

# THE CANADIAN BAR REVIEW

VOL. XXVI

August-September

No. 7

## LAW AND PHILOSOPHY

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It is no longer news that law has lost its connection with philosophy. In place of its traditional foundations of morals and metaphysics, it now rests either on some pragmatic expediency or on an historic evolution evidenced by custom, or it is deemed to consist of nothing but facts and therefore rests on no basis at all.

Complaints emanate from both sides of the Atlantic. From England, Pollock observes that "the besetting danger of modern law is the tendency of complex facts and minute legislation to leave no room for natural growth, and to choke out the life of principles under a weight of dead matter which posterity may think no better than a rubbish heap".<sup>1</sup> The late Justice Cardozo similarly complained of "the absence of an attempt to reach an agreement about the things that in truth are fundamental", so that, as he said, for lack of an accepted philosophy of law our judges are deprived of "the underlying and controlling principles that are to shape the manner of their judging".<sup>2</sup> And with equal realism, the distinguished former Editor of the Canadian Bar Review, the late Dr. Charles Morse, asked "whether now is not a convenient season for common lawyers to take Philosophy out

<sup>1</sup> Sir Frederick Pollock, *The Expansion of the Common Law* (London, Stevens and Sons, Limited, 1904) p. 8.

A reverberation of this complaint is found in the following passage from the writings of Professor Carleton Kemp Allen of Oxford: ". . . in our attempt to set the standard of law by its recognition of interests and the satisfaction of wants, we come back in the last resort to the position that justice is the highest, the most certain, and assuredly the most durable interest of all. Amid the clamor of multiplying and contending interests, the quiet voice of the philosopher, reminding us of such elementary principles as justice and liberty, may teach us more wisdom and resolve more of our doubts than the statistician, the fact-finder and the whole teeming multitude of -ologists. Justice is, heaven knows, imperfect enough in its applications, but at least it is

an ever-fixed mark

That looks on tempests, and is never shaken.

It is the abstract meditations of the thinkers, even more than the trials and errors of the doers, which help to keep that mark steady and to send its guiding beams across troubled waters; . . ." *Interpretations of Modern Legal Philosophies, Essays in Honor of Roscoe Pound* (N.Y., Oxford University Press, 1947) pp. 27, 28.

<sup>2</sup> Benjamin N. Cardozo, in a review of *Interpretations of Legal History* by Roscoe Pound, (1923), 37 *Harv. L. Rev.* 233.

of the stable, to which we have seen her consigned, and try her quality on the road of law reform. . . ?”<sup>3</sup>

As might be suspected, this divorce of law from philosophy is not a unique phenomenon. For law is a part of a culture. Indeed, it is more a reflection of a culture than a determinant of it. Its influence in shaping the times is immense, but its institutions, like those of politics and economics, are expressions of elements which lie deeper in the thought content of the age. In other words, the laws of a society are in large part the badges or insignia of the underlying attitude toward life and the world which is prevalent in that society. From this, it is clear that no portrait of legal processes and institutions is adequate without relating these features in some degree to what is basic in the spirit of the times.

## II

The prevailing characteristic of modern times is a tendency toward disintegration. It is an anti-synthetic movement, which tends to break down instead of build up, to take apart instead of put together. It applies both to society and to persons. In the social order its emphasis is atomic rather than organic; individualistic rather than corporate; provincial rather than universal. In the case of persons, it is reflected in a subjectivity which regards truth more as a matter of individual opinion than of something anchored in objective reality. The result is a pervading formlessness which characterizes both our institutions and our ideas.

If we look first at our institutions, the evidence of this disintegration is widespread and overwhelming. On the worldwide scene, it is evidenced by a nationalism which has cut the world up into a multitude of political units breathing forth the spirit of external sovereignty and war. Ethnologically, the characteristic is a similar separatism which manifests itself in a maniacal exaltation of one race, and a demoniac savagery toward another. In economic life, the emphasis has been on class, with its wolf-like struggle for supremacy carried on under the hands-off political quietism called *laissez faire*. More startling still, the spirit of dissolution has invaded the unit of society, the family, which has passed through a transition from a status generally recognized as permanent to one increasingly conceived as based upon little more than daily mutual consent. The same breakdown is reflected in education, where — at least in the United States — the various disciplines have become so widely separated that it is said that there are few college professors who could pass one

<sup>3</sup> (1945), 23 Can. Bar Rev. 805.

another's examinations, and in one of the foremost American universities it has been found necessary to create a department whose object is to make the other departments acquainted one another. And these disruptions in our natural institutions have their counterpart in religion, where individualism as a conscious principle is naturally accompanied by an ever increasing multitude of creeds and sects.

On the theoretic side, the evidence of disintegration is equally impressive. The fundamental ideological breakdown has consisted in the dissolution of the trilogy of science, philosophy and theology.

In its traditional significance, this trilogy has constituted the three methods of knowledge, which are in a hierarchical order, based upon the nature of their objects. First, there is science, which has to do with the regularities observable in phenomena. It lies at the foot of the hierarchy, because it is exclusively concerned with *how* things act, not *why*, and therefore does not include the element of value. Moreover, by the very nature of the scientific method its conclusions are tentative and uncertain. This is so because its subject matter consists of facts, and since facts are endless they are incapable of being known in their totality. Thus today's scientific conclusions are subject to being superseded by tomorrow's discoveries, and they in turn by the ever expanding process of hypothesis and verification.

Next is philosophy, which, though it has its origin in experience, goes beyond experience to what is ultimate in things. In contrast to the observable and contingent phenomena which are the objects of the scientific method, the concern of the philosopher is with the innermost or substantial aspects of reality, such as essences and natures, ends and purposes. It is in this substratum that the key to values is to be found. For example, the substratum is the clue to the good, both the individual good and the common good. For the fundamental question of value is: What is the good of the person and of society? And the answer is that it is the object of *natural* desire or inclination. The key to the problem therefore is nature, which is a metaphysical entity. In other words, what is good for man is that which is appropriate to his nature, and his nature is that essential aspect of him whereby he is destined for the perfection which is proper to him, a perfection which is the fulfillment of his human potentialities, his destiny as a human being.

Finally, there is theology, the science of God and of man's relation to God. As method of knowledge, theology is distin-

guished from philosophy by the fact that its premises are the result of Divine revelation instead of human reason and it deals with the supernatural rather than the natural. These distinctions place it at the top of the hierarchy for all those who, because of their participation in the Judaic or Christian traditions, accept the fact of revelation and its supernatural import.

The breakdown of the trilogy began at the top. It began with a naturalism which erased theology from the hierarchy, leaving man to his own devices of philosophy and science. Considered in itself and without regard for the indirect effect of the discarding of the supernatural, philosophy is capable of sustaining an integrity in natural morals and the social sciences because of its overall view of reality and because of the fact, long recognized in theology, that the effect of the supernatural is not to destroy nature but to perfect it. But that is only a partial view. Regarded as a whole, and from the viewpoint of history, man's philosophical habits exhibit a vagrant and disintegrating tendency when deprived of the accompanying orientations of theology. It is not that the intellect is incapable of attaining the truth. It is that the whole truth is not present at a given time or to a given mind. This fact is reflected throughout western thought, from the early Greeks to modern times. It appears in the plaintive resignation of Plato who, speaking through the Athenian youth Simmias in response to the arguments of Socrates regarding the immortality of the soul, says, "I feel myself (and I daresay that you have the same feeling), how hard or rather impossible is the attainment of any certainty about questions such as these in the present life. And yet I should deem him a coward who did not prove what is said about them to the uttermost, or whose heart failed him before he had examined them on every side. For he should persevere until he has achieved one of two things: either he should discover, or be taught the truth about them; or, if this be impossible, I would have him take the best and most irrefragable of human theories, and let this be the raft upon which he sails through life — not without risk, as I admit, if he cannot find some word of God which will more surely and safely carry him."<sup>4</sup> This passage, which from the Christian viewpoint might be called a pagan prophecy of the Incarnation, finds its modern accompaniment in the commentaries of Blackstone, whose orthodoxy sounds so strangely outmoded in an age of naturalism. In his discussion of the natural law, for example, Blackstone says, ". . . if our reason were always, as in

<sup>4</sup> Phaedo, *The Dialogues of Plato Translated into English by B. Jowett* (London, Oxford University Press, 3rd ed.) p. 229.

our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

"This has given manifold occasion for the benign interposition of divine Providence, which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures."<sup>5</sup>

At any rate, the burden on philosophy was too great, and with the breakdown of theology, philosophy too gave way and crumbled.

The question will immediately be asked: what, is there no philosophy today? are there no philosophers? The answer is that the prevailing philosophy is one which is limited to the systematic arrangement of the propositions of empirical science and which strenuously rejects, as invalid or superfluous, the metaphysical aspects of being and nature. It has many variations but they all join in the common doctrine that the only valid or meaningful knowledge is scientific knowledge, a knowledge of positive facts and of the uniformities discoverable in facts. From this it gets its name of *positivism*. Because of its fundamental limitation, it is not only naturalistic but also monistic; to it, all dualisms are dead. Cause and effect, means and ends, matter and spirit, are logical playthings with no counterpart in reality. Since there are no such things as essential natures, there is no essential difference between man and brute, but only quantitative variations. Since there is no final end, there is neither goal nor direction of human life but only a multitude of immediate situations, which, moreover, are but outgrowths of the antecedents, leaving all observed order, all sciences, all physical experiments that discover aspects of teleology in nature, not on the foundation of means and a Final Cause, but on the irrational assumption of chance. And since all knowledge is limited to phenomena, there are no underlying absolutes, and there is no certainty except the dogmatic affirmation that there is no certainty, an affirmation which for American positivists found

<sup>5</sup> Commentaries on the Laws of England, Introduction, Sec. II, pars. 41, 42.

its testament in a scrap of paper discovered near the death-bed of William James of Harvard: "There is no conclusion; what is concluded that we might conclude in regard to it? There are no fortunes to be told, and there is no advice to be given. Farewell."

The effect of this positivism on the social sciences is profoundly catastrophic. The reason is that with the elimination of finality — that is, of an ultimate end and of an essential nature inherently disposed toward that end — there is automatically removed the only possible basis for the good of human life and the only warranty for the dignity of human personality. This is so because the good cannot be found in mere facts, however carefully observed and verified and however skillfully arranged. The test of goodness lies in the fitness of means for end. If there is no end, there is no goodness. By the same token, if there is no essential difference between man and other creatures, there is no basis for moral distinction, in which case, just as a man may with impunity destroy an animal so a strong man should with equal impunity destroy a weaker one. Moreover, if there be no absolute, but if the relativity recently attributed to the physical world be applied to moral and social life, then there is chaos infinitely compounded. In fact, a universal relativity consisting of an infinite regression of relatives from one to another without an ultimate which is relative to nothing further is unthinkable. Upon the exclusively relativist view, therefore, nature and society are fundamentally irrational, and the field of action is left open to irresponsible will and force.

### III

If from this general view of the disintegrated state of western culture we turn to law, our forebodings are verified by what we find.

We need not dwell upon the verifications which are contained in those monstrous modern regimes of force and violence — some of them crushed, some surviving — in which law has not dared to raise its head. In these regimes, the relentless application of irrational concepts of state or class or race supremacy has either resulted in the suspension of legal processes, or, what is worse, has applied the name of law to shameless official savagery.

What is more to the point is the state of the law in the free countries. The question is whether the legal systems of those countries reflect the general disintegrating tendencies of western culture as a whole.

Offhand, law in the democracies would seem to have escaped the general trend. The courts are open. The common law survives. Magna Carta is revered, and fundamental rights are emblazoned in constitutions. But as indicated at the opening of this article, law has become orphaned from philosophy; and thereby our legal systems have taken the first step in that process of disintegration which characterizes our culture as a whole.

The disintegrating process in the case of law has followed the same pattern as in the other fields. Upon the removal of the integrating influence of philosophy, jurisprudence has been shattered into a multitude of schools based upon a great variety of postulates. This variety may be illustrated by reference to three of the more influential types of thinking.

The first is the so-called realism which regards law as a closed system of pure fact from which all norms and values are rigidly excluded. A typical example of this is analytical jurisprudence, which views laws simply as commands and which limits legal science to placing in order the multitude of laws and decisions to serve as a pattern for future lawmaking. Of this process, an author comments, ". . . Analytical Jurisprudence does not create its premisses; these premisses are furnished by the law itself. It is the function of Analytical Jurisprudence to accept these premisses and to decompose them into their final atomic elements in an organized juristic system."<sup>6</sup>

Another example of legal realism exists in the case of an influential legal writer who with commendable consistency declares himself in these frank terms, "Legal writers maintain that the lawmaker should be led by justice and that the courts have to 'administer justice', i.e. realize this justice. Such assertions are in jurisprudence by no means regarded only as empty phrases, but as founded on facts. However, they are not founded on facts, but are completely senseless. . . . There is no justice. Neither is there any objective 'ought', consequently neither any material law, i.e. legal commands. Thus the entire legal ideology — including legal rights and duties, wrongfulness and lawfulness — goes up in smoke."<sup>7</sup>

A similar antipathy against norms is found in the writings of the late Justice Oliver Wendell Holmes. Justice Holmes

<sup>6</sup> Albert Kocourek, *An Introduction to the Science of Law* (Boston, Little, Brown and Company, 1930) p. 26.

<sup>7</sup> Vilhelm Lunistedt, *Law and Justice: A Criticism of the Method of Justice, in Interpretations of Modern Legal Philosophies, Essays in Honor of Roscoe Pound* (N.Y., Oxford University Press, 1947) pp. 450, 451.

defined law as "a statement of the circumstances, in which the public force will be brought to bear upon men through the courts".<sup>8</sup> This factual vision of the law is a logical outgrowth of his repudiation of essences. In this respect, he is rigidly positivistic, for he says, "I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand".<sup>9</sup> Accordingly he says that a "right" is an "empty substratum" which we get up "to pretend to account for the fact that the courts will act in a certain way".<sup>10</sup> Therefore he says that he does not believe it is an absolute principle "that man always is an end in himself — that his dignity must be respected, etc.";<sup>11</sup> that to him the *ultima ratio* is "force";<sup>12</sup> and that "when it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way".<sup>13</sup>

The second is the historical school, which looks beyond law as fact, but in its reaction against abuses of natural law theory prefers to find the source of law in the common consciousness of the people as disclosed in custom. The provocative abuse consisted of the ill-conceived attempt by some natural law thinkers to deduce by reason from first principles a whole *corpus juris* complete in detail and applicable to all times and places. That natural law is open to no such deduction made this a tragic betrayal of natural law theory and drove adherents from it in search of new foundations for law. For such a new foundation, the historical school seized upon a fact, namely, the influence of custom on lawmaking, and, looking beyond custom to the folk-spirit which animated it, elevated that spirit to the place of primacy in the whole field of the law. Prompted no doubt by a caricature of nature, it revolted against the idea of nature itself. But it felt the need of a norm. And it found such a norm in what seemed to be a semi-mystic, internally operating evolution by which a people's destiny is unfolded. This silently operating evolution was the source of all laws and human rights, and against it the human will should create no law which might stand in the way.

<sup>8</sup> *American Banana Company v. United Fruit Company*, 213 U.S. 347, at p. 356.

<sup>9</sup> *Holmes-Pollock Letters* (Cambridge, Mass., Harvard University Press, 1944) Vol. 2, p. 252.

<sup>10</sup> *Op. cit.*, Vol. 2, p. 212.

<sup>11</sup> Harry C. Shriver, *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* (N.Y., Central Book Co., 1936) p. 187.

<sup>12</sup> *Holmes-Pollock Letters* (Cambridge, Mass., Harvard University Press, 1944) Vol. 2, p. 36.

<sup>13</sup> Harry C. Shriver, *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* (N.Y., Central Book Co., 1936) p. 187.



It is typical of the disruption of tradition in its rejection of the objective nature of man and society as the basis of justice and fundamental right and in its identification of law with such a provincial thing as national spirit.

A third modern attitude toward law consists of various theories which may be generally classed as pragmatic. This doctrine is described by William James as anti-intellectualist in that it appeals always to particular facts, emphasizes practical utility and disdains metaphysics as mere verbal unreality.<sup>14</sup> It is a pluralism which ignores all philosophic unification, because it looks away from "first things, principles, 'categories', supposed necessities", and looks towards "last things, fruits, consequences, facts".<sup>15</sup> Truth is what leads to other parts of experience with which we feel that our original ideas are in agreement. As William James put it, "The true' . . . is only the expedient in the way of our thinking, just as 'the right' is only the expedient in the way of our behaving".<sup>16</sup>

The effect of pragmatism upon morals and law is to create a chaos among means for lack of an end. It is not that the pragmatist has no end or purpose in action. The human mind and will are so constituted that a human act necessarily includes purpose. Only unconscious or insane acts are without purpose. But the pragmatist end is not a true end, because it includes neither finality nor objectivity. Its end is the useful; but usefulness is a quality of means, and the question remains, *useful for what?* Its end is also happiness; but happiness is a subjective quality, and the question remains, *what produces happiness?* To attempt to construct a philosophy of life within a closed circle of means and subjective states leads inevitably to that tragic last testament of James, "There are no fortunes to be told, and there is no advice to be given. Farewell."

Here is the supreme depth of our cultural disintegration, the end product of that dissolution of science, philosophy and religion, under the influence of which good men struggle to cure the ills of society but because of their intellectual nihilism struggle in vain. It is in this setting that the great instrumentality of law now wields its mighty influence among the lives of men. For us lawyers, the question intrudes through all our other preoccupations: What will the future of this great instrumentality be?

<sup>14</sup> Pragmatism: A New Name for Some Old Ways of Thinking (N.Y., Longmans, Green and Co., 1921) pp. 53, 54.

<sup>15</sup> William James, *op. cit.*, p. 55.

<sup>16</sup> *Op. cit.*, p. 222.

## IV

Chaos is intolerable. It must be replaced by order.

The signs of this necessity are already evident in present day life, wherein the reaction against the modern chaos in our institutions has already begun. Irresponsible nationalism has run its course, and there is a beginning recognition of the necessity for world organization. The old *laissez-faire* economy is yielding to increased regulation. The threat of family destruction is beginning to produce cries of alarm, even from the pragmatists. Minority races are insisting on removal of the yoke of discrimination. Education is looking for formulas for reintegration. And in August of this year there was held a world congress for unification of religious sects.

However, the fact that chaos is being replaced by order is not necessarily ground for reassurance. Order eventually comes, because it is demanded by the exigencies of life. But there are two kinds of order. There is an order of force and an order of ideas, an order of will and an order of reason. Under Fascist Italy, the trains began to come in on time, but freedom was running out. Some people took heart at the appearance of orderliness, but they failed to detect the tragic disorder beneath the surface.

The disruption in legal theory will be removed when it is again recognized that law is rooted in morals. But that will not be until it is also recognized that morals are rooted in metaphysics. This is merely to say that law is normative or it is force. And if it is to be normative, there is only one norm, and that is the natural law — the law of man's nature — whereby those things alone are good which conform with that nature.

The effort to cut short of this norm has bred a false disjunctive in legal theory by which the schools of thought are frequently classified as philosophical, analytical, historical or pragmatic. A philosophy of law, which recognizes the relationship of law to morals and metaphysics, includes, rather than stands as an alternate to, the elements of truth in the other three doctrines. It includes the truth of analytical jurisprudence that laws are facts, and of the historical school that laws are influenced by custom, and of pragmatism that there is a correlation between utility and the good. But it rebels against the claims of these schools that they constitute any more than a part of the truth about law, and it demonstrates that these schools are not strictly philosophy of law because they do not attain to what is truly ultimate in it.

Any hope of reform in legal theory, therefore, will depend upon a philosophical reintegration which will restore law to its natural foundation. The beginnings of this foundation were laid by the early Greeks. That achievement was furthered by the legal genius of ancient Rome. It was extended and developed by the great mediaeval philosophers. It flourished in the modern law of nations. Then it became the victim of misconception and abuse, scandalizing the subsequent age into protest and dissent.

If the present age could reexamine the core of the natural law doctrine, stripped of its spurious trappings, it would surely be a fresh beginning in that perennial synthesizing of theory and experience known as jurisprudence. It would recognize that the making of law is an art, the art of prudence, by which, with due regard for existing circumstances, and for the time being, a particular form is given to principles and precepts which spring from the nature of man and society. The principles are the first principles of man's practical reason: seek the common good, or, do good to others, harm no one, and render to each his own. From these principles are necessarily and immediately deduced the precepts: for the individual, do not kill, or steal or slander, bear your share of the burdens of society, and so on; for the state, foster and protect those rights of the individuals which are necessary for their self-realization as human beings. Surely this is the solid ground of the law and the source of its reintegration.

The reintegration will come, because it is grounded in reason, and reason is historically recurrent. It will come when philosophy resumes its place with science for the assaying of true knowledge. Will that take place without a restoration of theology as the highest discipline? There is no limitation in the philosophic method itself which would prevent such a result; but considering human minds as they are, our reflections go back to the gentle skepticism of Plato and the sharper strictures of Blackstone, and when they do, they evoke a question which for Christians generally may find its answer in the well-known passage from St. Thomas Aquinas: "It was necessary for man's salvation that beyond the physical sciences, which are sought out by human reason, there be some doctrine revealed by God Himself. First, because man is ordained to God as to an end that exceeds the comprehension of his reason: 'The eye hath not seen besides Thee, O God, what things Thou hast prepared for them that wait for Thee' (Isaias 64:4). It needs must be that the end be foreknown to the men who are to order their minds and their deeds to that end. Hence for man's salvation it was necessary that certain things that exceed

human reason be made known to him by divine revelation. Even in the case of those truths about God that human reason can search out, it was necessary for man to be instructed by divine revelation, for the truth about God searched out by human reason could be attained only by a few men, after a long time, and with an admixture of many errors, whereas man's whole salvation depends on a knowledge of that truth which is in God. Hence that salvation might come to men more fitly and securely, it was necessary that they be taught by divine revelation. Therefore, beyond the philosophical sciences, which are investigated by human reason, it was necessary that sacred science be known through divine revelation."<sup>17</sup>

For those who do not share the Christian faith, the foregoing passage will be devoid of reality. But for those who do share that faith and who recognize the part that that faith has played in the genesis and growth of western civilization, it will be a reminder of the fact that without religion there is no guarantee of either intellectual or moral integrity.

The problem which faces law, therefore, is a part of the larger problem which faces our entire culture. It is the problem of putting together again the shattered parts of that culture, so as to give that wholeness of view which charts the course for a truly human life.

This implies no effort to reconstruct any previous regime; nor does it imply that the last word has been said upon anything. On the contrary, it implies an ordered view of man and nature which is the necessary prelude to any genuine progress.

Above all, it implies the establishment of ends for the rational marshalling of the means of science. It is this cultural need which the noted Vice-Chancellor of the University of Oxford, Sir Richard Livingstone, had in mind when he wrote, "If you want a description of our age, here is one. The civilization of means without ends; rich in means beyond any other epoch, and almost beyond human needs; squandering and misusing them, because it has no overruling ideal: an ample body with a meagre soul."<sup>18</sup>

The overruling ideal is the joint product of philosophy and religion. Not until that ideal is restored will the world be at peace. Not until it is restored will law possess the framework within which it can securely operate as an instrument of justice and human welfare.

<sup>17</sup> *Summa Theologica*, Part I, Q. 1. a. 1.

<sup>18</sup> *On Education* (N.Y., The Macmillan Company, 1944) p. 118.