

LAW, PHILOSOPHY AND HUMAN RIGHTS

THOMAS A. COWAN

People everywhere are calling upon Law to solve virtually all the important problems of modern life. The result is the emergence of the modern Welfare State. At the same time, the traditional demands for freedom from governmental restraint are growing. The name of this *paradox* is Human Rights.

The traditional demand for freedom or liberty, which was the chief aim of the doctrine of Human Rights until the present century, was formulated by philosophers, chiefly those of the *Enlightenment*. But current welfare programs calling for governmental or legal action are not the work of philosophers. They are political formulations made in response to popular demand. Yet they too are framed in the traditional terms of freedom. The result is that present day declarations of Human Rights are a *hodge-podge* of all the evils that beset humanity. Far from being direct, clear-cut enunciations of fundamental policy, they are vague, inconsistent, and rhetorical. They are informed by no general ideas of what humanity does or should want. Their emphasis is upon Rights but no one has a clear idea of what it means to be truly human. I believe that the emphasis should be shifted to a concern for the meaning of the term Humanity. This is the business of philosophers. When they undertake to do it, then lawyers, social scientists, politicians and reformers can try to convert ideas of what it means to be human into Human Rights.

Why has contemporary Philosophy failed so notably in this task? Part of the answer, I think, is the above-mentioned emphasis upon the legal nature of the term Human Rights. The older notion of "natural right" needed no legal or governmental enforcement. The right existed by nature, and government, the natural enemy of the right, was specifically warned not to encroach upon it. Three centuries ago, the idea of a natural right was the very stuff of philosophy. Since then government and its laws have proliferated so hugely that it is felt that rights must depend entirely upon governmental sanction.

LAW AND TECHNOLOGY

Ever since the middle of the last century, there has been a growing disinclination on the part of philosophy to concern itself with law. This has come about, I think for two reasons. One is the very rapid development of the Philosophy of Law and the other is the overwhelming influence of science and technology in modern life. I shall discuss each of these movements very briefly.

Legal philosophers are fond of saying that after Hegel, philosophy simply abandoned law. During this time, philosophy of Law has grown immensely, and philosophy merely followed its ancient practice of allowing each of the separate sciences to follow its own course after sufficient specialization seemed to make it difficult for philosophy to continue with it. In this way, natural Philosophy became Physics, mental Philosophy became Psychology, and social Philosophy became Sociology.

While Philosophy lost interest in Law, legal philosophers maintained an avid interest in philosophy. No serious philosophical movement has escaped the minute scrutiny of the legal philosophers. Roscoe Pound in his voluminous writings noted and discussed a long list of legal-philosophical "isms," attesting to the concern of legal specialists for the impact of philosophy on the law. The literature of philosophy of law continues to grow in volume, but no corresponding philosophical insights into the nature of law keep pace with it. Philosophy of law simply devours new philosophical movements, accepting responsibility for processing general philosophical ideas, into forms relevant for use in law.

It is easy to understand why philosophers prefer to leave law and government to trained specialists. It is unfortunate that this neglect of the generalists helps accelerate the process that makes the philosophy of law a self-contained speciality. Conversely, philosophers find themselves less and less able to engage in relevant social inquiry without confronting the massive complexity of law and government.

Science and technology have had a similar effect on another great branch of philosophy, namely Logic. Many years ago, the logician Andrew Ushenko lamented the greed with which mathematics devoured logic. Logicians are no longer philosophers. They are specialists harnessed to the needs of the exact or formal sciences. The philosophy of science is not philosophy. It is science, just as the philosophy of law is not philosophy, but law. I think the time has come for philosophy to regain its ancient prerogative. And while I am not competent to tell philosophy what to do about science, I do have some advice on the subject of law and government.

Fortunately, I am not alone in this concern. We are witnessing a rebirth of interest in legal matters on the part of certain members of the philosophical community. I call attention particularly to the activities of the international Association for Philosophy of Law and Social Philosophy. (1) Many of its members are professional philosophers and their influence is being increasingly felt. Still, the major orientation of the group is toward law and despite its efforts there is a growing tendency to split into the specialties as Political Philosophy, concerned with government, legal philosophy demanding a professional knowledge of law, and social philosophy, oriented toward social action and sociological methods of investigation. Philosophy itself grows further and further away from these specialized efforts.

Despite their technical competence, most legal, political and social philosophers are still astonishingly conservative in their general philosophical outlook. Most legal philosophers, for example, are still hung up on the outworn issue between Natural Law and Positivism. To general philosophers, this is an astounding state of affairs, since they tend to think of Natural Law doctrines as either outmoded or else the concern of religiously oriented thinkers. Positivism seems simply outmoded.

Human Rights appears to be the special prerogative of natural law theorists, though positivists stoutly contend that the meaning and efficacy of any Right whatsoever depend upon positive law. I consider this perennial war of the opposites to be largely irrelevant and hope that a general philosophical re-orientation would dissolve the current impasse. But a warning is in order. Both natural law theorists and positivists assume that the basic problem of Human Rights is how best to have them legally recognized and enforced. There is a tacit agreement to "use" philosophy in the service of law in this respect. As I have said previously, it is a fundamental assumption among legal philosophers that all philosophical learning whatever is to be put to immediate use for legal purposes.

(1) — See *Human Rights: Amintaphil*, (ed. E.H. Pollack, Jay Stewart Pub. Inc., Buffalo, N. Y.) 1971

The bald statement of this basic assumption may well evoke the response: why not! All human intellectual behavior is in the public domain, to be used freely by anyone who comes upon it. I do not quarrel with this response in general. I merely suggest that it highlights the present difficulty: that there is an immense demand for philosophical insight on the problem of Human Rights coupled with a very short supply of the commodity needed. This "economic" dilemma suggests the remedy.

Philosophy can, and if possible, should turn its attention to Human Rights. It must ask itself not how Human Rights may be legally implemented nor what the conception of a Right means in the modern setting. Instead, it should concern itself with the perfectly general problem of what "Humanity" means today. This is my thesis here, and what say hereafter is intended to explicate it. Insightful thoughts on what men and women mean when they use the concepts Human, Humanity, Humaneness are what is called for. Then legal philosophers, enriched by new and exciting vistas of human potential can, like their predecessors after the Enlightenment, seek technical ways and means to convert the new philosophic insights into law.

I cannot do more than sketch out briefly the program for such philosophy. To do more would be to fall into my own trap as a legal philosopher. Nevertheless, I may be allowed to run the risk of suggesting a few lines of inquiry for what we might call a new humanism.

What do human beings mean by the term Humanity? Does it include the new minorities as special objects of attention? Or are women, blacks, browns, the poor, children, youths, the new nationalities and the rest of the dispossessed simply to be lumped together in the tradition of the older Human Rights doctrines as simply "all men." Philosophy is largely the business of adult males. Can there be detected a bias in the traditional formulations of Human Rights? Why should there not be a phenomenological amplification of the term in its modern setting? Can there not be a linguistic analysis to establish non-redundant and consistent but vastly enriched levels of meanings of the term - Human?

Existentialism's pre-occupation with a certain aspect of the human condition could be expanded. The pessimistic myths of Non-being and Anguish have been explored. What about the optimistic counter-myths of Being and Joy or Hope? Existentialism cannot come of age if it stays with its present pre-occupation with the problem of Non-being, an obvious reflection of the youthful Ego obsessed with itself. Not only the pessimistic mood but also what we need from existentialists is the application of their method - the role of the creative artist as existentialist philosopher - a revival of a liaison between art and

philosophy that has been denied us since Antiquity. We need from existentialists in evocation of the image of the whole human being.

Marxists and other materialistic philosophers have not been materialistic enough. Mind is not a secondary epiphenomenon subordinate to matter. Mind, and not merely brain, is a prime material object. Consciousness is no less primary than action. Ideology is real and material. It matters. This is all that one can say for the world, its supposed primary substrate. Metaphors borrowed from eighteenth century physical science will no longer do. The older materialistic human being is only partly human. What does full *Humanitas* mean in a modernized materialistic philosophy?

I turn now for a moment to the general intellectual movement known as Humanism, to ask what is its relevance to our theme. Humanism, at the beginning of the modern era, was of immense consequence in freeing philosophy from religious creeds and binding ideologies. Its subject was Man. Its inspiration was the classical models of Greek and Roman antiquity, and on the basis of these models it established man as responsible for his own fate and therefore as a free agent to choose. It opposed the Humanities to both the Sciences and the Theologies and its influence in the course of Western systems of education has been inestimable. Strangely enough, Humanism has always had an aristocratic cast, in the original models of antiquity, in the Renaissance and in nineteenth and twentieth century theories of education and political liberalism.

I regard the task of this movement to secularize the idea of humanity as virtually accomplished, even though *Humanism's* contribution to humanistic goals, as contrasted with idealistic and materialistic ones, does form a large share of what the concept "Humanity" means not only for philosophers but also for human persons everywhere.

The problem is to put *Humanism* in a modern setting. Unfortunately, in the modern world, many so-called "humanists" find themselves hostile to the modes and methods of the vast bulk of underprivileged humanity. The "humanities" have somehow or other become inhumane, upper-class, privileged, esoteric, aristocratic, nostalgic, pessimistic, irrelevant.

I should now like to issue a brief set of warnings to Philosophy if, as I hope, it turns its attention to a new outline of the meaning of Humanity. To begin with, the new social sciences give the impression that they have preempted the field. Anthropology is the study of man. Is it not its main function to describe humanity in the full extent of its existential being? If we want to know what humanity is really like, should we not turn to the anthropologists, ethnologists, archeologists, and behind them to ecologists, behaviorists, biolo-

gists? What is there left for the philosopher to do in the face of this imposing array of specialists much of whose study is the nature of the human being? Or, after the psychologist, the psychoanalyst, the mythologist, the historian have had their say, is there anything left? Has philosophy, the queen bee of the sciences been overwhelmed by her numerous progeny, so that she is no longer fit to nourish by her own methods her primary object, mankind?

I am afraid that my original question has been swamped. I wanted to ask what philosophy had to say about the human part of Human Rights. Now I find myself confronted with the vastly larger question: What is philosophy about? Does it have anything unique to say about anything? Have not science and law, the twin monsters of modern life, made it obsolete? Have not the social sciences completely absorbed the problem of morality, as mathematics has devoured logic, and art criticism aesthetics? And has not history more to say about the history of philosophy than philosophy itself? What is left of the great realm of speculation on the nature of the good, the true, and the beautiful? Is the subject of Humanity too important to leave with its inventors, the philosophers?

The answer of course is No! Now more than ever the art of the philosopher is in demand. Forsaking the sciences and the arts with their confused demands for practicality, the philosophers should turn their attention to the creation of a new Utopia, the real and final proper Business of the philosopher. Plato's *Republic* is an enduring monument of western culture. His practical excursus into legal, philosophy, namely in the laws, is of antiquarian and specialist interest only. His attempt to implement his ideas led rapidly to his being sold into slavery. Philosophers must free themselves from confusions and intricacies of both law and technology. The grand vision of how humanity should live awaits their creation. Philosophical ideas, strictly utopian in character are called for. And lest anyone think that ideas are impractical, let me quote my own philosophical mentor, Professor Edgar A. Singer, who said, "Ideas are more dangerous than dynamite, more practical than guns or butter." And if further testimony on the power of ideas to move men were needed, consider the utopian vision of a classless society of the philosopher, Karl Marx.

When professional philosophers see that it is both their opportunity and their obligation to create a new meaning, a new philosophic meaning, for the thing we call Humanity, then indeed a new doctrine of Human Rights will begin to emerge. And I suggest, in conclusion, that perhaps the attempt to formulate a purely philosophical understanding of what the human part of Human Rights means might lead in turn to a clearer comprehension of what mankind intends the philosopher's function to be.