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COMMENTARY: A TRILOGY ON GREAT PHILOSOPHERS IN THE LAW

LUIS KUTNER*

PLATO AND ARISTOTLE: PRECURSORS OF THE HUMAN RIGHTS OF WORLD HABEAS CORPUS

To reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . . and in promoting and encouraging respect for human rights and for fundamental freedoms for all. . . .

—United Nations Charter

Everyone has the right to life, liberty and security of person.

—Universal Declaration of Human Rights, art. 3

. . . It is the overriding aim to aid in the implementation of . . . human dignity . . . in order to more fully establish the sanctity of human liberty, provide for the security of the individual and guarantee human rights. . . .

—Preamble, World Habeas Corpus

Modern political thinkers regard the individual as possessed of rights which the state is expected to guarantee, thereby securing conditions of spontaneous growth of character.¹ Among these eternal rights which the state is bound to respect are freedom of press, worship, and speech, the right of free elections, and the right to judicial safeguards—all of which are considered sacred and inviolable.

The concept of human rights held by both Plato and Aristotle, however, was unlike the Hebraic or Christian and Modern Western conceptions.² The concept of personal rights as seen in modern

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1. E. BARKER, *THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE* 7 (1959) [hereinafter cited as BAKER].

2. L. KUTNER, *WORLD HABEAS CORPUS* 20 (1962) [hereinafter cited as KUTNER].

political thought was not as prominent in Greek political thought—perhaps, due to the fact that the Greek felt himself to be of worth and influence in the life of the whole community; secure in his social value, he did not trouble with his “individual” person. Thus, the starting point for Plato and Aristotle became the state—as a means whereby the good (or virtue) could be impressed on the individual.³

In the writings of Aristotle, for example, it can be seen that the goal of virtue could only be achieved as a citizen of a state, the *polis*.⁴ The individual apart from the state was the “most malignant and dangerous of beasts.”⁵ He who was without *polis* by reason of his own nature was “a human beast worse than any animal, a brutish man, a barbarian not found among other men because he was beyond human nature; he stood outside of human society in violation of the very concept of man . . .”⁶ Being a social animal, man spontaneously tended toward partnership with those to whom he was akin by nature.⁷

Like Aristotle, Plato envisioned the state as the place where goodness could be realized.⁸ In his *Republic*, he viewed “the Good itself” as “a pattern for the right ordering of the state and of the individual themselves included.”⁹ While Plato contended that the mere attainment of such virtue alone was sufficient to bring happiness, Aristotle later added that no one would argue thusly “unless he were maintaining a thesis at all costs.”¹⁰ As for his own concern with the reality of Good in the state,¹¹ Aristotle viewed the end of the *polis* as the attainment of the good life via social institutions, with the “good man” being identifiable only as the “good citizen” within the state.¹² No goal transcended the ideal of the *polis*, against which no right of a citizen could be admitted.¹³ Rights

3. BARKER at 7.

4. H. ROMMEN, *THE NATURAL LAW* 18-19 (1959) [hereinafter cited as ROMMEN].

5. R. POUND, *JUSTICE ACCORDING TO LAW* 9 (1958) [hereinafter cited as POUND].

6. M. HAMBURGER, *MORALS AND THE LAW: THE GROWTH OF ARISTOTLE'S LEGAL THEORY* 85, 89 (1951) [hereinafter cited as HAMBURGER].

7. J. ZANE, *THE STORY OF LAW* 2 (1927).

8. ROMMEN at 13.

9. Oppenheim, *Metaethics of Natural Law*, in *LAW AND PHILOSOPHY* 243 (S. Hook ed. 1964).

10. Stern, *Either-Or or Neither-Nor?*, in *LAW AND PHILOSOPHY* 249-50 (S. Hook ed. 1964).

11. J. ZANE, *supra* note 7, at 3.

12. HAMBURGER at 169.

13. ROMMEN at 18-19.

existed only between those who were free and equal before the state,¹⁴ for equality was to be found among those who shared their life in community¹⁵—and justice in the state demanded a unanimity in which mutual rights would not be violated.¹⁶

Plato, however, neither predicated his concept of justice upon the idea of rights nor viewed the function of justice as that of maintaining such rights.¹⁷ Rather, in *The Republic*, he attempted to redefine justice in terms of an educative polity in pursuit of harmony, for justice to him included moral truth in the individual and harmony in social life.¹⁸ It was in justice that Plato saw the harmonizing of the soul which made it one with virtue generally,¹⁹ this supreme virtue then harmonizing all other virtues.²⁰ To Plato, justice was a quality of the state.²¹ Making the distinction between that which was legally and that which was naturally just, he contended that there could be no justice in the state when laws were passed for the good of a particular class instead of the commonweal.²² In this way, justice was likened to the body politic; just as a healthy body required that each organ function properly to such a degree that it reinforced, rather than hindered, the function of all the other organs, so, too, a just state required the general harmony of all the society.²³ This justice of the state Plato identified with the individual, since it was comprised of the individuals composing it. Hence, each individual showed justice.²⁴

Despite the widespread familiarity with Plato's *Republic*, it was Aristotle's discussion of justice that served as a model for all future discourses on the subject.²⁵ Like Plato, Aristotle distinguished that which was naturally just from that which was legally just²⁶—the former being in accord with nature, common to all regardless of source,²⁷ with the same force everywhere,²⁸ and the latter being

14. POUND at 9.

15. HAMBURGER at 58.

16. POUND at 9.

17. BARKER at 118.

18. J. SHKLAR, *LEGALISM* 113 (1964).

19. B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 38 (1927).

20. POUND at 3.

21. BARKER at 118.

22. ROMMEN at 13-14.

23. M. COHEN, *REASON AND LAW* 92 (1950).

24. BARKER at 118.

25. J. SHKLAR, *supra* note 18, at 113.

26. ROMMEN at 17.

27. C. HAINES, *REVIVAL OF NATURAL LAW CONCEPTS* 6-9, 23 (1965).

28. W. SEAGLE, *THE HISTORY OF LAW* 370 (1946).

solely derived from man-made enactments applicable to a particular place and to each separate community.²⁹ Aristotle proceeded to divide justice into the distributive type, relative to rights and duties apportioned to each, and the corrective type, which included those functions for the enforcement of rights or redress.³⁰ Where the original distribution of justice was defective, corrective justice was called for to render to man as near as possible what belonged to him,³¹ each receiving his due of justice.³² Recognizing that no system was perfect, Aristotle realized that to overcome imperfections in the law a principle of equity was required so that each individual case got its right.³³ Without intending to diminish the importance of the dual system of corrective justice, however, it should be noted that the most important feature was the doctrine of distributive justice,³⁴ on the basis of which political rights were distributed in much the same way as scarce goods were handed out to competing groups or persons, according to some accepted notion of merit.³⁵ With each being judged equally by his fellow men according to merit, the guiding idea for equality thus became one of proportion based on merit³⁶ by which rights were so determined—the better getting more of what was good, and each getting that which benefitted him.³⁷

When it came to rights, Plato's objective was clearly to destroy a false kind of individualism by abolishing individual rights such as those embodied in the proposition that "might makes right."³⁸ Indeed, while the Just may have been "something expedient" for established government, it was not something that belonged to the "more powerful."³⁹ Further, Plato sought to deny freedom in the sense of allowing man to do as he likes.⁴⁰ Freedom was sought only insofar as it realized order.⁴¹

29. C. HAINES, *supra* note 27, at 7.

30. J. ZANE, *supra* note 7, at 120-21.

31. POUND at 5, 9.

32. B. CARDOZO, *supra* note 19, at 38-39.

33. ROMMEN at 18.

34. POUND at 9.

35. J. SHKLAR, *supra* note 18, at 115.

36. POUND at 9.

37. HAMBURGER at 135.

38. BARKER at 153-54.

39. F. JOHNSTON, JR., MODERN CONCEPTIONS OF LAW 142-43 (1925).

40. BARKER at 153-54.

41. ROMMEN at 13.

Plato's advocacy of state supremacy over the individual in even the most personal affairs was to serve as the basis of Hegelian philosophy, as well as other totalitarian systems, where the individual was subjugated.⁴² The extent to which Plato would go in denying rights to the individual is demonstrated by his position in favor of abolishing property.⁴³ Nevertheless, Plato wanted to develop individualism in the true sense and, along with it, the rights and freedom such individualism required. What he was talking about where the "real rights."⁴⁴ This Greek philosopher, in particular, was responsible for introducing the new concept of "public," rather than "private," rights and authorities evolving from law.⁴⁵ To secure freedom, the individual had to be both set "free" from everything which prevented him from taking his rightful place in the order of the state and allowed to live under conditions necessary for him to perform his function in the state. This, in turn, would help the state perform its own functions. Being a member of a community did not destroy an individual's rights. They still belonged to him; indeed, they were secured for him by the community in which he acted. An individual with no interests outside himself was limited in his actions. The greater the sum of his interests in the whole body of which he was a part (and merely a single aspect), the greater his individualism. Extension of self, it was felt, would lead to an absolute, true realization of self, identified with nothing more than the state—not even on the level of the family unit.⁴⁶

For Aristotle, all rights were primarily based on personality. Man was a person: he had will; but mere personality did not, of itself, involve the right of liberty, and neither did mere capacity for expressing a will. Only a social personality could claim freedom. Like all rights, personality was individual, rooted in the person; yet, it was social, as well. Every right postulated a recognition of a person by society: a recognition of the same goals and purposes as the society in which he lived. This appeal to a sense of personality led Aristotle, unlike Plato, to uphold the concept of property. The ultimate foundation of the property concept could be found in reflection of oneself. Each must have his own for the very sense

42. KUTNER at 21.

43. BARKER at 156.

44. *Id.* at 154.

45. KUTNER at 20.

46. BARKER at 154-55.

of self—a feeling of personality. Property, then, became a medium for expressing the will (which was oneself).⁴⁷

Both Plato and Aristotle believed in, above all, the excellence of reason. This belief bespoke a certain faith in the worth of the individual—a faith which prompted these Greek philosophers to give the basis of reason to the law and, thus, perform an everlasting service.⁴⁸

It was Plato who introduced the qualities of “reason” into the law through his writings, wherein justice under law was associated with the “Good, the True and the Beautiful.” In Plato’s ideal state, however, the law could be dispensed with because the Philosopher-King embodied the principle that “Goodness is Righteousness in Justice.”⁴⁹ The Philosopher-King achieved justice by giving every man not the due of some average man who neither ever existed nor could exist but, rather, his own due. At issue here was the ancient question of whether it is better to be governed by the best man or by the best laws.⁵⁰ Plato pointed out that law was only possible where there was a willingness to generalize—a willingness which necessarily resisted the need to treat each as an individual.⁵¹ Therein lay the vice of the rule of law. Such passionless, impersonal machinery imposed crude generalities of law upon the complex, shifting, changing human material of society, where each individual should be treated as such instead of as a case under a general rule.⁵² As Plato said in the *Statesman*:

The law cannot comprehend exactly what is the noblest or most just, or at once ordain what is best for all. The difference of men and action, and the endless and irregular movements of human things do not admit of any universal and simple rule. . . .⁵³

Nonetheless, Plato favored the rule of law above the rule of citizens and rulers alike in the reality of the city-state.⁵⁴ While the Philosopher-King was necessary to Plato’s ideal system, in the real world it was highly improbable that such a person could possess

47. *Id.* at 367, 393.

48. KUTNER at 21.

49. *Id.* at 20-21.

50. A. SUTHERLAND, *GOVERNMENT UNDER LAW* 548 (1956).

51. Kuhns, *Rule and Case*, in *LAW AND PHILOSOPHY* 220 (S. Hook ed. 1964).

52. A. SUTHERLAND, *supra* note 50, at 549.

53. W. SEAGLE, *supra* note 28, at 182.

54. KUTNER at 21.

the experience and wisdom needed to govern a state in this way.⁵⁵ To be sure, experience had taught Plato that his ideal of a Philosopher-King governing by will, which he had believed to be intrinsically superior to government by law, was unattainable—and, given the “hard facts” of human nature and the inherent egotism of every man if ordinary men were allowed to rule by will alone, the interests of the community would be sacrificed to those of the ruler. All power corrupts, and absolute power corrupts absolutely (*à la* Lord Acton). Thus, Plato modified his ideas somewhat, as government under law was at least “second best.”⁵⁶

Aristotle, far less idealistic than his teacher, always preferred government under law—the established rule of law which he recognized as emanating from the state⁵⁷—to that of any individual man,⁵⁸ for if man, himself, were to rule, he would add the character of the beast to pervert even the best man. Praising constitutionalism for its adoption of the rule of law and fair equality,⁵⁹ Aristotle favored rule under a constitutional system of law, as it would not suffer from personal caprice.⁶⁰ Aristotle, thus, looked upon the law as “Reason unaffected by Desire.”⁶¹ His belief that “will, not force, is the basis of law” and that “if a constitution is to survive, all of the elements of state (the people) must join in willing its existence and its continuance,”⁶² formed the basis of World Habeas Corpus.

Plato and Aristotle adopted an “essentialist,” rationalist approach which concerned itself not with the subjective living person but, rather, with the objective “nature,” “idea,” “form” or “essence” of things.⁶³ For example, Plato dealt with the idea of law in that realm it abided,⁶⁴ and Aristotle spoke of reason as a part of the essence of man.⁶⁵ Moreover, the Platonic-Aristotelian tradition was particularly concerned with the “essence” of the law and

55. Y. SIMON, *THE TRADITION OF NATURAL LAW* 25 (1965).

56. MacDonald, *Government under Law*, in *THE RULE OF LAW* 3-4 (A. Harding ed. 1961).

57. *Id.* at 4-5, 26.

58. A. SUTHERLAND, *supra* note 50, at 118.

59. HAMBURGER at 59.

60. J. ZANE, *supra* note 7, at 123.

61. KUTNER at 20.

62. E. BARKER, *THE POLITICS OF ARISTOTLE* 94 (1957).

63. KUTNER at 20.

64. ROMMEN at 15.

65. C. CURTIS, *IT'S YOUR LAW* 132 (1954).

the natural and conventional law in terms of right by nature *vis-à-vis* right by custom or legislation, to preserve the social status quo. The entire purpose was to create "systematic" order from a world of apparent chaos.⁶⁶

Plato fully developed the idea of maintaining the social order through law. Every man was assigned to a class to which he was best fitted. Once the assignments were made, the law kept everyone there so as not to disturb the social order. A shoemaker was only to be a shoemaker, not a pilot too.⁶⁷ Aristotle, on the other hand, while recognizing that inequality arose between individual men in their differences and worth of capacity for the tasks which the social order called for,⁶⁸ tended to underevaluate manual labor, which in an analogy to the way in which fire burns, implied that one who worked with his hands did so merely out of routine, acting from nonrational habits.⁶⁹

A similar weakness may also be noted in Aristotle's attitude toward slavery.⁷⁰ It seems almost incongruous that the lofty mind of Aristotle would conveniently accept slavery and that he would even defend it.⁷¹ Yet, it was he who gave excuses in defense of slavery:⁷² Aristotle tried to justify the institution on the grounds that certain men were, by nature, unfit for citizenship because they were incapable of being educated to virtue.⁷³ Nature had made them slaves, as they were men who could obey reason but were unable to exercise it.⁷⁴ Believing that these men could not truly determine themselves by reason, and were ruled instead by their passions, Aristotle maintained that they ought to be ruled in the form of ownership by those who were more nimble of mind.⁷⁵ However, Aristotle, in his view of natural slavery, still advocated a humane exercise of the rule of the master over the slave and envisioned the development of "a community of interest, and a relation of friendship" between the two "when both . . . naturally

66. KUTNER at 20, 27.

67. R. POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 76 (1922).

68. *Id.* at 82.

69. Y. SIMON, *supra* note 55, at 29.

70. *Id.* at 81.

71. KUTNER at 21.

72. Rommen, *In Defense of Natural Law*, in LAW AND PHILOSOPHY 115 (S. Hook ed. 1964).

73. ROMMEN at 9, 32.

74. Y. SIMON, *supra* note 55, at 117 n.2.

75. Rommen, *supra* note 72.

merit the position in which they stand." This humanitarianism demonstrated Aristotle's regard for a slave as more of a man than a living tool; certainly a slave had more reason than a child whom one had but to command.⁷⁶ Aristotle did, in fact, see an injustice in slavery based on conquest or "force of law" (which he distinguished from slavery "by nature").⁷⁷ And, whereas Plato held firm on slavery as an institution, there is evidence that Aristotle, himself, may have been uncomfortable with his own argument for slavery. After all, he did free his slaves in his will.⁷⁸ By arranging for their freedom, Aristotle was true to the words he had written when he advised that "it is wise to offer all slaves the eventual reward of emancipation."⁷⁹

In conclusion, suffice it to say that the writings of Plato and Aristotle have long provided a source of wisdom from which great jurists have drawn, either directly or indirectly.⁸⁰ Specifically, in the area of human rights there is surely agreement with the premise that to understand oneself as a human person one must see what he ought realize in order to actualize himself as a person in his free acts—both internal and those affecting the world.⁸¹ Perhaps John Stuart Mill best summarized the contribution the Greek philosophers made to mankind when he characterized "the source of equality" as emanating from "the lofty inspiration of Plato and the judicious utility of Aristotle."⁸²

76. HAMBURGER at 139.

77. Y. SIMON, *supra* note 55, at 117 n.2.

78. ROMMEN at 9.

79. HAMBURGER at 139.

80. M. COHEN, *supra* note 23, at 1.

81. Rommen, *supra* note 72, at 114.

82. KUTNER at 31.