.J. LASKI, *A Note on M. Hauriou*, in « Harv. Law Rev. », 31 (1918), pp. 875-876.

⁽¹³⁾ L. DUGUIT, *Law in the Modern State*, F. & H. Laski trans., New York, Huebsch, 1919.

⁽¹⁴⁾ H.J. LASKI, *A Grammar of Politics* (hereafter *Grammar*), London, Allen & Unwin, 1925, Preface.

They provided « the scaffolding » from which « a general reconstruction of the state » could be built ⁽¹⁵⁾, and these were the key concepts studied in his first three books. Each book follows a common style of presentation: after the essentials of Laski's general argument are presented in its first chapter (respectively « the sovereignty of the state », « the authority of the state » and « the foundations of sovereignty »), the essays that follow illustrate aspects of the general thesis.

Laski's first book, *Studies in the Problem of Sovereignty*, is a series of historical inquiries into the orthodox positivist theory of the state. That orthodoxy rests on the claim that, as William Blackstone put it, within the state there must exist some « supreme, irresistible, uncontrollable authority, in which the *jura summa imperii* or rights of sovereignty reside » ⁽¹⁶⁾. This claim was subsequently taken over by John Austin who added analytical rigour by defining law as the command of the sovereign, conceiving sovereign authority as undivided, absolute and unlimited. The merit of this theory is that it clarifies the definition of law and, in refusing to concede that the right of the state is ever limited by competing rights, it upholds as the key value the need to maintain order. Laski's basic aim was to show that the formal account of the state offered by analytical jurisprudence bears no relation to how political authority is actually established. Absorbing the insights of the path-breaking works of Gierke, Maitland and Figgis, Laski shows how the implied claim of state supremacy cannot be justified by the history of the institutional development of government.

The absolute concept of sovereignty adopted in positivist legal theory, Laski argues, is far too simple. The sovereign is simply « the person in the State who can get his will accepted » and « there is nothing absolute and unqualified about it ». It is merely « a matter of degree and not of kind that the State should find for its decrees

⁽¹⁵⁾ H.J. LASKI, *The Foundations of Sovereignty and Other Essays* (hereafter *Foundations*), New York, Harcourt, Brace & Co., 1921, p. ix.

⁽¹⁶⁾ W. BLACKSTONE, *Commentaries on the Laws of England*, Oxford, Clarendon Press, 1765, vol. I, p. 48.

more usual acceptance than those of any other association »⁽¹⁷⁾. Laski here questions the accounts of state and sovereignty offered by analytical jurisprudence with evidence from historical sociology and insights from the philosophy of pragmatism and the critical techniques of realism.

His various studies in the problem of sovereignty are all taken from struggles over allegiance between church and state in the nineteenth century: the disruption of the established Church of Scotland in 1843, the impact of the Oxford Movement between 1833-1845, and Roman Catholic Revival in England in the latter half of the century. His general contention is that the Austinian theory of sovereignty could not prevail against claims of conscience. His last study extends the argument to continental Europe, showing how the stance taken by Bismarck to subordinate the church to the state in the *Kulturkampf*, was simply the mirror image of Joseph de Maistre's ultramontane claim for papal authority⁽¹⁸⁾. Each sought to suppress, each advocated « the ideal of unity » as « the surest guarantee of survival », each conceived truth as singular and doubted fallibility or indivisibility, and « each in the end came to the realization that his theories were inconsistent with the facts of life »⁽¹⁹⁾.

Laski's studies pressed home his argument that the state asserts a formal claim to supremacy which it cannot in reality maintain. This discrepancy between theory and fact provides the platform for his own pluralist, realist, and pragmatic account of sovereignty: sovereign authority, he argues, extends only so far as its commands secure consent. Sovereignty rests upon the consent of the governed, a consent that is conditional. We thus find the true meaning of sovereignty « not in the coercive power possessed by its instrument, but in the fused good-will for which it stands ». Con-

⁽¹⁷⁾ H.J. LASKI, *Studies in the Problem of Sovereignty* (hereafter *SPS*), New Haven, Yale University Press, 1917, p. 17.

⁽¹⁸⁾ *Ibid.*, p. 263: « Where De Maistre speaks of the Church, Bismarck speaks of the State: where De Maistre discusses the Papacy, Bismarck is discussing the German Empire. Otherwise, at bottom, the thought is essentially the same ». See J. DE MAISTRE, *Study on Sovereignty*, in *Id.*, *The Works of Joseph de Maistre*, J. Lively ed., London, Allen & Unwin, 1965, pp. 93-129.

⁽¹⁹⁾ LASKI, *SPS*, p. 264.

sequently, law cannot be defined as command; it is simply a rule whose « goodness consists in its consequences » ⁽²⁰⁾.

In these *Studies*, Laski shows his credentials as a realist whose aim is to subvert the state's claim to authority founded on an abstract concept of sovereignty. He argues that since the state can only function through its system of government, the nature and authority of the state cannot be explained without looking at the way it carries out its essential functional tasks.

But questions remain. Does his argument not reduce the idea of state sovereignty to mere power, thereby collapsing *de jure* and *de facto*? Is his thesis that absolute sovereignty destroys liberty based on the confusion of state and government by assuming that absolute sovereignty is incompatible with limited government? And in building his argument from corporate fellowship theories in which the state is just one group-unit among many, does he not underestimate the significance of the state's singular function in reconciling conflict? These are challenges to his theory of the state which are taken up in his subsequent studies on sovereignty and authority.

The next volume to be published was a study of authority, which he called « some sort of sequel » to the 1917 book ⁽²¹⁾. However, it is more in keeping with the logical development of his project for me first to explain his 1921 book on *The Foundations of Sovereignty*. In this book, Laski suggests that we need to clarify basic concepts like sovereignty, liberty, authority and personality: « we want alike the history and the definition; or rather, we want the history because its substance is in fact the definition » ⁽²²⁾. It is the history of sovereignty that he addresses in this study.

Laski explains that in the middle ages any sense of absolute power was qualified both by « attention to the principles of abstract right » and the belief in a contractual relationship by which the prince had rights but also duties. But in the modern world « we have moved from the medieval ground of universal ethical right to which the state itself must bow, to a right of law which the state, through

⁽²⁰⁾ *Ibid.*, pp. 12, 13.

⁽²¹⁾ LASKI, *Authority*, p. ix.

⁽²²⁾ LASKI, *Foundations*, p. 314.

its sovereign organ, is alike privileged to make and interpret » (23). This move, he maintains, leads to two difficulties.

The first is that the claim is formal; the modern state might formally be recognized as having unlimited power, but the governing relationship is still reciprocal and « in actual fact there will always be a system of conditions it dare not attempt to transgress ». When they do, as James II discovered, it leads to revolutionary overthrow or, as George III and the British Parliament discovered a century later, it leads to the American Revolution. His second point is that initially the European nation-state's claim of sovereignty was a weapon against the external aggression of Rome and particular difficulties arose when it was extended to internal arrangements. This was because « the true heart of a state is its government » and the unity that government represents « is not so much the interest of its subjects as a whole as of that part which dominates the economic life of its members ». The orthodox theory of sovereignty forces these different interests within society into a unity and places itself « at the disposal of the social group which, at any given historical moment, happens to dominate the life of the state » (24).

The formal legal account of sovereignty thus « takes its stand upon the beatification of order » and does not inquire into « the purposes for which order is maintained ». It is for this reason that this formal account can never provide the basis of a working philosophy of the state. The foundations of sovereignty, he concludes, « must strike deeper roots if they are to give us a true philosophy » (25).

Laski recognized that the modern foundations of sovereignty are commonly conceived in terms of the Rousseau's synthesis: sovereignty is associated with the people as a whole and their will — the general will — is supreme. But these claims must be critically examined. Rousseau had emphasized the distinction between state and government, and vested sovereignty in the former alone. Yet the business of the modern state is much too complex to be conducted by the people directly. And since the scale of modern social life

(23) *Ibid.*, pp. 9, 16-17.

(24) *Ibid.*, pp. 22, 27, 28-9.

(25) *Ibid.*, p. 29.

involves specialization of function, the device of representation cannot be avoided. If popular sovereignty « means that the whole people is, in all but executive detail, to govern itself » it is « an impossible fiction ». In reality, we adopt Rousseau's distinction between state and government, but vest ultimate power « in the hands of that minority which is able most effectively to manipulate the inert mass of the population » ⁽²⁶⁾.

Laski accepts that popular sovereignty, the idea that the interest of the mass must prevail over the interest of any particular group, provides the criterion of public good. But he emphasises that « the real problem lies not so much in the announcement that the interest of the people as a whole must be the ultimate governing factor, as in the means taken to secure the supremacy of that interest ». And on this matter, the practice « limps painfully behind the theory it is to sustain ». His point is that the British state has been democratized, becoming a positive state in which « for the realization of good, it has embarked upon an effort [...] to control the national life by governmental regulation ». But it has done so without our political institutions keeping pace with the changes in social and economic structure. The liberty and equality promoted by Rousseau and implied in the modern state are purely formal: « The industrial worker has the suffrage; but he is caught in a system which deprives it of any fundamental meaning » ⁽²⁷⁾.

This brings us to his work on authority. *Authority in the Modern State* was designed as a sequel to his first book. « When I have finished similar studies in the political theory of the Catholic Reaction in France during the nineteenth century », he says in the preface to *Studies*, « it may be that I shall be able to attempt a more comprehensive theory » ⁽²⁸⁾. This more comprehensive theory is advanced in the *Authority* book. Its thesis is that the problem of sovereignty is one merely aspect of a more general problem of authority. While his studies on the state and sovereignty have been

⁽²⁶⁾ *Ibid.*, p. 214.

⁽²⁷⁾ *Ibid.*, pp. 227-28, 30, 34, 76.

⁽²⁸⁾ LASKI, *SPS*, p. iv.

mainly « negative and critical » the ambition of this book is « positive and constructive » ⁽²⁹⁾.

After addressing the authority of the state as a general phenomenon in the first chapter come the promised detailed studies of the history of nineteenth century French thought. Laski justifies this because « it is in France, above all, that the ideals I have tried to depict are set out in the clearest and most suggestive light » ⁽³⁰⁾. The argument presented in his essay on De Maistre in the *Studies* book is now extended through analysis of Bonald's worship of absolute sovereign power, of Lamennais's struggle between order and liberty, of Royer-Collard's liberal denial of sovereignty, and finally through the transition from statism to governmentalism in the syndicalist claim that property must be replaced by social function as the key principle of political life. But it is the one hundred page first chapter that is of most relevance to our inquiry.

It begins by distinguishing between state and government which, as we have seen, was emphasized in Rousseau's work. For Laski the state cannot be equated with society because the state is « concerned only with those social relations that express themselves by means of government ». However wide those relations are, there will always be associations, such as churches, trades unions, and other voluntary societies, that exist independently of the state and resist absorption into it. But he recognises that because the state exists to promote the good life, we vest government with the authority on the assumption that it fulfils the purpose of the state. Government therefore « wins our loyalty by the contribution it can make to the achievement of the state-purpose » ⁽³¹⁾.

Laski then argues that Rousseau goes wrong by equating the state with society, an error compounded when the state's authority is assumed by its executive organ, the government. To say that the state is the supreme embodiment of power is only to say that the state exists « as the most adequate means we have yet invented for the promotion of an end we deem good ». But if the state's sovereignty means that its will must be obeyed, then that rather depends:

⁽²⁹⁾ LASKI, *Authority*, p. ix.

⁽³⁰⁾ *Ibid.*

⁽³¹⁾ *Ibid.*, pp. 26-7, 28.

« the thesis is self-evident when it acts in accordance with that end; but no one, surely, would urge that the state must be obeyed if the methods it followed were those of Machiavelli's prince » ⁽³²⁾.

It follows, argues Laski, that the state's claim to sovereignty rests on two conditions: consent and rightness. According to what criteria can the state be said to have consented to some course of governmental action? Under what criteria can that course of action be deemed « right conduct »? Numerical majorities may justify political action, but they cannot provide a guarantee of rightness. Public opinion might be important, but this does not explain what is « public » and when it is « opinion ». A realistic analysis must accept that what is termed state action is in reality action by its government and governmental action becomes state action only if it gains acceptance. State action is therefore « simply an act of government which commands general acceptance » ⁽³³⁾.

This brings us to the basic question of authority. Why do people obey government? Why is there « a voluntary servitude of a large mass [...] to a small portion of their number »? ⁽³⁴⁾ These questions, argues Laski, have never been adequately answered by political philosophers: Hobbes founded obedience on fear and Rousseau tried to locate it in consent, but each built their explanations around the fiction of social contract. The inquiry can be advanced only by starting with existing realities and examining how subjection through fear is transformed into consent. From such a perspective, any formal legal theory of sovereignty is worthless: absolute in theory, in actuality the state's sovereignty is subject to limitations. Our attention must therefore focus on the conditions under which sovereign power is actually limited.

Laski's account runs as follows. People may obey but no one surrenders their entire being to the state. They have a sense of right and wrong and if governments act contrary to this sense, the people are « pricked into antagonism ». They also have expectations that the state will fulfil its purposes, and when « the realisation of these hopes is keenly enough felt to be essential to the realisation of the

⁽³²⁾ *Ibid.*, p. 29.

⁽³³⁾ *Ibid.*, p. 31.

⁽³⁴⁾ *Ibid.*, p. 32.

purpose of the state we have a political right ». This political right is « not justified on grounds of any abstract or absolute ethic ». It is a demand born of « the general experience of the state » and is recognised by society as « directly essential to the common good ». And if « power is so exerted as to refuse the recognition of that right, resistance is bound to be encountered » ⁽³⁵⁾.

Laski argued that the labour movement was now demanding that every member of the state must be able to secure those goods that are « the requisites of healthy life and worthy citizenship ». These demands impose conditions on authority, such that rights are now « written into the fabric of the state by the constitutional processes provided by law ». And whenever « a group of persons large enough to make its presence felt demands the recognition of certain claims, it will not recognise a law which attempts defiance of them; nor will it accept the authority by which that law is enforced ». Laski then offered two examples from contemporary politics: first, how Ulster Unionists before 1914 refused to accept the sovereignty of an Act of Parliament which granted self-government to Ireland and secondly how the suffragettes pursued their cause in defiance of the ordinary rules of law ⁽³⁶⁾.

Governmental action, he maintained, is conditioned by political right, that is, by the expression of the hopes and expectations that subjects have of their state. A power that fails to achieve these basics abuses that public trust. And that power must be limited by this sense of political right « because otherwise there is no means, save continual revolution, of achieving the purpose of the state ». Every government, in short, is merely « a *de facto* government except insofar as the rightness of its effort makes it *de jure* » ⁽³⁷⁾.

In these three books, Laski analyses the concepts of state, sovereignty and authority to show how all claims to absolute power are misconceived. The concepts are all conditioned by a claim of political right whose source is located « less in any formal constitution than in the effort to secure in the state the expression of a

⁽³⁵⁾ *Ibid.*, p. 43.

⁽³⁶⁾ *Ibid.*, p. 44.

⁽³⁷⁾ *Ibid.*, pp. 48, 58.

certain spirit »⁽³⁸⁾. But a claim of political right is not of itself sufficient protection against governmental power. In the positive state, Laski acknowledges, political right must be strengthened by the provision of institutional safeguards.

4. *A Grammar of Public Law.*

Laski brings his analysis of the positive state to a conclusion in 1925 with the publication of *A Grammar of Politics*. The book is in two parts: the first is an analysis of the principles of the modern state — sovereignty, rights, liberty, equality, property and authority — and the second examines the governmental institutions needed for their realisation. The first part examines the principles that legitimate modern government, while the second shows how in practice these principles are being thwarted. Laski's overall aim is to show how governmental institutions must be reformed to realise the potential implied by these modern principles.

The book's title is misleading. It is less a « grammar » of « politics » than a programme for reconstituting the foundations of the modern state. It is an account of what generates authority in the modern state and the institutional arrangements through which that authority is sustained and legitimately exercised. Once public law is understood as « an assemblage of rules, principles, canons, maxims, and manners that condition and sustain the activity of governing »⁽³⁹⁾, then Laski's *Grammar* — which connects theory with practice, the concepts with the institutions — is more appropriately seen as a study of the grammar of public law. Interpreting him in this way, I also follow him in distinguishing between principles and practices.

Laski begins by reprising his account of state and sovereignty to emphasise that if the will of the state is the will of its government, there can be no absolute sovereign authority in the sense expressed by Austin and no inherent rightness about its decisions. Rightness depends on the extent to which governmental decisions adhere to

⁽³⁸⁾ *Ibid.*, p. 69.

⁽³⁹⁾ M. LOUGHLIN, *The Idea of Public Law*, Oxford, Oxford University Press, 2003, p. 30.

the state's basic purpose, which is to realise the common good. He then elaborates on the idea of purpose, by which he means « to realise my best self in common with others » ⁽⁴⁰⁾.

Laski's conception of purpose is an ambiguous blend of Bentham, Rousseau and Green. His notion of purpose adapts Bentham's theory of utility to contemporary conditions, but his claim that social good involves « such an ordering of our personality that we are driven to search for things it is worthwhile to obtain » is far removed from orthodox Benthamism ⁽⁴¹⁾. As an appeal to a higher purpose, it resonates more strongly with Rousseau's concept of the general will, though Laski clearly rejects what he perceives to be Rousseau's idealism ⁽⁴²⁾. His sense of the purpose of social organization seems closest to the ideas of individual self-realisation and realisation of the common good that are associated with the philosophy of T.H. Green ⁽⁴³⁾.

Laski argues that although the state exists to perform this sense of purpose because its will is the will of its government, realisation of that purpose remains contentious. Further, because the idea of an absolute sovereign state no longer holds in the modern world, sovereignty must be replaced by a claim to authority. This is a significant shift. Claiming that authority is essentially federal in nature, he shifts the focus from sovereignty to authority, highlighting the reciprocal relationship between authority and rights. His analysis of rights, liberty, equality, and property become the most important innovations in this work.

Since the character of a state must be judged by its contribution to human welfare, its acts are rightful not by reason of their source but by virtue of their contribution to that purpose. And since purpose is best expressed in the language of political right, the state must be conceived as not creating but only recognising those rights. The character of a state is revealed by the rights it acknowledges. Rights recognition is a basic criterion of the state's authority.

⁽⁴⁰⁾ LASKI, *Grammar*, p. 39.

⁽⁴¹⁾ *Ibid.*, p. 25.

⁽⁴²⁾ *Ibid.*, p. 68: « A general will, in Rousseau's sense, is [...] an impossibility ».

⁽⁴³⁾ T.H. GREEN, *Lectures on the Principles of Political Obligation* (1885-88), London, Longmans, Green & Co, 1924.

These rights, Laski stresses, are not natural rights. They do not constitute a permanent and unchanging catalogue of goods reflecting the natural order of things. But his concept of rights is broader than those adopted by Hobbes and Bentham, who define rights simply as claims the state willingly acknowledges. How, then, does he explain the existence of rights which demand recognition in that state?

Acknowledging that rights vary according to context, Laski maintains that they express « those conditions of social life without which no man can seek, in general, to be himself at his best ». The test is that of utility: in a modern democratic state where each citizen is of equal worth, « the utility of a right is [...] its value to all the members of the State ». Rights, therefore, are always relative to functions. I have rights « that I may make a contribution to the social end ». They are possessed because citizens are performing duties. But those duties, he emphasises, are towards the ends that the state aims to serve rather than simply to the government of the day. Consequently, there are circumstances « in which resistance to the State becomes an obligation if claims to right are to be given validity ». This is because rights are not created by positive law but are its precedent conditions. Rights « are that which law is seeking to realise » ⁽⁴⁴⁾.

But it is not just as a member of the state than an individual has rights. The individual also has rights of personality which may be expressed through various forms of association. Consider, for example, the status of the Roman Catholic Church which, Laski says, must persist unhindered by the state « because invasion of its sphere means the destruction of the quality it brings to the life of its members ». Such an accommodation does not jeopardize the role of the state as « the co-ordinating factor in the community »; it merely acknowledges the federal character of social organization. Since the state is not the body from which other bodies derive, it must recognize these rights of personality before it can demand a citizen's loyalty ⁽⁴⁵⁾.

⁽⁴⁴⁾ LASKI, *Grammar*, pp. 91, 92, 94, 96, 105.

⁽⁴⁵⁾ *Ibid.*, pp. 97, 98.

This explains the concept of rights, but the challenge lies in their realization. The adoption of rights in written constitutions « will doubtless give them greater sanctity », says Laski, but « they will not ensure their realization ». Acknowledging that this raises a problem « as difficult as any in the realm of political science », he argues that any system of rights must respect three aspects: the interest of the individual, the interest of the various groups which express the individual's personality, and the interest of the community ⁽⁴⁶⁾. To achieve this, it is necessary to establish an institution with the responsibility of interpreting and enforcing a set of common rules.

Laski's account of rights is the foundation for his concepts of liberty, equality and property. By liberty is meant « the eager maintenance of that atmosphere in which men have the opportunity to be their best selves ». There can be no liberty without rights since without them we are « the subjects of law unrelated to the needs of personality ». But liberty does not mean simply the absence of constraint. « Whenever there are avenues of conduct which must be prohibited in the common interest », explains Laski, « their removal from the sphere of unrestrained action need not constitute an invasion of liberty ». He therefore rejects Mill's attempts to invoke liberty to determine the limits of state interference because « the separate freedoms I use are not freedoms to destroy the freedoms of those with whom I live » ⁽⁴⁷⁾. Liberty is a positive quality enabling an individual to determine the path towards attaining their best self.

For liberty to exist, there must be effective mechanisms by which government can be held accountable. These must include « the organised and conscious power to resist in the last resort » since it is this implied threat that safeguards against abuse by government. Drawing a distinction between three aspects of liberty, he points to the necessary institutional safeguards. First, private liberty, the opportunity to exercise choice in areas such as freedom of religious worship, which only affect the individual. Secondly, political liberty, the freedom to be active in public affairs. For this, two conditions must be in place: individuals must have received

⁽⁴⁶⁾ *Ibid.*, pp. 103, 135.

⁽⁴⁷⁾ *Ibid.*, pp. 142, 144.

enough education that they can express themselves in a way that is intelligible to others and there must be an honest and efficient mass media. The third aspect is economic liberty, the « security and the opportunity to find reasonable significance in the earning of one's daily bread », a liberty that not only requires freedom from « fear of unemployment and insufficiency » but also « implies democracy in industry ». For the great majority of citizens, then, freedom will not be realised without the existence of « special guarantees » ⁽⁴⁸⁾.

These conceptions of liberty intersect with the concept of equality. For Laski, equality does not mean « identity of treatment » and « does not even imply the identity of reward for effort so long as the difference in reward does not enable me, by its magnitude, to invade the rights of others ». Although it implies a « certain levelling process » it is essentially « a coherence of ideas » according to which the « realisation of my best self must involve as its logical result the realisation by others of their best selves ». Equality therefore means the absence of special privileges and the provision of equal opportunities. Great inequalities of wealth make the attainment of freedom impossible because the rich will find ways of manipulating government to protect the amenities represented by their property ». Consequently, the first essential « is approximate equality of wealth ». Any distinctions of wealth and status « must be distinctions to which all men can attain and they must be required by the common welfare » ⁽⁴⁹⁾. That is, any advantages must relate to the performance of a social function.

Political equality, then, « is never real unless it is accompanied by virtual economic equality » because otherwise political power « is bound to be the handmaid of economic power ». These economic inequalities arise mainly from the workings of the property system. There is an understandable impulse to acquire property, whether to provide security against change in fortunes, to enhance leisure, to protect children, and so on. There is also an ethical justification based in return for effort. But private property, Laski argues, is not a simple and unchangeable thing, and in the modern world it has become increasingly recognized that property is « a product less of

⁽⁴⁸⁾ *Ibid.*, pp. 144, 147-8, 148, 149.

⁽⁴⁹⁾ *Ibid.*, pp. 153, 154, 157, 161, 157.

individual exertion than of the total forces in society ». Since property increasingly depends upon the operation of social forces, its rights are « socially created » ⁽⁵⁰⁾. The key challenge is to specify a concept of property which fits the morality of the times.

A modern conception of property depends on a rights-based conception of the individual. Individuals have rights to control things to the extent that such control enables them to realise their best selves, but no one has « a moral right to property except as a return for functions performed ». This mainly counts against those who live from the proceeds of ownership, especially inherited wealth, since this group will have ready access to the sources of political power and will come to dominate its institutions. This, Laski maintained, was the problem in contemporary Britain. By its alliance with the finance capitalism, the landed aristocracy had reproduced itself so that the « grocer of one generation is the peer of the next », generating a plutocracy at the summit of the pyramid with no measurable utility to the community ⁽⁵¹⁾.

Property is rational, Laski argued, when it is the outcome of a function and its rights are legitimately enjoyed when « accompanied by the performance of duties ». Property is therefore both a theory of reward and a theory of economic organisation. Remuneration depends on « the condition of performing work recognised as useful », leading to the conclusion that although the miner and the judge display an equality of effort, the value to society of a skilled judge is accepted as greater than that of a skilled miner. With respect to economic organisation, Laski argues that modern society recognises « the socialised production of those elements in the common welfare which are integral to the well-being of the community », that those industries retained in private production must work under standard conditions of employment, and that industry must be operated by principles of qualification and publicity ⁽⁵²⁾.

In concluding his disquisition on property, Laski maintained that the present system was psychologically inadequate, resting as it did on fear, that it was morally inadequate because it conferred

⁽⁵⁰⁾ *Ibid.*, pp. 162, 181, 183.

⁽⁵¹⁾ *Ibid.*, pp. 184, 185, 186.

⁽⁵²⁾ *Ibid.*, pp. 188, 196, 204.

rights on « those who have done nothing to earn them », and was economically inadequate because « it fails so to distribute the wealth it creates as to offer the necessary conditions of health and security to those who live by its processes » ⁽⁵³⁾. This holds dangers for any state aspiring to liberty and equality, not least because of the risk of losing the allegiance of the majority of its members.

Laski concludes Part I, the basic grammar of public law, with an account of authority. The authority of government is « a function of relations » and it derives that authority from « the way those relations are organised ». Contrary to orthodox assumptions of modern political philosophy, authority is not derived from the consent of the people; this is a « specious intellectualism ». Authority is generated and maintained by government being able to co-ordinate the experiences of those affected by its decisions. This explains why administrative decisions should be decentralised, why those affected should be consulted, why the principle of hierarchy implied by sovereignty must be abandoned, and why the organisational form should be federal. « The groups we encounter in social and industrial life », he notes, « need to be federally related to the government if the decisions of the latter body are to be wise ». And in order to make its law valid, the state must discover « the legality of law » ⁽⁵⁴⁾.

The *Grammar* draws its analysis to a synthesis by reinterpreting the idea of law. As a system of rules posited as the will of the state, law is morally neutral. But for law to be associated with justice, it must be « the expression of relations found adequate in [...] experience » and must be « built upon an induction from the widest possible experience it can know ». Drawing on Maine's claim that the movement of modern societies is from status to contract, Laski argues that with the emergence of the positive state the movement is from contract to relation: « It is an endeavour to make rights and duties flow from the functions involved ». This is a sociological conception of law which « makes the concepts of jurisprudence grow out of the facts of life ». For Laski, law is not simply command,

⁽⁵³⁾ *Ibid.*, p. 216.

⁽⁵⁴⁾ *Ibid.*, pp. 243, 241, 280, 251.

the will of the state. It is « that from which the will of the State derives whatever moral authority it may possess » ⁽⁵⁵⁾.

In defining law, Laski distinguishes between law as the will of the state and the law that makes the state. The former is positive law whereas the latter is an expression of « political right ». Political right, as used by Rousseau in calling his inquiry into the legitimisation of political order the search for *les principes du droit politique* ⁽⁵⁶⁾, is that which specifies the true basis of public law. Laski would agree with Rousseau that placing the law above man is a problem in politics similar to that of squaring the circle in geometry: if it can be solved good government results, but if not then, rather than achieving the rule of law, « it will be men who will be ruling » ⁽⁵⁷⁾. But sceptical of the value of such intellectualism, Laski preferred to ground the claim to legal validity in experience, in prudential and proportionate judgment. For this reason, Laski's study of the conceptual foundations of public law is best conceived as an exercise in political jurisprudence ⁽⁵⁸⁾.

5. *The Institutional Scheme.*

The second part of *Grammar* is a veritable *tour d'horizon*, a 350-page survey of the entire social world conceived as an institutional scheme. It is a comprehensive analysis, but less a grammar than a sustained argument for the radical reform of economic and political institutions. And although it is presented as a review of western institutions, in reality it is Laski's own blueprint of a Constitution for the Socialist Commonwealth of Great Britain ⁽⁵⁹⁾.

⁽⁵⁵⁾ *Ibid.*, pp. 276, 279, 286.

⁽⁵⁶⁾ J.-J. ROUSSEAU, *The Social Contract* (1772), in his *The Social Contract and other later political writings*, Victor Gourevitch ed., Cambridge, Cambridge University Press, 1997, pp. 39-152, p. 39.

⁽⁵⁷⁾ J.-J. ROUSSEAU, *Considerations on the Government of Poland and on its Projected Reformation* (1772), in *The Social Contract and other later political writings*, cit., pp. 177-260, p. 179.

⁽⁵⁸⁾ M. LOUGHLIN, *Foundations of Public Law*, Oxford, Oxford University Press, 2010, chs 4-6; ID., *Political Jurisprudence*, Oxford, Oxford University Press, 2017.

⁽⁵⁹⁾ Cf. S. & B. WEBB, *A Constitution for the Socialist Commonwealth of Great Britain*, London, Longmans, Green & Co, 1920; see LASKI, *Grammar*, pp. 335-40, 428.

His economic reforms, which are the more radical, will be briefly introduced before turning to political reforms.

Laski's thesis is that the inherited social, economic and political system can no longer continue without radical change. The coming of democracy means that we are now living under a system whose moral assumptions are rejected by the majority. This leads to « a desire for its active overthrow which [...] must lead either to concessions or to revolution » and since the latter « is probably incompatible with the maintenance of civilised life » the concessions must be great enough to « assure a world-order in which the average man is assured of the opportunity to realise his best self » ⁽⁶⁰⁾. That requires the institution of an economic system that satisfies the basic principles of justice.

To realize this objective, Laski proposes to divide the government of industry into three classes ⁽⁶¹⁾. Into the first fall those industries « urgently affected by a public character, which are monopolistic in their nature » and whose operation « is essential to the welfare of the community ». These industries, such as the railways and public utilities, must be operated for use rather than profit and should therefore be nationalised. The second category concerns commodities, such as agriculture and milk and bread production, which are not natural monopolies but where the public interest is paramount. This category, in which « the less room there is for private profit the better », is the natural sphere of « the consumer's co-operative movement ». Finally, there is a third category in which « the commodities produced are not invested with a public character », and this is left to private enterprise. Here, « the forms of industrial government may be as various as human ingenuity can suggest » and all the state requires is conformity to wage and labour standards ⁽⁶²⁾.

As he had previously stated, the crucial reform was to bring about « the removal of industries essential to the welfare of the

⁽⁶⁰⁾ LASKI, *Grammar*, pp. 539, 540.

⁽⁶¹⁾ For his early thoughts on this question see: R.H. TAWNEY, H.J. LASKI, *Introduction*, in R.B. HALDANE, *The Problem of Nationalisation*, London, Allen & Unwin, 1921.

⁽⁶²⁾ LASKI, *Grammar*, pp. 436, 436-7.

community from the danger of exploitation of private enterprise » ⁽⁶³⁾. In *Grammar*, he examines the governance arrangements of these various industrial categories in detail. He recognizes that two groups of thinkers will find his plans unpalatable. To the communists they will appear conservative, and to them his answer is that revolutions « do not achieve the direct end to which they aim » and the weapons they use « destroy by their character the prospects they have in view ». The other group, the advocates of laissez-faire, he denounces as retaining a naïve faith in a system that the working-classes have rejected and which « involves dislocation as the law of its being », implies « a distribution of property at no point referable to moral principle », and entails « waste and corruption and inefficiency » ⁽⁶⁴⁾.

With respect to political institutions Laski complains that philosophers have spent too much time on the « abstract metaphysics of power » and the « intangible State » to the neglect of the « central fact that what is truly important is the relationships of those who act as its agents ». The « true » state, by contrast, is « a body of men issuing orders, and what must be considered is the range of subjects to which their orders should refer, and the methods by which abuse of power must be adequately prevented » ⁽⁶⁵⁾. Working on this principle, he provides a comprehensive review of the institutional arrangements by which public power is allocated and exercised.

Recognising that the tripartite separation of powers means neither equal distribution nor complete separation of personnel, he nevertheless argues that some differentiation is essential to the maintenance of freedom. Laski also favours Britain adopting a written constitution, not only to avoid the unlimited authority of Parliament but also because, in the reforms he countenances, this is « the only method by which the effective control of the powers allotted to the constituent parts of a federation can be guaranteed to them ». Within that scheme, judicial independence is of fundamental importance, as is the principle that all governmental action be

⁽⁶³⁾ H.J. LASKI, *Karl Marx: An Essay*, London, Allen & Unwin, 1922, p. 33.

⁽⁶⁴⁾ LASKI, *Grammar*, pp. 506, 507.

⁽⁶⁵⁾ *Ibid.*, pp. 430-1.

open to scrutiny by the courts. He accepts that judicial review of legislative acts is contentious, often revolving as it does on judgments of reasonableness rather than application of strict legal principles, but he argues that it follows logically from a written constitution. However, any such constitution should be more easily amendable than the American Constitution to prevent the judiciary from « exercising more than a limited control over the political sphere » and to maintain the capacity to make changes that accord with contemporary public opinion ⁽⁶⁶⁾.

Laski then considers the legislative, executive, and administrative design principles that accord with the reformed British state. Approving of the party system as an effective broker of ideas and because it makes intelligible « the results of its failure », he sees its strength as bringing « an alternative government into immediate being ». But he rejects the system of proportionate representation because it intensifies « the complexity of choice », increases « the power of the professional organiser », destroys « any prospect of personal relations between member and [...] constituents », and transfers « the place where governments are made [...] to the obscurer recesses of the legislative assembly ». He also proposes that a single-chamber legislative assembly best meets the needs of the modern state, arguing that that assembly must be organized into a system of legislative committees shadowing the work of a government department and involving the use of committees with inquisitorial and deliberative functions ⁽⁶⁷⁾.

The political element of the executive would be constituted along the lines of the Cabinet system but reformed to strengthen the central executive's role in co-ordinating and controlling administration. Consequently, « no department should have the power to issue rules until they have been presented to the appropriate committees for criticism ». The administrative function would be entrusted to permanent officials recruited on merit and rendered accountable not only politically, but also legally by removing Crown immunity from suit and establishing effective mechanisms of administrative re-

⁽⁶⁶⁾ *Ibid.*, pp. 305-6.

⁽⁶⁷⁾ *Ibid.*, pp. 314, 315-6. See also, H.J. LASKI, *The Problem of a Second Chamber* (1925), in *Id.*, *Studies in Law and Politics*, London, Allen & Unwin, 1932, ch. 4.

dress ⁽⁶⁸⁾. Abandoning his early flirtation with guild socialism, Laski accepted that central government would need to control the work of local authorities through the enforcement of uniform standards of minimum attainment in areas such as education, housing and health, while not stifling local government's efforts to pursue community enterprise. Finally, Laski includes a chapter on the judicial process which addresses appointment, promotion, relations with the executive, and access to justice and reinforcing the basic messages that independence is a condition of liberty and that provision of public support for legal advice is a condition of equality of access ⁽⁶⁹⁾.

The whistle-stop tour of the institutional framework of modern government that Laski offers in Part II of the *Grammar* is driven by the principles of effectiveness, openness, accessibility, and accountability. It is designed to realise true liberty, though critics might question whether the vision of a Panoptic society with its comprehensive network of boards, committees, and oversight agencies is well-designed to achieve that objective.

6. *Laski's political jurisprudence.*

During the first decade of his academic career, Laski laid out a blueprint for a new conceptual and institutional framework of public law necessary to realise the new social order that was emerging. His first task was to challenge the notion that the state has an ideal character and claims the undivided allegiance of its subjects. Arguing that the will of the state is in reality the will of its government, he maintained that although it may assert a legal right to enforce obedience, the rightness of its conduct depends on whether its acts promote the common good. Laski here argues, first, that the state must prove itself through its achievements rather than its abstract claims and, secondly, that however important politically,

⁽⁶⁸⁾ LASKI, *Grammar*, 391. These issues are elaborated in H.J. LASKI, *The Civil Service and Parliament*, in R.B. HALDANE et al., *The Development of the Civil Service*, London, PS King & Son, 1922. The problem of Crown immunity had been the main theme of his essay *The Responsibility of the State in England* (1919), reproduced in LASKI, *Foundations*, pp. 103-38.

⁽⁶⁹⁾ LASKI, *Grammar*, ch. 10.

the state is merely one type of association among many in society: « Like any other group, what it is and what it will be, it can be only by virtue of its achievement » (70).

In these foundational studies, Laski's analysis of state, sovereignty and authority is pragmatic, pluralist, institutionalist, and functionalist. His pragmatism is seen in his embrace of an experimental method that requires proof of achievement from any claim to authority, his pluralism in his claim that authority is federal, his institutionalism in the claim that all institutions have the allegiance of their members, and his functionalism in the argument that the state must be judged by its service to its citizens. Laski drew philosophical inspiration from the works of John Dewey and William James (71), and derived his public law orientation from the methods of Roscoe Pound, Léon Duguit and Maurice Hauriou (72).

His project, both intellectually and politically, was remarkably ambitious. Writing so much on such a broad scale so quickly, it is not surprising that his scheme contains ambiguities and even contradictions. Laski's view of the state, for example, was hardly consistent. Rejecting the claims of syndicalism and guild socialism that the state must be abolished (73), he nevertheless maintained that it is « only one of the associations to which [the individual] happens

(70) LASKI, *Foundations*, p. 170.

(71) LASKI, *SPS*, p. 23: « Such difficulties as this the pluralistic theory of the State seems to me to remove. As a theory it is what Professor Dewey calls 'consistently experimentalist' in form and method ». LASKI, *Foundations*, p. 169: « The pluralistic world, said James, is [...] more like a federal republic than an empire or a kingdom ».

(72) LASKI, *Authority*, p. 42: « There is [...] a vast difference between what Dean Pound has admirably called 'Law in the books' and 'Law in action'. It is with the latter alone that a realistic theory of the state can be concerned ». *Ibid.*, p. 360: « Nor is it possible to obtain any large measure of agreement as to where technical service ends and the detention of a part of public power begins. M. Hauriou does not doubt that teachers and postmen are fonctionnaires d'autorité ». *Ibid.*, p. 378: « The sovereign state, as M. Duguit has repeatedly emphasised, is becoming a great public service corporation; and its organs demand readjustment to the new purposes it is to serve ».

(73) Cf. G.D.H. COLE, *Social Theory*, London, Methuen, 1920, p. 135: « The co-ordinating agency can only be a combination [...] of all essential associations, a joint Council or Congress of the supreme bodies representing each of the main functions in Society ».

to belong » (74). But he also recognized that its compulsory nature and co-ordinating functions gives the state the potential to be the pre-eminent institution. This assumes greater significance in his account of the positive theory of the state in the *Grammar*, where he defines the state as « the keystone of the social arch » arguing that it claims « a supremacy over all other institutions » (75). But these are minor ambiguities in the context of his overall objective.

Of particular importance is his recognition that the state has its own distinctive political purposes and does not operate simply as an instrument of economic power. The modern democratic state serves the purpose of promoting liberty and equality in the cause of the social good. This purpose is elaborated through a discourse of « political right » that depends for its vibrancy on maintaining a determined political will. « The knowledge that an invasion of liberty will always meet with resistance from men determined upon its repulsion », he argues, « in the last analysis is the only true safeguard that we have » (76).

This discourse of political right is the key to Laski's conception of public law as a set of political institutions orientated towards realising the good society. In the regime operating in contemporary Britain, in which economic power was held by the few, he argued that the common good could not be realised without political struggle. But this meant evolutionary reform rather than revolutionary overthrow. Given the existence of well-established institutions of parliamentary government, political struggle must work through these institutions, reforming them where necessary, to realise a democratic society. Laski advocated this parliamentary road to the good society — as against revolutionary upheaval — for two main reasons. He argued, first, that once privileges are removed through democratic means, the privileged class would be forced to set themselves against democracy. The working class could then present themselves as upholders of legality, democracy and constitutional

(74) LASKI, *SPS*, p. 19.

(75) LASKI, *Grammar*, p. 21.

(76) H.J. LASKI, *Liberty in the Modern State* (1930), Harmondsworth, Pelican, 1937, p. 94.

legitimacy, and the privileged class as its destroyers ⁽⁷⁷⁾. Secondly, Laski believed in the vital importance of maintaining civil liberties. Whatever their origins, the basic liberties — freedoms of speech, expression and association, and of equality before the law regardless of race, colour and creed — were not just bourgeois aspirations. They were human achievements of universal value and whenever they were lost, as in the emergency conditions of revolutionary upheaval, history suggested they were not easily restored.

In a series of essays in the late 1920s, Laski explored the implications of his method and the reforms to the legal system that would be required. In *Law and the State* he explained that « a philosophy of the State can never rest satisfied with the maxims of formal jurisprudence » since it « must seek a bridge between the purely logical world of ideal concepts, and the actual world about us ». Institutions of the state justify themselves by their ability to meet contemporary needs; « once they fail in this, new institutions become necessary » — something that many continental jurists have recognized but that the British have yet to do so. The emergence of a new world-order is « making our political conceptions rapidly obsolete for the purposes they have to fulfil », and these developments require « the construction of a new juristic edifice » ⁽⁷⁸⁾.

⁽⁷⁷⁾ Cf. Friedrich Engels, 1895 Preface to Karl MARX, *The Class Struggles in France* (1850): « With this successful utilization of universal suffrage, an entirely new mode of proletarian struggle came into force, and this quickly developed further. It was found that the state institutions, in which the rule of the bourgeoisie is organized, offer still further opportunities for the working class to fight these very state institutions. They took part in elections to individual diets, to municipal councils and to industrial courts; they contested every post against the bourgeoisie in the occupation of which a sufficient part of the proletariat had its say. And so it happened that the bourgeoisie and the government came to be much more afraid of the legal than of the illegal action of the workers' party, of the results of elections than of those of rebellion. [...] The irony of world history turns everything upside down. We, the 'revolutionaries', the 'rebels' — we are thriving far better on legal methods than on illegal methods and revolt. The parties of order, as they call themselves, are perishing under the legal conditions created by themselves. They cry despairingly with Odilon Barrot: *la légalité nous tue*, legality is the death of us; whereas we, under this legality, get firm muscles and rosy cheeks and look like eternal life » <https://www.marxists.org/archive/marx/works/1850/class-struggles-france/intro.htm>.

⁽⁷⁸⁾ H.J. LASKI, *Law and the State*, in « *Economica* », 9 (1929), p. 267; reproduced in ID., *Studies in Law and Politics* (hereafter SLP), pp. 237-275, pp. 239-40, 244, 271.

Other essays dealt with the necessary institutional reforms. Arguing the need to reshape the foundations of the legal to meet the needs of a democratic society, he proposed « a movement towards law reform as vigorous and as far-reaching as that which Bentham inaugurated a century and a half ago ». The problem was that through universal suffrage Britain had become a political democracy but was not yet a social or economic democracy. Despite lip service paid to the principle of equality before the law, « no maxim is more deeply rooted in the mind of the masses than the belief that there is one law for the rich and one for themselves »⁽⁷⁹⁾. Based on this analysis, he advocates a series of legal reforms including reorganising the legal profession, establishing a Ministry of Justice, and reforming the judicial appointment process⁽⁸⁰⁾.

By the end of the decade, Laski had effectively completed his survey. His achievements were widely admired, with George Catlin in 1931 writing that Laski's « work in this century is already as important as was that of Mill in the last century, and is as certain of immortality »⁽⁸¹⁾. Yet this early promise was not to be fulfilled. Political developments in the 1930s caused Laski to doubt the efficacy of the gradualism he had so vigorously advocated in the 1920s and to adhere instead to an economic determinism in which the state is « simply the executive instrument of the class in society which owns the means of production ». In the mid-1930s, this brought from him a confession: « I now recognise (so far at least as I am concerned) that the pluralist attitude to the state and law was a stage on the road to an acceptance of the Marxian attitude to them »⁽⁸²⁾. This leads to a different story⁽⁸³⁾. Nevertheless, despite various criticisms made of Laski's work during this period,

(79) H.J. LASKI, *Justice and the Law*, in *SLP*, pp. 276-296, pp. 276, 290.

(80) *Ibid.*, pp. 291-2; H.J. LASKI, *The Technique of Judicial Appointment*, in *SLP*, pp. 163-180.

(81) G.E.G. CATLIN, Review of LASKI, *Liberty in the Modern State*, in « American Political Science Review », 25 (1931), pp. 733-735.

(82) H.J. LASKI, *The Crisis in the Theory of the State* (1937), Introductory Chapter to 4th edn of *Grammar*, pp. i-xxvii, pp. xii-xiii.

(83) I take this up in M. LOUGHLIN, *Laski's Materialist Analysis of the British Constitution*, in *The Cambridge Handbook on the Material Constitution*, M. Goldoni, M. Wilkinson eds., Cambridge, Cambridge University Press, forthcoming, 2022.

there can be no doubting the originality of his account of political jurisprudence and its importance in establishing the platform for the realistic analysis of British public law that had hitherto been entirely neglected.