Juridical Positivism and Human Rights By Mieczyslaw Maneli

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BOOK REVIEWS

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The legal and philosophical problem of human rights has been a controversial issue in international law. In the 150 years before World War II, international law was not concerned with human rights. Only the sovereign states had legal rights and duties in the international context. The individual person was merely an object of international law; he enjoyed no rights and had no duties. A nation's treatment of its own nationals, no matter how heinous, was not the concern of international law.

Recent jurisprudence is more active in seeking to protect human rights. To provide the analytic framework for a new attitude, legal theory has had to develop accordingly. Natural law has been the primary vehicle of this development; it stands in sharp contrast to juridical positivism, the so-called tool of tyrants. Mieczysław Maneli, in his new book Juridical Positivism and Human Rights, re-assesses the popularly held notion concerning juridical positivism and argues that his theory affords the best protection for human rights in today's international society. Professor Maneli adds a unique perspective on the role of juridical positivism and the protection of human rights in various modern societies.

The traditional absolutist notion of the state, where the state could treat its citizens "according to discretion," originated in the theories of Georg Hegel, the German philosopher. According to the Hegelian theory, the state is a moral person which is superimposed upon the individual members of a political society. As a person the state exercises supreme power for itself by its own natural, inalienable right; it is sovereign. This theory results, finally, in the state substitut-

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1. Professor Maneli was Professor of Law and held the chair of History of Political and Juridical Doctrines at Warsaw University in Poland. After he lost that academic position during the anti-liberal purges of 1968, Professor Maneli left Poland and assumed his present position at Queens College.

ing itself for the people to the detriment of the people, as the totalitarian states of this century have clearly demonstrated.

Professor Maneli discusses the Hegelian-Marxian dialectic as it has operated in the Soviet Union and in Communist Poland. According to the Communist Manifesto “law is the will of the ruling class,” serving the interests and purposes of this class. Law is an instrument of the class struggle. Thus, according to this theory, no legal rules which serve all the people or all of mankind can exist. The terrible excesses of the Stalin period directly followed this idea. The extermination of the kulaks, the establishment of a terroristic police force, and the “show trials” under Vyshinsky during the late 1930's were the product of the Soviet Union's brand of state absolutism.

After Stalin's death in 1953, the long process of de-Stalinization began. Maneli points out that this change had an impact on socialist law in the Soviet Union and in other socialist countries. Gradually a “liberal Communist view of Socialist legality” appeared in Poland and in other countries in the Soviet bloc. This new legality stressed that no justice could exist without legal procedures to protect the individual from governmental and administrative abuses. When one recalls the Russian intervention in Hungary in 1956 and in Czechoslovakia in 1968, one wonders about the reality of these new secure individual liberties. The current crackdown on the Solidarity Union in Poland by the Polish government does nothing to remove that doubt. The question remains: can any legal philosophy which gives pre-eminence to government and positive law, the law as it “is,” guarantee human rights? This is the focus of the perennial controversy between those who support the law as it “is” and those who opt for the law as it “ought to be”; between the juridical positivists and the supporters of natural law.

Professor Maneli argues that only the theory of juridical or legal positivism can preserve individual rights and liberties. He concedes that juridical positivism is not the favored philosophy of modern thinking. Opponents have criticized juridical positivism as the source of totalitarianism. This criticism has focused particularly upon John Austin's “command theory” of the law, a very influential version of juridical positivism. Maneli answers that the critics have missed the genuine meaning of positivism and have subjected the theory to distortions and misinterpretations. He then explains what he calls the true tradition of legal positivism and the role it has played in protecting human rights.

Professor Maneli examines the foundations of modern juridical positivism in the utilitarianism of Jeremy Bentham and Rudolf von Ihering. He then presents John Austin's ideas of law and sovereignty. Austin's famous work, *Lectures on Jurisprudence*, played a major role in establishing legal positivism as the predom-

4. Id. at 127.
inant legal philosophy in the century before World War II. According to Austin, laws or rules are a species of commands which oblige persons to obey them.\textsuperscript{6} Laws are ethically neutral; they are based on the power of a superior who can impose sanctions and thereby enforce obedience. While individuals in society have the duty to obey, the sovereign is not bound by any legal limitations. Austin's goal was to provide the basis for predictability, uniformity, and order in a political society. His "command theory" of the law can lead to a well-ordered state, but it does not guarantee the legal rights of individual persons. Thus, this imperative theory of law provides the ideal theoretical framework for a totalitarian state.

Professor Maneli, however, believes that juridical positivism is the best guarantor of human rights. In addressing the issue of the Austinian theory of law and totalitarianism, Professor Maneli argues that critics have misinterpreted Austin's views. Maneli's analysis of Austin's writings leads him to conclude that Austin never meant that the power of the sovereign was to be absolutely unlimited. Maneli contends that the principle of utility — the greatest happiness of the greatest number — would guarantee a reciprocal relationship between sovereign and subject. Whether this unique thesis adequately refutes Austin's critics is open to debate. In any case Maneli's thesis does not stand or fall with John Austin.

Professor Maneli has coined a new expression for his approach to legal positivism. He calls it "Positivist Realism." Professor Maneli describes positivist realism as a philosophical amalgam of juridical positivism and American realism. The realists argued for an experimental approach to the study of the legal order and a skeptical attitude toward traditional legal rules. They demanded that greater attention be given to the purposes of law and its actual operation in society.\textsuperscript{7} Maneli discusses the writings of Holmes, Arnold, and Llewellyn, and contends that realism added a new, liberalizing dimension to legal positivism. He suggests that classical legal positivism was, perhaps, too narrowly concerned with legal rules or the law as it "is." Alternatively, positivist realism is free from that danger because it departs from a dogmatic, schematic cast of mind and tends towards a cast of mind which is more flexible, modern and based on experience.

The realists certainly made an impact on legal thinking and institutions in the United States. They were particularly prominent during the 1930's and 1940's. Now, however, the realist school of legal thought is much less vital. Some realists displayed a skeptical and iconoclastic attitude toward precedent and principle which revealed a shallow cynicism. Therefore, the usefulness of the realist school as a basis for protecting human rights is open to challenge. Maneli's incorpora-

\textsuperscript{6} \textit{Id.} at 98.

\textsuperscript{7} F. \textsc{LeBuffe} & J. \textsc{Hayes}, \textit{The American Philosophy of Law} 179-85 (5th ed. 1953). Prominent American realists included Karl Llewellyn, Thurman Arnold, and Jerome Frank; Justice Oliver Wendell Holmes was the forerunner of the realists and the inspiration for their writings.
tion of American realism as an essential part of his legal theory is, therefore, also questionable.

In the past forty years a view that the individual possesses personality in international law has gradually developed. The practice of humanitarian intervention, the Genocide Convention,8 and the United Nations' Covenant on Human Rights9 are evidence of this change. However, the lingering Austinian concept of absolute state sovereignty still impedes full recognition of the individual's standing in international law. Nonetheless, the idea that international law, de lege ferenda, now recognizes rights of the individual is rationally defensible.

The renewed concern for human rights since World War II attests to the revival of the natural law as a source of international legal rules.10 The natural law postulates that each human being possesses a dignity in himself, something he did not get from other human beings. He has certain rights and duties which no man has a right to destroy. This bundle of rights and duties makes him sui juris. Proponents of natural law argue that the only protection from the human degradation sanctioned by the laws of totalitarian states available to individuals is to subordinate the state to the individual. Obviously, the natural law position is diametrically opposed to juridical positivism's "command theory" of law. Bad experiences with the totalitarian state have also driven legal philosophers away from legal positivism and back to natural law.11 A clear example of this trend is Judge Tanaka's dissenting opinion in the 1966 judgment of the International Court of Justice in the South West African Cases:12

The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its laws or on any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element. . . . If a law exists independently of the will of the States and, accordingly, cannot be abolished or modified even by its constitution, because it is deeply rooted in the conscience of mankind and of any reasonable man, it may be called "natural law" in contrast to "positive law."13

Professor Maneli takes the position that the theory of juridical or legal positivism is the best hope for human rights. Therefore, the fact that he

11. Id.
13. Id. at 297-98.
downplays the role of natural law, going so far as to characterize it as "the myth of natural law" is not surprising. This restatement of an old canard is thus a disappointment. Today's legal positivists may argue that no need exists to espouse natural law to protect human rights from the sovereign, but the revival of natural law thinking is no myth. Professor Maneli's judgment concerning the natural law may reveal his East European orientation. The natural law theory that the person supersedes the state is not a universally popular view behind the Iron Curtain.

Professor Maneli's thesis of positivist realism is interesting even if not entirely acceptable. *Juridical Positivism and Human Rights* is an important book because it provides the American lawyer with an insight into ideas originating in a different political environment and tradition. The major contribution of the book is to introduce, through Maneli's proposals, East European thought, which is largely unknown in the West, to the reader. One of Maneli's proposals is particularly revealing: "[T]he decisive question in modern society... is... how values, more or less generally accepted, should be incorporated into the existing positive law systems..." This concern for common values has a natural law resonance. Professor Maneli may be closer to the natural law than he realizes. This would not be surprising since the natural law is the *philosophia perennis*.

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15. Id. at 360.