

## WHAT LAW NEEDS FROM PHILOSOPHY

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*Una norma jurídica es un pedazo de vida humana objetivada. Sea cual fuere su origen concreto (consuetudinario, legislativo, reglamentario, judicial, etcétera), una norma jurídica encarna un tipo de acción humana que, después de haber sido vivida o pensada por el sujeto o los sujetos que la produjeron, deja un rastro o queda en el recuerdo como un plan, que se convierte en pauta normativa apoyada por el poder jurídico, es decir, por el Estado. Lo que importa subrayar aquí es que la norma jurídica es vida humana objetivada, porque siendo así resultará claro que, para comprenderla cabalmente, debemos analizarla desde el punto de vista de la índole y de la estructura de la vida humana.*

LUIS RECASÉNS SICHES

It is a very great privilege to be permitted to participate in a *Festschrift* in honor of Luis Recaséns Siches. For many decades, it has been a consolation to me that he continues to adhere to the conviction that law and legal philosophy are subjects embedded in the deepest way imaginable in the ordinary life processes of mankind. He vindicates for me a conviction which I have always had intuitively that law is part of the *feeling* life of mankind. That he has been able to maintain this position in the face of the catastrophic rise of modern technology, of the holocaust of world wars, and of the disintegration of virtually all of the systems that regulated civilized human existence is a tribute to his intelligence, his personal courage and his profound knowledge of law and philosophy. I cherish particularly his good sense in insisting always and everywhere in founding law on what he calls "objectivated human life" (the collective concourse of humanity in its social interactions) at the same time that he holds paramount over even this the inviolability, the dignity and the worth of the individual. Although the following thoughts will take quite other directions that he pursues, I hope that my aims for humanity, both social and individual, will not be in essential conflict with his.

## 1. The World-wide Demand for Law

If law were a commodity, its demand-curve would be seen to have risen astronomically in modern times. Food, energy and law are the things that the world's peoples are asking for in ever-increasing amounts. I have written elsewhere of Law and Technology as the Twin Monsters of Modern Life.<sup>1</sup> Briefly put, law is expected to solve all the problems created by modern technology in addition to the traditional burdens that have always rested on it by virtue of man's inherently contentious nature. Virtually all the peoples of the world are in the process of adopting or revising whole systems of law. Law is supposed to support national and international life, to regulate racial, religious and national struggles, to adjust conflicting demands of labor and capital, to bring at least minimal order into domestic and familiar strife, to provide revolutionary movements with rational motivation for their programs and enduring forms for post-revolutionary stability. Meanwhile, so-called stable governments are under constant pressure to reform themselves by law in the interest of conflicting groups which themselves often recognize their claims as irreconcilable. Traditional legal forms, even those of the most fundamental nature, are in a state of collapse as a result of these wholly unprecedented demands.

## 2. The Limits of Effective Legal Action

It is obvious that nothing in the history of law as a mechanism of social control has prepared us for this avalanche. Traditionally, law has always relied on religion, ethics, custom, and just plain human inertia to carry the vast burden of human contentiousness. These alternative modes of control have all failed. What irony to recall that only a few centuries ago, men guided by the great philosophers of the Enlightenment still thought of Law as Evil! "That government is best which governs least" (Thomas Jefferson). Law though necessary is necessarily bad. Since law is restraint on human liberty, it justifies itself only where it is a restraint upon a restraint (Kant). We can hardly imagine anyone today seriously advancing such "utopian" ideas.

Legal positivism is helpless in the face of the universal demands for law of all sorts and kinds. The formal aspects of law are being ignored. All the constraints which Positivism felt it necessary to impose on governmental action in order that such action qualify as law disappear. Multi-national corporations and other economic conglomerates are being likened to governments. Law itself occupies so vast a part of social life that it is becoming difficult to discover what is *not* law. Sovereign authority is meaningless in these circumstances. This situation makes Kelsen's General Theory

<sup>1</sup>"Law and Technology: Uneasy Leaders of Modern Life", *Case-Western Reserve Law Review*, vol. 19, 1967, p. 120.

of Law, with its hierarchy of authoritative norms, merely an exhibit in the museum of historical legal forms. It is as out-moded as the ideas of the Enlightenment, just as those systems of rationality had little relevance to the pressing needs of the hungry *sans culottes* of the Revolution. Positivism in Europe and in Latin America and analytical jurisprudence in the common law countries were analyzing an ideal system of law that never actually existed and that had become only a fond memory at the time of their analyses. They failed even to address themselves realistically to the positive law, as American Neo-Realism has so adequately shown. That is to say, positivism failed to portray the limits of effective legal action<sup>2</sup> (what law can and can not do) even in its own day, though this task is an absolute necessity for any theory of the nature of positive law. In an age which has simply discarded the notion that there are any limits to what law can be expected to do, the pre-occupation of positivism with an ordered hierarchy of the traditional forms of law is simply irrelevant. What, then, of positivism's natural enemies, the anti-positivistic theories of the nature of law?

### 3. Anti-positivistic Legal Theories

Natural law, still the most consequential of these, escapes of course the difficulty of constructing a rational hierarchy of legal norms backed by the organized force of government. However, since its guiding principle is Justice, it must ultimately insist that every prescription that purports to be law must be just. A "law" that is not just is not truly a law. As a practical matter, historical systems of natural law have had to assume that the actions of the existing sovereign are in fact just, or else accept themselves as the system of thought that justifies revolution. Natural law, in brief, must finally admit that the task of defining justice is even more onerous and less likely of success than the task of defining law. It is true that natural law remains relevant even in an era of exploding demands for action through law, but its task of deciding justly among an enormously growing mass of conflicting demands becomes a hopeless one.

I pass quickly over Phenomenological Jurisprudence in its *a priori* aspects, since these have suffered the fate of all apriorisms. They have been perceived to be out-worn epistemologies. The *a posteriori* life systems are another matter. Likewise, I reserve out of Existentialism its concern for the fate of the individual human being, but point out that since it has little to say of law a mode of social action its relevance for law is strictly limited. This leaves me with Recaséns Siches' two principles of law: objectified human life, and the paramouncy of individual existence. My concern here lies in the fact that these are philosophical principles, the first a principle of

<sup>2</sup> See Julius Stone. "Science and Limit-Situations for Mankind". *Dimensiones des Rechts: Gedachtnisschrift für René Marcic*. Berlin, 1974, p. 300.

legal ontology and the second a principle of ethics. As such, they can be no more firmly based than the general philosophy which supports them. And philosophy everywhere is in grave difficulty.

#### 4. The Poverty of Philosophy

When Karl Marx predicted the end of philosophy and the supremacy of science (the point is not to think about the world, but to change it) he had no way of knowing that science and its monstrous offspring, technology, would soon help to bring the world to a state of permanent crisis. But he did correctly predict that philosophy would suffer a general decline. Brilliant individual thinkers exist now as always. But there is no general philosophical system or congeries of systems that commands respect as summing up the current aspirations of humanity. No authoritative, even if contradictory, systems of thought gain general adherence and thus permeate and inform the cultural life of humanity. Not even the gigantic political and economic confrontation of capitalist and Communist countries has given rise to systems of philosophy. Marxism is either a bureaucratic creed or the ideological plaything of dissident groups. The opponents of Communism have no guiding philosophical positions at all.

The twentieth century, now entering its last quarter, has quite generally been perceived to have been in a state of increasing moral crisis. It is difficult to be sure that this is not a result of our own myopia. Every age sees itself in a state of alarming crisis. Still, our own crisis may be something special, and the voices of optimism are few and far between. In any event, doom is in the air, and one would expect, in the light of history, the emergence of religious creeds rather than philosophic systems.

Meanwhile, philosophy remains inside academic walls, and the academicians as caretakers are fulfilling their traditional role. This is all that one can expect from the bloated bureaucratie regimes that our universities have become, and it would indeed be surprising if creative philosophic work could possibly take place in the midst of such senselessly active beehives.

I conclude that regardless of the cause, our own is an era of philosophic poverty and pending the emergence of new inspiration we must get along with existing and traditional modes of thought.

#### 5. The Appetite of Legal Philosophers

Legal philosophers have always been hungry for philosophy. Roscoe Pound noted the immense range of this appetite. Every philosophical movement has its legal philosophical counterpart. Let us look at Luis Recaséns Siches as an example to stand for all of us. Not only did he swallow up Greek and Roman philosophy, medieval and modern philosophy, including Kant, Hegel, Husserl, and virtually all the nineteenth century thinkers, but he also consumed all the philosophy of legal philosophers down to

and including the American legal realists, and Kelsen and Stammler pre-eminently, not overlooking the New-Scholastics, and of course present and past Latin American legal philosophers. *There is now no more philosophy left to us to consume.* Indeed, unless I am greatly mistaken, the philosophers have turned about and are now consuming the legal philosophers. This is only just, but it leaves us hungry.

#### 6. An Appeal for Philosophy for Law

I appeal to the philosophical community to cease its interest in us legal philosophers and turn its attention to its proper business, the nature of man in the late twentieth century. What does the human race expect of itself, what does it conceive its destiny to be, what does it mean to be truly “humane” in the chaos of contemporary life, what are the general aspects of “objectivated life” today?

#### 7. The New Humanity

Human rights today are still conceived in the frame-work of the Enlightenment and in the nineteenth and twentieth century revolutions that tried to give concrete objective form to these aspirations. What could be accomplished with these philosophic hopes has been done or has been shown to be unattainable. Now philosophers must frame new hopes and new aspirations consonant with the revised conception that humanity has of its destiny. When these are articulated in the form of philosophical principles by philosophers, it will be relatively easy for legal philosophers to show how these ideals may be made concrete through the forms of law. We need to be shown not what human life, social and individual, *is* at present, but what life wants to be, what it ought to be. That is the present task of philosophy.