James LORIMER

(1818-1890)

A natural lawyer amongst the positivists

by Sir GERALD FITZMAURICE

I

James Lorimer was born on 4 November 1818 at Abergaldie in Perthshire and was educated at Perth High School and then at Edinburgh University where he entered upon the study of philosophy—for it was through philosophy that Lorimer came to law, and through philosophical spectacles that he viewed it. All his life indeed, his attitude to law was to be tinged by his philosophical outlook—so much so that it is tempting, even if it would be exaggerated—to say that the former was but a convenient vehicle through which to manifest his views on the latter. In this he resembled his mentor at Edinburgh, Sir William Hamilton[1], the professor of logic and metaphysics who, though called to the Scottish Bar at the age of twenty-five, devoted the remainder of his working life to philosophy and, in the field of logic, is said to have been the inventor of the process subsequently known as the " quantification of the predicate "[2].

At the age of twenty-two Lorimer left Edinburgh in order to study abroad, going to Geneva, Berlin and Bonn. When at Berlin he attended Puchta's lectures on Roman Law and Trendelenburg's on philosophy;

1 Hamilton (1788-1856), though less well known than his celebrated compatriot, Hume, had considerable influence on the philosophical thought of his time, not only in Scotland but abroad.

2 The following explanation is taken from *Everyman's Encyclopaedia*, 1968 ed., Vol. 10, p. 262: " Quantification of the predicate. Propositions in logic . . . were classed by Aristotle by *quality*, as affirmative or negative; by *quantity*, as universal or particular. Quantity had reference to the subject; thus, ' *All* quadrupeds are animals '. Sir W. Hamilton ' quantified ' the predicate, thus distinguishing propositions further. The one quoted does not state whether all quadrupeds comprise all animals or not, and by quantifying the predicate we write, ' All quadrupeds are some animals', thus stating whether the whole or only part of the predicate agrees with or differs from the subject."

but in the course of these wanderings he also gave some time to science, doing zoology under De la Rive and chemistry under Mitscherlich, afterwards declaring that he had learnt more law from the chemists than the jurists, and that his own theory of " scientific jurisprudence " owed more to the former than to the latter. The chief impression that science made on the minds of its devotees in those days was the comforting one of the apparent governance of all phenomena by fixed and unchanging laws, either known or discoverable. Lorimer seems to have seen in this a key to the social sciences also, amongst which he certainly placed law, believing that they must equally be governed by unchanging laws, which it was the task of reason, scientifically applied, to discover. In this way, he thought, a valid system of jurisprudence might be constructed on a sort of *a priori* basis. At Bonn however, to which he went after Berlin, Lorimer reverted to philosophy under the influence of Dahlmann who, he later said, first brought him face to face with his special calling and, together with Aristotle and Hamilton, constituted the source of his philosophical and political inspiration—though in fact, other German legal philosophers of the period, such as Ahrens and Krause, were to have an appreciable influence on him.

Returning to Edinburgh in 1843, he took a course in law at the University, and was called to the Scottish Bar two years later, where, however, he met with little success as a practitioner, and accordingly took up political philosophy and writing on literary, historical, political and educational topics in reviews such as the " Edinburgh " and " North British ", to which he became a frequent contributor. Eventually, in 1862, at the age of forty-four, he was appointed to the Chair of Public Law at Edinburgh, which he held until his death twenty-eight years later. The full title of this Chair—significant in the context of Lorimer—was the professorship of " Public Law and the Law of Nature and Nations ". Originally established as a " Regius " professorship under Queen Anne in 1707, it had been in abeyance since 1832, and was in fact revived for Lorimer. The main duty attached to it under the governing ordinances was to deliver forty lectures annually on " international law ", but Lorimer placed a characteristically individual interpretation on this term; for, in his view, the expression " Public Law and the Law of Nature and Nations " ought to be regarded as covering four separate if related disciplines, viz. Public Law in the sense of Constitutional Law; Natural Law and Legal Philosophy; Public International Law or the Law of Nations; and Private International Law. However, partly on the ground that there was already a Professor of Constitutional Law at Edinburgh, Lorimer refused to teach the first of these subjects, and concentrated mainly on the second and third—but chiefly on the second,

though with special reference to its principles as reflected in the Law of Nations—justifying this on the ground of the importance of Legal Philosophy as the " foundation of jurisprudence in all its branches "[3].

Lorimer had first attracted attention as an author by the publication in 1854 of an essay entitled *The Universities of Scotland, past, present and possible*, in which he advocated many of the educational reforms that afterwards—much later and with many delays—came to be adopted; and this was followed three years afterwards by a more important work, *Political Progress not necessarily Democratic*, and (in 1865) its sequel *The Constitutionalism of the Future*, in which traces of Dahlmann's influence can be seen. These works undoubtedly contributed to his appointment to the revived Edinburgh Chair as already described. His major works however came subsequently. These were *The Institutes of Law: a Treatise of the Principles of Jurisprudence*, and (in two volumes) *The Institutes of the Law of Nations: a Treatise of the general Relations of separate Political Communities*, respectively published in 1872 and 1883-4. The first of these works was based on his system of teaching the philosophy of law—a subject in which (in contrast to continental Europe) few in the Great Britain of his day took any real interest, and to which the prevailing utilitarianism and positivism of such authorities as Bentham, Austin and Fitzjames Stephens was totally alien[4]. A second (1880) edition of this work was, in abridged form, translated into French by Nys, and published in Brussels in 1890. One of its central themes was the key to Lorimer's conception of law, namely that positive laws were merely an application to particular facts or situations of pre-existing and fundamental principles of natural law inseparable from the human disposition and human relations in political communities.

His second major work, the *Institutes of the Law of Nations*, exhibits the same feature, deriving the rules of public international law not from international agreement express or tacit (i.e. through treaty or custom) but from natural law—although this did not prevent him from discussing in a practical way many of the international legal problems current at the time. But perhaps the chief interest of this work from the standpoint of

3 Lorimer, *Studies National and International*, Ch. XVII.

4 This opposition was carried by Lorimer to the point where he ascribed a totally different meaning from the normal one to the expression " positive law ". The legislator, according to him, merely " declared " the (positive) law discovered by the application of the principles of natural law to particular facts or circumstances. What is usually regarded as positive law, Lorimer called " enacted " law which, if it did not conform to the tenets of natural law, had (in his view) no scientific basis as true law. In short, to Lorimer, positive law was " necessary " law, in the sense that reason and morality must have it so.

the centenary volume of the Institute of International Law is the fact that it was dedicated to Lorimer's colleagues of the Institute, which he had helped to found in 1873. Of this event he gave a vivid description in a later work (*op. cit.* in note 3 *supra*, Ch. VII). This is accordingly perhaps the moment to recall that, as stated in the British " Dictionary of National Biography "[5], Lorimer was a " constant contributor " to the work of the Institute, and that

> " Its meetings at various European centres gave him the opportunity of keeping up his intimacy with his continental friends, their countries and their language(s). He constantly insisted in his writings on the importance to a small country like Scotland of keeping itself in contact with the great States of Europe and of intercourse with their distinguished men."

Though very much a Scot, Lorimer was also, both by education and predilection, an enthusiastic European.

There was one aspect in particular in which Lorimer's attitude was wholly in keeping with—and perhaps partly contributory to—the various currents that led to the founding of the Institute, namely in the feeling that, as the present writer put it on another occasion[6], " the future of international law [was] too important to be left any longer to the action of States and governments conducted through the diplomatic channels, or to the personal efforts of individual publicists, teachers and writers ". So striking is the passage in which Lorimer expresses substantially the same view, that it is worth quoting some of it in full[7]:

> " What has retarded the progress of international law has been the smallness of the number of really efficient workmen of any kind who have devoted their energies continuously to this kind of work. There has been less consecutive thought and labour devoted to it than to any other branch of jurisprudence . . . In place of being, like the municipal systems, the result of the calm and persistent efforts of the best legislative and judicial minds of successive generations, the law of nations is left to be determined on the special occasions on which it is about to be administered, always more or less afresh, by party leaders and diplomatists who are endeavouring to overreach each other, or by legal practitioners to whom for the most part the whole subject is new . . . The involuntary or one-sided decisions thus arrived at, are then embodied in treaties, recorded by the text-writers, and generalised into the so-called ' principles of international law '. Nor has the case been much better, when the subject has been discussed apart from special occurrences, by those whose lives were devoted to speculative inquiries. With them too it has been for the most part a *πάρεργον* . . . Even the great work

5 Vol. XII in the original edition as reprinted in 1921-22 and 1937-38, p. 137, col. 2.

6 See the beginning of the writer's opening lecture in his course on the *Contribution of the Institute to the Development of International Law*, given on the occasion of the Jubilee anniversary of The Hague Academy in July 1973.

7 *Institutes of the Law of Nations*, Vol. I, pp. 60-62.

> of Grotius occupied but a very small portion of his long and active life . . . There is, so far as I know, no single instance of a man of first-rate speculative ability who ever made the law of nations, as a science, the study of his life . . . "

Yet Lorimer was no devotee of immediate codification, believing that a code which consisted mainly of " benevolent aspirations " was of little value[8]—one of his not infrequent inconsistencies, having regard—see section II *infra*—to the ardour with which he maintained that law should be what it ought to be rather than what it was. However, in the long run the Institute adopted Lorimer's cautious attitude to codification, not only in its very careful and meticulous methods of work, but also as to the principle;—for having, at its New York Session in 1929, adopted a resolution on codification somewhat of the type of " the law as it ought to be ", it subsequently adopted a very much more realistic one, at its Lausanne Session in 1947[9]. The lessons of the abortive Hague Codification Conference of 1930, of the Hitler period, and of the war and its aftermath, had been absorbed.

Of no lesser interest from the point of view of the Institute was Lorimer's posthumously published volume entitled *Studies National and International*. This was a collection of the opening lectures delivered to his classes in the period 1864-89. It was Lorimer's habit to start each university session by, as he put it, " discussing in a popular manner what seems to be the leading public question or public event of the day "[10]. One of these lectures, later reproduced in the " Studies ", dealt with the founding of the Institute in 1873, and others reflected matters of interest to the Institute, such as the Franco-Prussian War of 1870-71, preoccupation over which had been one of the factors leading up to its foundation[11]; the Three Rules of Washington, endorsed by the Institute at its Hague Session in 1875; and a proposal for the setting up of a European organization of nations and of an international court of justice, which has been described as Lorimer's " most spectacular contribution to the science of the Law of Nations "[12]. Of these studies it has been justly said[13] that they are well worth reading " if only for the enjoyment of

8 *Studies* (see note 3, *supra*), p. 86.
9 See *op. cit.*, in note 6, *supra*, Part A, Section 2 (d).
10 *Studies* (see note 3, *supra*), Introduction.
11 See note 6, *supra*.
12 W. Wilson in *Sources and Literature of the Scots Law*, Stair Society (Edinburgh) 1936, Vol. I, p. 417.
13 In a paper on Lorimer read to the former Grotius Society on 18 July 1953 by the late Professor A. H. Campbell, who then held the same Chair of Public Law at Edinburgh as Lorimer had done—see *Transactions of the Grotius Society*, Vol. 39 (1953), pp. 211-229. The present writer's indebtedness to Professor Campbell's paper will be obvious.

Lorimer's style " and his " genius for the vigorous phrase and the pointed epigram ", as well as " for their relevation of his character, lofty, idealistic, impetuous yet tempered by native caution, passionate and lovable ". Moreover, the same source continues, these studies

> " are all pieces of the same fabric as his larger books. Everything Lorimer wrote on legal topics was for him the expression of a perennial philosophy, the systematic application of the principles of jurisprudence as determined by Nature under the ultimate authority of God ".

II

A great deal of all this—i.e. of Lorimer's theoretical position—is clearly derived directly from Bodin; and it also owed something to the contacts made during his apprentice years with the prevailing German school of natural lawyers. His own distinctive contribution lay in the attempt, already mentioned, to impart a rigorous and scientific basis to it. This however is not the place to enter upon an exposition of Lorimer's system of jurisprudence. Suffice it to say (but without engaging the present writer's own views) that it has proved unconvincing—at least to the common-law mind. One eminent commentator, Sir Frederick Pollock[14], himself a jurist of the first rank, and by no means unsympathetic to Lorimer's point of view, summed the matter up as follows[15]: " The school followed by Professor Lorimer concerns itself far less with law as it is than with law as it ought to be, or at least regards the consideration of law as it ought to be as forming the fit and necessary prolegomena to the study of law as it is ". (This in fact was precisely Lorimer's approach.) Pollock continued: " My own view . . . is a totally different one. I think it a mistake to preface the study of legal conceptions by an exposition of transcendental ethics . . . I do not see that a jurist is bound to be a moral philosopher more than other men . . . ".

Yet there is much in Lorimer's attitude that would appeal powerfully to a modern school of thought that tends to assess the obligatory character of any law or rule by reference to its conformity with moral standards often themselves postulated rather than self-evidently correct. Lorimer never went as far as that—and there is indeed a distinctly

14 Pollock—a member of the well-known legal family of that name—held the Chair of Jurisprudence at Oxford from 1883-1903, and was the author of several standard works on various branches of English law; and part-author, with F. W. Maitland, of Pollock & Maitland's *History of English Law*.
15 *Essays in Jurisprudence and Ethics* (1882) pp. 18-20, reviewing the second edition of Lorimer's *Institutes of Law*.

amoral tinge to a number of his doctrines [16]—for he was full of inconsistencies. Nevertheless there is more than a hint in his position of the plea that the so-called " unjust law " is, in the final reckoning, without true legal force. This is never explicitly stated, but can be discerned hovering behind the scenes of such remarks as, for instance, the following, taken from his critique of Wheaton's methods [17]:

> " To him [Wheaton] whatever is recognized by custom or established by treaty is, *eo ipso*, positive law; and this equally, whether it conforms to or violates the necessary law [as to this see note 4 *supra*] . . . whether, absolutely, *it be right or wrong* [our italics] . . . It is in consequence of this that [he, Wheaton] constantly abandons the position of a jurist . . . and records conflicting lines of policy without the slightest attempt to . . . try them by an absolute standard, or even the slightest conception that there is any absolute standard . . . "

Lorimer did not, indeed fail to add to this a generous and admiring tribute to Wheaton personally, characterizing his work, as " valuable beyond perhaps any other book " as a " record of what was believed or held to be the law of nations in his time "—a distinctly Parthian shot this! But these works, whatever authority they possessed " for practical purposes ", helped " over no theoretical difficulties, and can scarcely be regarded as a contribution to scientific jurisprudence, otherwise than by chance ". This was forthright language; but Lorimer does not seem to have seen that Wheaton was not trying to write a book on scientific jurisprudence but merely to state what the rules of international law appeared to him to be on the basis of accepted customary law and treaty. The belief that these rules have, or should as far as possible have, a foundation in natural law and justice did not require, as Lorimer seems to have thought, that their status as rules of law must hang in suspense until the existence of that foundation is established. Nor does he seem to have seen that his own doctrine of the " absolute standard " opens up an

16 For instance his assertion of something in the nature of an inherent right of aggression where absolutely essential to the full development of a State, provided that the overall gain to the liberty of action of the aggressor was greater than the loss of it suffered by the victim, and that there ensued " an increase of freedom on the whole "—i.e. in sum total—(but can such things be measured?—see *Institutes of the Law of Nations*, Vol. II, pp. 33-41). Lorimer seems also to have contemplated with equanimity the practice of the absorption by a progressive State of what he called a " retrogressive " one (*ibid.*, p. 41)—while equally curious, though not wholly irrational, was his belief that the wealth and prosperity of a State was a true index to its moral worth (*ibid.*, pp. 185-7). Nevertheless he was at pains to make it clear that a right of aggression did not justify inhuman conduct: " Humanity steps in to protect the hearth and the home, and declares the sacrifice of the humblest life and the violation of the poorest household, a breach of the law of nations. So long as the non-combatant character is strictly maintained, no extremity of war like necessity can justify interference with personal rights or domestic relations."—(*ibid.*, p. 83).

17 *Op. cit.* in previous note, Vol. I, pp. 83-85.

almost never-ending vista of uncertainty and speculation[18]. As to specific topics of international law, much of what Lorimer wrote has now only a historical interest, and will not be entered upon here. However, his views upon recognition—a subject which he dealt with *in extenso*[19]—remain pertinent. His doctrine of partial or relative recognition—recognition proportioned to the character and power of the entity to be recognized—is indeed alien to modern ideas. But he came close to one influential school of to-day in so far as he tended to connect the obligation to recognize and the right to receive it, not so much—or not only—with the factual and legal situation of the entity concerned, but, or also, with its attitude and behaviour.

One other element in Lorimer's make-up must be mentioned. He was undoubtedly something of a seer. As has already been mentioned (*vide* section I *supra*, *in fine* and note 12), he foresaw the International Court; and in effect he also foresaw the League of Nations in his proposal for an organization of European States with its centre at Geneva[20], some of the details of which are even faintly anticipatory of the United Nations. There was to be a standing " congress " of the nations to which would be attached a Court to deal with matters requiring judicial determination; and each member State would provide money or armed forces in proportion to its voting power in the congress. This voting power would however be weighted according to the power and importance of each member State, as resulting from the size of its population and its financial and commercial assets—an idea which was indeed proposed and discussed at San Francisco, but not adopted for the purposes of the United Nations Charter.

Lorimer also, in effect, foresaw the emergence of the British Commonwealth of Nations[21], and even went a considerable distance towards foreseeing, or at least sensing, the eventual emancipation from colonial rule of dependent territories generally. " The only ties ", he said, " that will bear the strain of progressive development are the ties of blood and race "[22]. This notion recurs in another form in a striking passage, most

18 An absolute standard, and its character, can of course be postulated as an axiom or datum, but cannot be deduced, except from, and by postulating, a still higher standard, which would then itself become the absolute one. (This is one of the theoretical difficulties about the concept of *jus cogens*). So equally is it with the notion of the absolute standard as a reflexion of the will of God—which can be declared but, *ex hypothesi*, not deduced. To the good Victorian in Lorimer, however, right and wrong were self-evident categories that needed no elucidation.

19 *Op. cit.* in note 7 *supra*, Vol. I, Book II, *passim*.

20 *Op. cit.* in note 3 *supra*, pp. 59-61.

21 *Op. cit.* in note 3 *supra*, Vol. II, pp. 290 *et seq.*

22 *Ibid.*, Vol. I, p. 201.

of which may be quoted *in extenso* on account of its analogies with various strands of thought to-day[23]:

> " Is it not possible that separate ethnical groups may, by their very nature, be directed towards political and social ideals so dissimilar as to prevent them from ever following the same lines of progress? . . . Ought we not . . . *within the lines of natural law*, to measure nations rather by the approach they make to their own ideals than to ours? If we attempt to construe Turanian or Mongolian politics or positive law from an Ayran point of view, is it not very much like attempting to construe Chinese or Turkish by the grammatical laws which are more or less common to the Romanic and Teutonic languages? Even within the wider groups . . . may not the ethnical sub-divisions which so often penetrate and transcend the limits of nationality, generate social and political conceptions permanently irreconcilable and yet mutually entitled to recognition? . . . What in western Europe we understand by political organisation rests on individualism and aims at self-government, which always tends to assume the form of constitutionalism . . . This conception of national life is apparently at variance, not only with the history and traditions, but with the present sympathies and aspirations of the whole Slavonic race. Starting with the Mir and ending with the Czar, Slavonic organisation, in so far as it has grown from Slavonic roots in Russia, has hitherto been communal and autocratic; and to these conditions of existence, amidst all their contradictions and inconsistencies, the whole national party, from the most moderate Slavophile to the wildest Nihilist, still clings."

There Lorimer the philosopher and jurist may perhaps be left—with a few words to be added about Lorimer the man.

III

The late Professor Campbell, to whom this Memoir owes so much (*vide* note 13 *supra*), says of Lorimer that he was " a religious man, a devout Protestant, although his natural kindliness and optimism led him to question such orthodox doctrines as those of predestination and eternal punishment "[24]. He was also a family man, and when he died in Edinburgh on 13 February 1890, in his 72nd year, he left a wife, three sons and three daughters, two of the former attaining distinction, one as an artist, the other as an architect. He had many interests besides law, both political and social, and advocated an electoral franchise based mainly on educational rather than property qualifications, with votes for women and proportional representation. He had other liberal ideas, wanted the land to be owned by those who resided on it, was an enthusiast for public parks and urban amenities, and urged the need for

23 *Ibid.*, pp. 94-5.
24 *Op. cit*, in note 13 *supra*, p. 219.

improvement of working-class housing and conditions of life. Let the following evocation of his leisure moments, taken from the Dictionary of National Biography be his epitaph[25]:

> " He spent his vacation in the old castle of Kelly, near Pittenweem, Fifeshire, which he had acquired on a long lease and restored, and where he engaged with keen zest, so far as his health allowed, in the public duties and social amusements of a country gentleman."

25 As cited in note 5 *supra*, at p. 138.