### THE PHILOSOPHY OF MORRIS R. COHEN - A SYMPOSIUM

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By "legal ontology" I mean the religious or philosophical view which is the basis of a system of law and by "legal reasoning" I mean the totality of techniques which legal theorists and lawyers use to adjust that system to the requirements of adjudication; these requirements essentially being security and justice. Since the role of the judge is to proclaim the law in each specific case, we want his decisions to be not arbitrary, to be predictable in that they treat cases which are basically similar in the same way. We also want them to be seen as equitable, appropriate to the circumstances, the ways and the customs of the community. In reconciling stability and flexibility, the various systems to be compared in this article, i.e. Jewish law, Continental European law and Common law, allocate differently the powers of judge and legislator, regarded as complementary to one another. It will be seen that this division of powers changes at different times, while at the same time the ontology according to which the allocation of powers is effected becomes more flexible.

Clearly a detailed historical study of these differing systems would require many volumes; in this article only a short description can be offered, but it is one that is most illuminating in the sharp contrasts which it presents.

Jewish law as it is drawn from the Bible and the Talmudic interpretation\(^1\) of the Bible made Moses the sole prophet-legislator.

The body of his legislation is indeed accompanied by a command which renders it unalterable forever:

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\(^1\) As to this see my paper "La Bible et son interprétation juridique par les talmudistes" at the Louvain colloquium (10 Nov. 1975) published in the proceedings of the colloquium *Oral and Written Tradition*, L. Dequeker, ed. (Institutum Judaicum, Brussels), 42-62. For more detailed treatment see H. Cohn, *Jewish Law in Ancient and Modern Israel*, (Ktav Publishing House, New York, 1971).
Now, Israel, listen to the statutes and laws which I am teaching you, and obey them; then you will live, and go in and occupy the land which the Lord the God of your fathers is giving you. You must not add anything to my charge, nor take anything away from it. You must carry out all the commandments of the Lord your God which I lay upon you. (Deut. 4: 1–2, New English Bible translation).

The law of Moses was revealed to him on Mount Sinai by God. Emanating from divine authority, it binds all believers; emanating from a just God, its precepts are just: it will not be necessary to amplify them nor to amend them.

We know that the law given to Moses in the 13th century B.C. was reinstated by Esdras in 532 B.C. after the return from the Babylonian captivity. Did the law remain unchanged during these seven centuries? Should it remain unchanged forever? Was it necessary to integrate customs and ancestral traditions with it? According to the evidence of Flavius Josephus, the Pharisees, who represented popular feeling, were on this point fiercely opposed to the Sadducees, who represented the aristocratic class and especially the priests:

The Pharisees have delivered to the people a great many observances by succession from their fathers, which are not written in the law of Moses; and for that reason it is that the Sadducees reject them, and say that we are to esteem those observances to be obligatory which are in the written word, but are not to observe what are derived from the tradition of our forefathers; and concerning these things it is that great disputes and differences have arisen among them, while the Sadducees are able to persuade none but the rich, and have not the populace obsequious to them, but the Pharisees have the multitude on their side. (The Antiquities of the Jews, transl. by William Whiston, Book XIII, ch. x, § 6.)

The Pharisees won. They were responsible for the traditional distinction between written and oral law. So that it would not be confused with the written, more holy, law, it was forbidden to put it in writing until the time when Rabbi Akiba, the most outstanding interpreter of law who lived in the first century of the modern era, managed to give the unwritten law the same ontological status as the written law; it was only a commentary or repetition of it (Mishna).

The Mishna, the first codification dating from the second century of the modern era, declares at the beginning of Pirke Avot (The Precepts of the Elders I: 1) that the oral law had been received by Moses on Mount Sinai at the same time as the written law and that it was transmitted orally by
generations of interpreters without interruption. In the fifth and sixth centuries of the Christian era, the Talmud of Jerusalem and the Talmud of Babylon were written: they included the discussions by the scholars of the text of the *Mishna*. What should be done when the interpreters disagree? In the first century of the Christian era, the disagreement between the School of Hillel, the more liberal school, and the School of Shammai, the stricter school, had already become proverbial. In reply to the question put by Rabbi Samuel, how to know which interpretation was right, “a voice from above replied that both interpretations expressed the word of the living God” (Babylonian Talmud, *Erubin* 13b). How then is it to be decided? In a dispute about a ritual oven, Rabbi Eliezer, the only voice opposed to the great majority of Scholars, calls on God as witness in a kind of reference to the legislator. God declared himself by performing miracles and even a heavenly voice was heard, each time proclaiming that Rabbi Eliezer was right. The Babylonian Talmud reports (*Baba Metziah* 59b) that Rabbi Joshua, spokesman for the majority, said that “the Torah is not located in heaven” and explained the statement, according to Rabbi Jeremiah, thus:

...that the Torah had already been given on Mt. Sinai; we pay no attention to a heavenly voice, because Thou hast long since written in the Torah at Mt. Sinai (*Exod.* 13:2) after the majority must one incline.

If the law has a divine origin, its interpretation, although made by man, must be respected in the same way, since the oral law was handed down to Moses on Mt. Sinai at the same time as the written law. If the plurality of interpretations does not controvert the holiness of these laws (and that is why the Talmud reports all the dissenting opinions) there must, nonetheless, be some criteria for taking a decision.

The first criterion is that of the majority. When the opinions of two scholars contradict one another, then the opinion of the scholar of greater authority must be adopted: the opinion of Hillel contradicting that of Shammai, the opinion of Rabbi Akiba, contradicting that of any other adversary. The third rule takes into account the worth of the arguments: a rule supported by reasoning is to be preferred to one which is groundless, unless the latter can be based on a tradition deriving from Moses and the prophets. The fourth criterion grants precedence to the authority of most recent date. The fifth says that one should follow the established custom

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2 Cf. This quote from the *Jerusalem Megillah*, IV, 74d, was given to me by Professor Julius Stone: “Whatever a competent scholar will yet derive from the Torah, that was already given to Moses on Mt. Sinai.”
or usage. The sixth distinguishes between rules laid down by the written law as to which a more strict interpretation is adopted, and rules which are based on rabbinical decisions, for which a more lenient interpretation is adopted. Finally, the ultimate rule as it applies to the post-Talmudic judges is based on a text of Deut. (17: 8–11) where it is prescribed that in difficult cases, recourse should be had to “the levitical priests, or to the judge then in office... Act on the instruction which they give you, or on the precedent that they cite; do not swerve from what they tell you, neither to right nor left.” It was on the basis of this latter text that the authority of the courts, and particularly of the Sanhedrin established in 141 B.C., was founded.

Here is a system of law which, in the absence of legislative power, could only evolve through the work of commentators and judicial decisions. Their ruling could only be modified by someone whose moral authority prevails “in wisdom and number”, i.e., by his moral authority and the number of his supporters. It is for that reason that, in a difficult case, the rabbinical tribunals used to consult the great authorities of the age, whose responsa permitted a softening of the rabbinical law. The institute for the Study of Jewish Law at the Hebrew University of Jerusalem has, in its archives, 300,000 of these responsa.

Besides the evolution of law by textual interpretation, two other interpretative techniques can be recognized: the use of fictions and of general principles of law.

The best-known fiction was that proposed by Hillel which permitted the bypassing of the rule in Deut. (15: 1–2) requiring the remission of debts at the sabbatical year, which occurred every seven years. According to the fiction devised by Hillel, the courts became the fictitious creditors, the real creditors becoming the court’s agents: from that point on, debtors were no longer freed from their debts (Makkot, 3a). By means of other fictions, it was possible to by-pass the prohibition of loans with interest, establish testamentary succession for which there was no provision in the Bible, and so on.

Recourse to general principles of law was based on biblical texts whose import was generalized. From the fact that the rule had been ordained by God “that you may live” (Deut. 4: 1) the general principle was derived that one could violate the most imperative rules where a human life is at stake. On the basis of the text “Do not move the ancient boundary-stone which your forefathers set up” (Proverbs 22: 28) the general rule as to respect for customs was drawn. And following the rule “judge your fellow-countryman with strict justice” (Lev. 19: 15) the unacceptable results of legal formalism could be controverted.
Despite the prohibition of legislation, the value or regulations of subordinate status was admitted, within temporal and spatial limits. Thus the prohibition of polygamy on pain of excommunication decreed in the 11th century by Rabbi Gershom of Mainz, was only valid for Jews living among Christians and for a period of 1000 years.

From the 11th to the 16th century, there were four codifications of Jewish law which has, since that era, evolved very little until the creation of the State of Israel.

In contrast to Jewish law which offers the extreme example of a system of law without a legislator other than Moses, Continental law since the French Revolution represents the other extreme, where there was an attempt to regard the whole of the law as the expression of the will of the legislator.

The State-oriented and legalistic ideology of positivism was a consequence of combining the ideas of Montesquieu with those of Rousseau.

The doctrine of separation of powers gave the power to make laws to the legislative arm, judges being only "la bouche qui prononce les paroles de la loi: des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur". However, for Montesquieu, the laws, since they must respect equity which pre-exists positive law by which they are laid down, should be the expression of reason rather than of a sovereign and arbitrary will.

J.J. Rousseau, regarding the laws as the expression of the will of the sovereign, i.e. the nation, was to develop a theory of generalized will which is "always in the right" when it is motivated by the general interest. The law-making which derives from it must be just; the "admirable agreement between interest and justice gives to the common deliberations an equitable character which at once vanishes when any particular question is discussed, in the absence of a common interest to unite and identify the ruling of the judge with that of the party".

The elevation of the law and the distrust of the judges is exhibited by Art. 12 of the Organic Decree of 16-24 August 1790, setting up the referral of a general nature, and forbidding the courts to make regulations: "they will, on every occasion which they find necessary, whether for the interpretation of a law or the making of a new one, address themselves to the Legislature". The courts were required to give reasons for their

3 De l'esprit des lois, Part I, Book I, Ch. III. 6.
5 The Social Contract, Book II, Ch. VI.
6 Op. cit. Bk. II; Ch. IV.
decisions by reference to the law, and the Court of Cassation was established "with the duty of ensuring that the judges did not break the law which they were supposed to apply. The Court of Cassation was seen as a policeman, delegated by the legislative power to supervise the judiciary, and bound to account periodically to the legislature on the way in which it accomplished its task."^7

The conception according to which the whole of the law is contained within the written law led certain professors in France in the first half of the nineteenth century to say that they were not teaching the civil law, but the Napoleonic Code. Consider, too, the speech of Dean Aubry, at the opening session of the Faculties of Strasbourg in 1857:

The task of the teachers called on to dispense legal education on behalf of the State is to protest, temperately of course, but also firmly, against any innovation which would tend to replace the will of the legislator with some other intention foreign to it.^8

The accepted practice was to induce in the students an almost holy reverence for the written law, as is witnessed by these lines taken from the book, *Written Exercises on the Civil Code*, published by Mourlon in 1846:

A good judge submits his reason to that of the written law, for it is established to be judged by and not to be judged. Nothing is above the law, and it is prevarication to sidestep its provisions with the excuse that the sense of justice objects. In making judicial decisions, there is no, there cannot be, reason more rational, justice more just that the reason or justice of the law.*^9

We know that the inconveniences of the reference to the legislator, which were very soon observed, obliged the drafters of the Code Napoleon to introduce the famous Article 4, which forbids the judge to refuse to give judgment "with the excuse that the law is silent or unclear or inadequate". He must act—even if he is forbidden to interpret, in the spirit of the elected representatives when the text is clear (*interpretatio cessat in claris*)—where there is a gap, antinomy or ambiguity. It is by these means that the judges have gradually increased their power while nevertheless sheltering behind a written provision of the law as far as possible.

^9 Cited by L. Husson, *op. cit.*, at 183.
That was the technique of adapting the texts advocated by Ballot-Beaupré, first Chairman of the Cour de Cassation in 1904 in his speech commemorating the centenary of the Civil Code. We know how French judges, under the influence of the historical school and of sociological trends, are adopting more and more a teleological interpretation of law, invoking the values which the legislator sought to protect (referring to the spirit of the law) and making more and more room for general principles of law and legal topics.¹⁰

At the moment the judge is expected not only to respect the written law but to reconcile it with the requirements of justice in such a way that the judge’s decisions are at one and the same time in conformity with the law in force and accepted by enlightened public opinion. The judge will use all the techniques of legal reasoning in reconciling security and justice, in carrying out his task of pronouncing the law in the particular cases which come before him. We will see that the Common Law which has a quite different legal ontology has reached a not dissimilar synthesis.

While the written law in Jewish or Continental law is the expression of will, either of God or of the nation, the legal ontology of the Common Law as it was developed first in England and then in the English colonies, assumes the existence of an objective, rational and just law which is evident in judicial decisions. This we call case law, defined by the American jurist Karl Llewellyn thus:

Case law is found in decided cases and enacted by judges in the process of solving particular disputes... These generalizations contained in, or built upon, past decisions, when taken as normative for future disputes, create a legal system of precedent. Precedent is operative, however, before it is recognized. Toward its operation drive all those phases of human makeup which build habit in the individual and institution in the group. The force of precedent in the law is heightened by an additional factor: that curious almost universal sense of justice which urges that all men are properly to be treated alike in all circumstances. As the social system varies we meet infinite variations as to which men or treatments or circumstances are to be classed as ‘like’; but the pressure to accept the views of the time and place remains.¹¹

¹⁰ See on all these matters Ch. Perelman, Logique Juridique, Nouvelle Rhétorique, (Dalloz, Paris, 1979).
According to this view, already to be seen in the writings of Bracton in the 13th century, the judges do not make the law, they only discover it. In a significant contribution of Professor L. Chafee, Jr. of the Harvard Law School titled “Do Judges Make or Discover Law?” we find the following characteristic quotations from Blackstone where he says of judges:

They are the depositaries of the laws; the living oracles who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.

and further on he states that judicial decisions are

... the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the “common law”.

The ontology in which the judge discovers the law, but does not make it, makes it possible to reconcile the stability of a system based on precedents with its evolution. For even if it is conceded that the judges, as a normal rule, decide cases submitted for their consideration in a just way, it may be that the way in which they formulate the decisive rule (the ratio decidendi) is not adequate, because it is expressed too widely or too narrowly. This was the origin of a basic distinction made within the doctrine of stare decisis, i.e. to follow judicial precedents, a doctrine which was strongly espoused in the nineteenth century. The distinction was made between dicta, the rule as expressed, and the holding, the rule which was a prerequisite for the judge to reach the decision which he did on the facts established. It is for the judge in a later case to reformulate the rule followed by the prior judge where necessary, using the technique of distinguishing the case by showing how the instant case differs from the precedent. The rule of stare decisis binds all lower courts, and the appellate courts, while the House of Lords, acting as final court of appeal, regarded itself from 1898 to 1966 as bound by its own decisions. During that period only an act of Parliament could alter by statute, the rules of law already established in the common law.

The advantage of this system is that it satisfies the need for security and formal justice because of the obligation to follow decided cases and to treat similar cases in the same way. The disadvantage is that each new judgment, each reinterpretation of the rule works retroactively, the new formulation of the rule being regarded as the only adequate statement of the common law. The advantage of statute law, of a legislative rule, is that it is prospective, only having validity, in theory, for the future.

For this reason, Bentham, and later Austin, scorned the fiction that judges do, like the legislator, make law, but instead of proclaiming the law in advance, they state it after the event, at least each time that they formulate it. Bentham considered that the judges established the common law the way a man trains his dog:

When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog; and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do—they won't so much as allow of his being told: they lie by till he had done something which they say he should not have done and then they hang him for it.15

The application of the common law created some problems in the United States where the Constitution set up, besides the Supreme Court, federal courts with jurisdiction to judge conflicts between inhabitants of different states by applying the common law. What happens when the judges of one state frame a rule which is rejected by a federal judge? Should e.g., the principle of commercial law concerning the effects of trade, be made by the judges of each state, which would lead to intolerable diversity, or should the law be uniform? In this connection, a distinction has been made between legislation of a local nature with which federal courts should not concern themselves, and law of general relevance which is stated by the federal courts. From this stems the problem described by Professor Chafee:

...two different sets of legal rules prevailed in a given state over great areas of the law, depending on whether the litigation got before a state court or a federal court.16

This major problem was a weighty argument for those like John Chipman

16 Chafee, op. cit., p. 413.
Gray or Oliver Wendell Holmes who preferred a conception of law as the expression of the will of a competent authority.

In a 1928 decision Holmes expressed himself thus:

Law is a word used with different meaning, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.¹⁷

From that point is was a short step to the statement of Justice Brandeis in a 1938 Supreme Court decision:¹⁸

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal common law.

Once this is conceded there is nothing to stop the courts acting as the legislator and giving notice in a decision that the doctrine previously applied will not be applied in the future.¹⁹

A similar évolution, i.e. a gradual libération from the baleful results of légal ontology, can be seen in the attitude of the common law judges to statutes, i.e. laws made by the legislator.

Their initial reaction to statutes was to regard them as an intrusion to which the judge is required to submit, but which he must interpret in a restrictive way wherever the statute is contrary to the common law. Thus the renowned English lawyer, Sir Frederick Pollock, described the approach of the common lay judges in these terms: their attitude

... cannot be well accounted for except upon the theory that Parlia-
ment generally changes the law for the worse, and that the business of the judge is to keep the mischief of its interference within the narrowest possible bounds.²⁰

¹⁸ Erie Railroad Co. v. Tompkins, 304 U.S., 64, 78.
Again in 1908 in an article with the title "Common Law and Legislation", Roscoe Pound mentions four possible approaches to statute law:

1. They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will; as superior authority to judge made rules on the same general subject, and reason from it by analogy in preference to them.

2. They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge made rules upon the same subject.

3. They might refuse to receive it into the body of the law and give effect to it directly; refusing to reason from it by analogy but giving to it, nevertheless, a liberal interpretation.

4. They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly.21

It was the fourth approach which he considered delineated the orthodox attitude of the common law judges although the third just missed being adopted; but the first two would have seemed ridiculous to the common law lawyer.

Since that time there seems to have been a development towards the third approach, that a statute ought to be put on the same footing as the rules devised by the judges.

On this point, I would like to draw attention to an important article of Charles D. Breitel, former Chief Justice of the New York Court of Appeal. He accepted that statutes constituted a new source of principles and rules, along with customs and usages. But there cannot be a single way of dealing with them.

All statutes are not alike, in fact, are not treated similarly... What is required is an acknowledged pluralistic treatment... the scope for creative adaptation... varies directly with the degree of generalization... Because perfect generalization for the future is impossible, no generalization is complete. Aware of this impossibility, legislators often do no more than propose to lay down the most general state-

21 (1908) 21 Hvd.LR. 383.
ments of law, intending that the courts and other law applying agencies shall creatively adapt the general principle to specific cases. Thus, every time a statute uses a rule of reason, or a standard of fairness without specification, there is conscious and deliberate delegation of this responsibility to the courts.22

Furthermore, various codifications and restatements have been undertaken in the United States with the object of unifying different branches of the law and achieving codes similar to the Napoleonic Code: thus we come to the domain of codified law, to the primacy of statutory law. Depending upon the type of code and the area of law the greater importance may be attributed to the work of the legislator or that of the judge. Indeed, their roles are complementary, and judges will be more active where it is relatively difficult to achieve an analogous result by legislation, e.g., where a constitutional amendment would be required.

Thus can be seen, in this search for a synthesis between the will of the legislator and the acceptable or fair result in each factual situation, the ideological vision faded in order to make the solutions reached acceptable to the community concerned.

I have chosen, on purpose, three essentially different legal ontologies as examples in order to be able to show how, in each case, the scholars and judges found a way to liberate the law from the logical consequences of the religious, philosophical or ideological legal ontology when it became indispensable to cope with "the felt necessities" of the legal situation.
