

Chapter Ten

Captive Conscience

Humans, as social animals, are obliged to live together. "Living together" demands a system that shall regulate the relationship of Human Society's members. Living together can occur either via Real System or True System.

When Philosophy as the theoretician of the True System failed to fulfil its mission, Judiciary and Politics were obliged to fall into the trap of the Real System.

Many brilliant minds dedicated themselves to Judiciary and Politics to manage and regulate human relationships according to Justice and Law during humankind's history. But they are defeated because no matter a man how much benevolence enters the Judiciary or Politics.

In those fields, an honest but unwise man is compelled to be confused and incompetent.

A man with mere goodwill cannot materialise his dreams to achieve the Rule of Law and Justice. He needs Wisdom.

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As a sample for the effect of Real Philosophy on the Judiciary, I have chosen the essay "*The Path of the Law*" by Oliver Wendell Holmes, Jr. for reviewing law and judgment in Real Judiciary.

Oliver Wendell Holmes was an American jurist, legal scholar and Professor of Law at Harvard Law School.

He also served as an associate justice of the United States Supreme Court from 1902 to 1932.

Mr Holmes is the most influential American common law judge in history.

One hundred years after publishing that essay, Cambridge University Press in 2000 pressed a book with the title *“The Path of the Law and its Influence.”*

Steven J. Burton, the professor of law at the University of Iowa in Cambridge's book about Holmes and his essay, wrote:

“Oliver Wendell Holmes, Jr. (1841-1935) is, arguably the most important American jurist of the twentieth century, and his essay The Path of the Law, first published in 1898, is the seminal work in American legal theory. This volume brings together some of the most distinguished legal scholars from the United States and Canada to examine competing understandings of The Path of the Law and its implications for contemporary American jurisprudence.”

My review of Judge Holmes' essay considers the confusion a jurist faces when he wants to have the moral principle for his judgements.

Judge Holmes said:

“I venerate the law, and especially our system of law, as one of the vastest products of the human mind. No one

knows better than I do the countless number of great intellects that have spent themselves in making some addition or improvement, the greatest of which is trifling when compared with the mighty whole. ... But one may criticise even what one reveres.”¹

According to the same principle, my criticism of Judge Holmes and other honest people in the legal system reflects my great reverence.

I resemble a judge like the conscience of Humanity, but he cannot fulfil his duty when he is imprisoned.

The main body of Real Philosophy has confined the whole legal system—including the judges—by depriving them of necessary devices: transparent principles and clear definitions.

Confess to Confusion

A "True Law" should emanate from Human Morality. If lawmakers have access to Human Morality, they can legislate laws without contradicting morality. Otherwise, legal and moral ideas clash within Real Judiciary and confuse a Judge.

“Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract.”

Judge Holmes doesn't claim the confusion between legal and moral ideas manifests itself merely in *“the law of contract,”* still, you can see perplexity in all laws or at least in most of them, but *“the law of contract”* suffers more.

¹ The Path of the Law, page 32.

Hesitation about the relationship between Law and Morality in *“The Path of the Law”* is apparent. From one side Judge Holmes accepts the role of morality in forming and developing law:

*“The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.”*²

On another side he seems tired to adapt law with morality and think to be rid of every word of moral significance:

*“For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law.”*³

Does he want "Law" without depending on morality, independently solving its problems?

Confusion in understanding the relationship between law and morality emanates from the lack of definitions as a chronic sickness of Real Philosophy.

The law cannot solve its problems by eliminating existing vague moral terms. Only by giving transparent meanings to abstract concepts—including morality—, Judiciary can approach clarity and independently do its tasks. Otherwise, the legal system would be willy-nilly the follower of Realpolitik as lawmakers and lose its independence.

² Ibid. Page 6.

³ Ibid. Page 16.

“We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.”⁴

The reason behind the confusion is somewhere else, outside of the realm of Morality and Law. The source of confusion is the main body of philosophy.

Judge Holmes knows how important it is to have accurate meanings of abstract concepts: *“...it is well to have an accurate notion of what you mean by law, by a right, by a duty,...”⁵*

He adds: *“I have in my mind cases in which the highest courts seem to me to have floundered because they had no clear ideas on some of these themes.”⁶*

The question is: Who should define the terms like Right, Justice, Law and Morality?

The accurate meanings of abstract concepts are outside the range of legal staff —lawyers or jurists.

You cannot reach these meanings by entertainingly dealing with philosophy, whether you are a scientist or a jurist. Philosophy demands all "mind energy".

When a person wants to divide his "mind energy" between philosophy and something else, he will not reach his goal.

⁴ Ibid. Page 16.

⁵ Ibid. Page 34.

⁶ Ibid. Page 34 and 35

Philosophy should be the priority of a person's life, and he should always accept its demands by taking risks —as I mentioned in Volume Four.

A student of law, when he starts his study in a law school, should be equipped with the meanings of abstract concepts.

Legal staff shall enjoy philosophy's services, like what a neurosurgeon does.

Others should prepare everything for an operation when the neurosurgeon goes to the operating room to remove a cancerous brain tumour.

When the neurosurgeon and his team enter the operating room, they focus on correct decisions based on their medical knowledge to save their patient's life.

A judge is a surgeon who shall remove injustice —a sort of cancerous tumour— from the body of Humanity, but nothing is prepared for him.

The deep knowledge about "Right, Justice and Law" and their relationship to other abstract concepts like Morality and Liability are devices that he needs to make a correct decision at a permissible time.

Judge Holmes says:

*"I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right."*⁷

⁷ Ibid. Page 18.

The question is: How long did it take for the judge to make the right decision, and with which criterion had he recognised right from wrong when he had no accurate definition of "Right"?

A neurosurgeon does his operation at a limited time, not an unlimited duration. Because his patient is human, the surgeon cannot leave him with an open skull and come back a few days, weeks, or months with a correct decision.

A judge, like a neurosurgeon, should be equipped with the knowledge and have access to the necessary devices.

The neurosurgeon enjoys those privileges, but the judge is deprived of them.

Behind those deprivations is Scholastic Philosophy which has not done its mission by providing the necessary definitions for supporting legal staff.

Judge Oliver Wendell Holmes knows *"the worth of doctrines"* and understands the importance of *"systematic questioning,"* but he presumes jurists must fulfil those tasks.

"Now let us consider the present condition of the law as a subject for study, and the ideal toward which it tends. We still are far from the point of view which I desire to see reached. No one has reached it or can reach it as yet. We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their

grounds."⁸

I am afraid to say, after more than a hundred years of publishing *The Path of the Law*, "*We still are far from the point of view which I desire to see reached. No one has reached it or can reach it as yet. We are only at the beginning of a philosophical reaction...*"

Until legal staff ignore the origin of their failures, which is the main body of Philosophy, they cannot fulfil their task.

The legal staff don't demand Scholastic Philosophy to do its duty, which is a big mistake and fatal wrongdoing.

Even if the legal staff persisted in making Philosophy responsible, they faced Scholastic Philosophers who either remained silent or dodged all their questions with philosophical phraseology and verbosity. But it could have an advantage: hopelessness to Real Philosophy.

When the legal staff lost their hope in Scholastic Philosophy, they could, like Stephen Hawking, who proclaimed: "*Philosophy is dead.*"

In 2011 —when he proclaimed "*Philosophy is dead*"—Hawking was a physicist who dedicated himself to scientific questions.

I suppose neither Hawking nor other humans with a scientific mentality buy phraseology and verbosity, which Scholastic Philosophy sells.

⁸ Ibid. Page 22 and 23.

It would be great if the jurists did the same thing and required reasonable answers for their juridical questions without gibberish.

But the problem is jurisprudence itself suffers from legal phraseology.

Despite people with a scientific mind who comply with the logic of mathematics where verbosity has no place, the judicial field, like Scholastic Philosophy, suffers from jargon.

Jurisprudence is a business where phraseology and complicated terms dominate. An ordinary man should feel confused about grasping the language and be in an inferior position that justifies a need for professionals who can cope with the situation.

Judge Holmes says: *“When we study law we are not studying a mystery but a well-known profession.”*⁹

If within the legal system an understandable language prevailed, everybody could go to court and solve his problem. *“The reason why it is a profession, why people will pay lawyers to argue for them or to advise them,...”*

Then Oliver Wendell Holmes adds:

*“People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared.”*¹⁰

Using legal jargon —like philosophical jargon— causes people to feel the lawyers and jurists are in a superior position and pay them.

⁹ Ibid. Page 3.

¹⁰ Ibid.

However, the difficult words or perplexing expressions guarantee their business, but verbosity and legal phraseology work as a double-edged sword that has its aftermaths, for instance, falling into the self-made trap of language.

With the help of wordiness and complicated phraseology, a man can deceive others. Still, after a while, such a method leads him to self-deception and generates a false feeling of knowing the topics.

A simple test can shake a Real Philosopher, Jurist, and Politician and save them from self-deception. If they are supposed to know a topic, they should define it in one sentence or maximum, in a paragraph —as I do. Otherwise, he has been trapped in verbosity and phraseology.

A man who calls himself a philosopher or jurist, or politician must be able to explain philosophy, justice and politics, at least to himself.

I am afraid to say, the "Right Concepts", like scientific topics, don't obey "*the mere force of language*", as Judge Holmes expressed. He says:

*"The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, ..."*¹¹

¹¹ Ibid. Page 7.

Like Quantum Mechanics, understanding some scientific topics is challenging even when you use mathematical language. It is the same with "Right" as intelligent energy that causes "Life" and other abstract concepts that emanate from "Right to Life" like Justice, Law and Morality.

If you want to grasp such concepts, you must avoid making them more complicated than they are.

The last thing you need to deal with Wisdom is to use complicated language.

From personal experience, I can say that I have tried to learn from everything for four decades. Also, I have used any possible methods to grasp the abstract concepts I defined—in these volumes—and make them understandable.

If I was a language-ridden man excessively concerned with minor language details, I was forced to be captivated by "form" and abandon the "contents".

Why shouldn't I make handmade models and colourful drawings instead of using merely language to grasp abstract topics?

"Talking a lot about nothing" is a method that Scholastic Philosophers have used. Their phraseology results from extraordinary attention to pretentious language that causes them to forget that language is a device for communication, not arrogance and deception.¹²

¹² Humanity pays the Real Systemists' arrogance and verbosity.

The target in philosophy —including the philosophy of law— should be to achieve Truth and Justice through Wise Knowledge. In that field, words and sentences are merely the tools.

If legal staff don't achieve the "Right Knowledge", they are forced to fall into another trap as bad as the trap of language.

The Trap of History and Tradition

When morality and moral values are blurred in the legal system, a judge must turn to past times and consider how his colleagues made decisions in similar cases.

“At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in the absence of generalized ideas, ...”¹³

Judge Holmes adds:

“The rational study of law is still to a large extent the study of history. History must be a part of the study,

¹³ Ibid. Page 24. B.Azafar has done all emphasising.

*because without it we cannot know the precise scope of rules which it is our business to know.”*¹⁴

He is aware of how dangerous it could be to rely on history and tradition:

*“It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from **blind imitation** of the past.”*¹⁵

Judge Oliver Wendell Holmes compares "relying on history and tradition" to getting a dragon out of his cave.

*“When you get the **dragon** out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.”*¹⁶

In the absence of clear definitions of "Right Concepts", Morality as the reliable principle for law and justice disappears, and history and tradition as unreliable guides take their place. Such a replacement is dangerous.

*“Everywhere the basis of principle is tradition, to such an extent that we even are in danger of making the role of history more important than it is.”*¹⁷

Holmes shows us the way of regulation in the past and present:

*“We must beware of the pitfall of antiquarianism, and must remember that **for our purposes our only interest in the past is for the light it throws upon the present.**”*¹⁸

¹⁴ Ibid. Page 24.

¹⁵ Ibid. Page 25.

¹⁶ Ibid. Page 24.

¹⁷ Ibid. Page 29.

¹⁸ Ibid. Page 33.

Any member of the legal system must ask himself: Am I a man of the past or a man of the present and the future? If he wants to be free of "*the pitfall of antiquarianism*" and adapt himself to the latest developments in human society, he must be equipped with "Right Knowledge".

Philosophy must render sufficient "Right Knowledge" to Judiciary.

The legal staff have the right to demand it from Philosophy. Otherwise, the legal system, confused between the past and the present, cannot fulfil its duty as executor of Justice.

When the neurosurgeon, as mentioned earlier, goes to the operating room and finds some shortage in the medical devices, he has the right and must protest.

The neurosurgeon must demand everything be appropriately managed for his operation. He knows any flaw in the operating room affects his function negatively and threatens the patient's life.

The "Right to Life" is at stake in medical surgery and judgement. Any dereliction of duty damages or takes human life in such circumstances.

The legal system's biggest mistake is the lack of demanding "Right Knowledge" from Philosophy.

Without considering the origin of their failures, the legal staff try to find answers to their questions from history and tradition.

People in the past were more or less confused like us. They were not wise men that their Wisdom, by time passing, became lost, and now we, by searching history, have a chance to find it.

No generation of our species had so much opportunity to achieve Wisdom and solve humankind's chronic injustice as we have.

Floundering in confusion that emanates from having no clear ideas on the "Right, Justice and Law" is not the sealed destiny of humankind. We can free ourselves from the bondage of the "Semi-jungle Law" through Collective Wisdom.

Besides Philosophy and Politics, Judiciary has a crucial role in emancipating Humanity.

The legal staff can and must take themselves out of the pitfalls of phraseology, history and tradition by making persistent demands on Philosophy to define the "Right Concepts" for them.