Selected sections of Christopher J Charles’ article

The Social Initiative and the Sphere of Rights; the Rule of Law in contemporary states.

 Christopher J. Charles

In the Threefold Social Order, Rudolph Steiner posits the Realm of Rights as the second of three realms in civil society. The underlying principle is of equality of human dignity, equal treatment and fairness in the social world. The lawfulness of the state relies upon its ability to guarantee for each citizen and for noncitizen refugees a lawful means of establishing and maintaining fundamental rights in the social sphere and liberty in the artistic, scientific, religious and educational sphere. The polity itself maintains the basis of fraternity and sorority in the economic sphere.

The realm of rights has been radically transformed since the Second World War by the creation of the United Nations and by the growth of the international law jurisprudence on human rights.

………..**Indeed, it would be a useful research project for an anthroposophical social science initiative, to consider these international law Covenants and Declarations and Conventions, in the context of the Social Initiative. That is a matter for further research for the Social Initiative Social Sciences Group.**

……..

……. The Decisions and Advices of the UN Human Rights Committee provide some useful guidance as to the meaning of the clauses of the Conventions. But they are an ideal. They are aspirational. A guide…...

The Threefold Social Order is also an ideal yet to be achieved in any state on Earth. So we must look at contemporary jurisprudence to understand the theory of lawfulness that applies in contemporary states and we must look at our own experience and our anthroposophical social science thinking and observations to understand the reality of the operation of human rights law in contemporary states. ……

**Legal Positivism**

A general collective noun to describe legal systems and principles of legality is to call them systems of “jurisprudence”. Jurisprudence also denotes the philosophical underpinnings of legal systems, hence the philosophy of law and specific philosophies of law, like legal positivism, and opposed to them, natural law theories of jurisprudence.

Amongst the greatest modern exponent of natural law is John Finnis, whose book Natural Law and Natural Rights[[1]](#footnote-1) expounds a theory of legality based upon Aquinian concepts of rights which devolve from a philosophical perspective of the spiritual nature of humanity and lawful orders of the state which flow from that perspective**. Again Finnis’ theoretical work is a great place to start more anthroposophical research, particularly as to the common Aquinian underpinnings of his natural law theories and of the Anthroposophical threefold social order.**

For our purposes, it will be helpful to start with the jurisprudential theory which underlies most modern states. That is legal positivism. That theory says that the criterion of lawfulness of a state is its overall coherence in the validity of its laws, not their moral worth under a philosophical or theological system of a higher moral order.

But the validity of laws is measured against the fundamental laws of the state – usually in the form of the state’s constitution……. Legal Positivisim is an attempt to divorce legality from moral values and it allows for questions of procedure and form to decide lawfulness, but to leave ultimate questions of legitimacy of the state into the realm of politics.

……..

……At the very least, legal positivism has the virtue of recognising that political questions are beyond the realm of law and of courts to decide. If courts ignore political questions and stick to strict legalism, there is a danger their decisions will become literally and fundamentally irrelevant. …..

…….

The great German sociologist Max.Weber’s theory of legitimation in modern European states rested upon the notion that macht - power in the modern state rests upon the legal domination of the subject through an abstract legal system which is operated formally through a complex state apparatus and rational bureaucracy. The emphasis is on instrumental reason directed to the purposes of the bureaucracy itself and the achievement of various government policies. Weber emphasised the importance of bureaucracy in administration whereby the citizen was subjected to the “iron cage” of rational legal domination. Weber’s understanding of a legal system included a rational administration of justice which divorces law from morals and allows procedural formulae and abstract rights and obligations arising from the civil codes or common law to be used to resolve legal questions. That is legal positivism.

 **The moral imperative for the three fold social order**

……. Under existing legal systems a threefold Commonwealth can be created. A state can define liberty as existing only within cultural, religious, artistic, scientific and educational realms and a polity can create fraternity and sorority as the moral practical basis of economic life and enact laws which maintain this principle.

At the same time, we must be realistic and we must recognise that within existing states, powerful people will wish to preserve their “economic liberties” and to maintain and enforce their “economic rights”. Those states which maintain equilibrium, do so by the balancing of interests which are strongly entrenched. The institutions of the state, particularly the courts are very accustomed to preserving rights which negate the principles of sorority and fraternity. Legislators have enacted numerous laws which have the same effect.

**For anthroposophists there is much work to be done in terms of moral persuasion and engagement within the public sphere.**

**The Separation of Powers**

…… The doctrine of the separation of powers flows from the French political philosopher Montesquieu. That theory assumed that tyranny could be prevented by separating within the government of a state, the executive power, the judicial power and the legislative power. Thus, in the case of Australia, under our Federal Constitution, only the Parliament can enact laws of general application to the people, only the courts can interpret those laws and apply them by imposing punishments and civil remedies and only the executive government can administer the laws made by the parliament.

…….

**Common Law**

Countries which had been part of the British Empire and also the United States of America inherited the common law of England. That means that a Parliament enacts laws of general application as an exercise of legislative- law making power, (for example the rules about how motorists must observe road rules in driving) but the principles for the conduct of life such as contracts, rules about the distribution of deceased estates, civil wrongs “torts”, commercial law questions, banking law questions, the laws of evidence, as applied by courts are resolved by judge made law, not by numerous specific rules of general application enacted by the legislature as codified principles of law. That is the judge-made law, the common law. ………..

In the common law tradition juries of citizens have a role in deciding factual issues of guilt and innocence in criminal cases, but professional trained judges preside over trials, decide upon the rules of evidence and procedure in trials and direct the jury as to the evidence which they may or may not rely upon to decide guilt or innocence.

Common law is both highly abstract systems of legal thinking which are so complex in operation that the ordinary citizen is precluded from being able to operate within it, on their own. Let alone the precise, arcane and esoteric use of legal language and canons of interpretation of documents, particularly parliamentary statute law.

**Probably this should not be so and it is part of the impulse of three folding that the legal system should not be so abstract as to require this. The citizen should have access to justice without intermediaries and the great expense which this entails….**

 **Under a Threefold Social Order, might it not be an aspect of citizenship that the law be written and expressed and enforced in such a way that the rights of the citizen are comprehensible and enforceable by the citizen without need of an elite group of legal professionals who work either as advocates or as judges? That is a philosophical question which is really of the utmost importance for the consideration of a threefold commonwealth.** ……

**The Rule of Law**

. It is said to preserve our freedoms and our civil liberties. There are some basic principles, particularly from the common law world which are said to exemplify the principles of the Rule of Law. ……

The reality is that many common law rights have been eroded by the legislatures of most modern states and that this serious erosion, particularly since the Second World War, has been an ongoing process. All of us are aware of the degree to which the so called “war on terror” is being used to justify further erosion of basic civil liberties.[[2]](#footnote-2) David Dysenhaus author of the book . The Constitution of Law: Legality in a Time of Emergency (Cambridge: Cambridge University Press, 2006) argues that it is the law of the exception which is used to justify the infringement of ordinary civil liberties. It is also implicit that the maintenance of the rule of law requires the protection of those fundamental liberties by an independent and courageous legal profession arguing unpopular cases before independent and courageous judges.

If there is wide-spread bribery and corruption of public officials, particularly police and the judiciary, if there is flagrant disregard of legality at the expense of minorities, if there is unequal, unfair and discriminatory enforcement of law to the benefit of elites and to the detriment of the poor, then the existence of the Universal Declarations of Humans Rights is mere paperwork. They have no effect in reality. It is for this reason that the principles of the rule of law are so significant and **the ability of the courts and the citizen to maintain fundamental human rights in existing states is a matter of so much significance for our social initiatives**…….

…… the principles of the rule of law are simply not applied, because local tyrants are able to maintain an appearance of statehood and legitimation without lawfulness, acting as often they do, at the behest of multinational corporations. ………

Ideology

Ideology, as a concept, is much present in our discussions about the distortions of public discourse over the rule of law and the imbalances of power and means, which occur in contemporary states. So the idea of economic freedom is not anathema to us, but we see it as a perversion of principles whereby freedom is appropriate in the sphere of religion, artistic, philosophical and educational expression, but completely inappropriate in the economic sphere which should be ruled by principles of fraternity and sorority. That is inherent in Rudolf Steiner’s threefold social order.

Ideology is a very useful intellectual tool to examine the validity claims of statements by ruling elities about their practices. It is useful to understand any closed discourse which is unfree and justified by its own internal logic.

.......

**Anthroposophists need to be zealous in the denunciation of dehumanising exploitation and illegitimate claims which are used to justify it**. That may be so, but we are not taking an ideological position on this; rather we are talking a spiritually realist position about what human intelligence and will and commitment is capable or is not capable of doing, and what effect it may have in any given situation.

**As Ute Craemer said at the 2015 Social Initiative Networking Conference, it is terribly important for anthroposophists to be able to see the light coming through what is otherwise a gloomy situation.** *That light of spirituality is manifesting through human warmth and heartfelt social action*. It occurs under the influence and affectation upon world affairs of the archangel Uriel. This is particularly significant and particularly to be understood in the context of our efforts to maintain the rule of law and citizens’ rights in difficult and desperate situations.

…….. ***The protection and enhancement of human dignity and human values is an essential feature of lawfulness and the rule of law – whatever form the rule of law may actually take in any given situation***. Rudolf Steiner reminds in his Philosophy of Freedom that

To live in love towards our actions, and to let live in the understanding of the other person’s will is the fundamental maxim of free men. They know no other obligation than what their will puts itself in union with intuitively; how they will direct their will in a particular case, their faculty for ideas will decide.

The free man does not demand agreement of his fellow man, but expects to find it because it is inherent in human nature. I am not here referring to the necessity for this or that external institution, but for the *disposition*, *the attitude of soul* through which a man, aware of himself among his fellows, most clearly expresses the ideal of human dignity. [[3]](#footnote-3)

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Questions:

1. The need for the citizens to get involved in this sphere is strongly felt in the article. Which paths are there for this contribution?
2. What are the legal/political mistakes that have taken us to our current tyrannical situation with a few controlling arbitrarily the majority through power?
3. What can be done, as citizens, to free ourselves from that control in a legal way?

1. Clarendon Law Series , Oxford University Press1980. [↑](#footnote-ref-1)
2. David Dysenhaus . The Constitution of Law: Legality in a Time of Emergency (Cambridge: Cambridge University Press, 2006). The author there argues that it is the law of the exception which is used to justify the infringement of ordinary civil liberties. It is also implicit that the maintenance of the rule of law requires the protection of those fundamental liberties by an independent and courageous legal profession arguing unpopular cases before independent and courageous judges. [↑](#footnote-ref-2)
3. Rudolf Steiner . The Philosophy of Freedom. Pages 139 and140 Rudolf Steiner press 7th Edition 2006 [↑](#footnote-ref-3)