1961


William Burnett Harvey

*Indiana University School of Law - Bloomington*

Follow this and additional works at: [https://www.repository.law.indiana.edu/facpub](https://www.repository.law.indiana.edu/facpub)

Part of the African Studies Commons, and the Comparative and Foreign Law Commons

**Recommended Citation**


[https://www.repository.law.indiana.edu/facpub/1165](https://www.repository.law.indiana.edu/facpub/1165)

This Book Review is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
On being invited to review Denis Cowen’s new book *The Foundations of Freedom*, I assumed my qualification, if any, lay in a long standing interest in African legal institutions, particularly those of the so-called “emergent” societies. Regrettably, this does not suffice. One needs the competences and insights of a keen student of contemporary political events in Southern Africa, of constitutional law on a broadly comparative basis, and of legal and political theory in order to deal adequately with this provocative little volume.

Professor Cowen is already widely known in this country. His academic attainments as Professor of Law at the University of Cape Town need not be recounted. It suffices to mention his wide ranging, humane scholarship of which this book provides ample evidence. Perhaps more because of his service as constitutional adviser to the Basuto people in the reforms of the fundamental law of Basutoland and his participation on the side of the colored voters in the great constitutional struggle over the franchise in South Africa, one turns to this book with great expectation of deep insight into the present and future of that troubled and tragic land.

Broadly classified, Professor Cowen’s discussion may be considered under three headings: (1) an analysis of the evolution of racial policy and law in the Union with an assessment of its present impact and accomplishments; (2) a consideration of certain constitutional devices that the author argues would better the situation; and (3) the presentation of a philosophical position that Cowen believes is the only reliable underpinning for viable reforms.

From the historic practice of racial segregation in the Union, Professor Cowen traces the development of the present policy of *apartheid* or separation. Apologists for the system tend to stress its affirmative aspects and speak not merely of separation but of separate development. The unreality and utter futility of the proposed Bantustans as effective devices for separation are here clearly revealed. Cowen demonstrates also what is too frequently overlooked—that the repressions involved in efforts to implement *apartheid* taint the whole society; they impinge not merely on the black and colored but on the white as well. The ruthless attack of the Nationalist government on the constitutional safeguards of minimal political participation by colored voters has undermined general confidence in basic institutions and left gnawing doubts and troubled consciences even among the dominant white minority. Cowen does not of course attribute the division in South African society solely to governmental policy and legal devices. The divisions, the hostilities, the fears are embedded in the society itself, deriving not merely from ethnic differences but from tremendous cultural disparities as well. Nevertheless, Cowen believes that certain unifying forces remain strong—the raw fact of economic interdependence, the tenets of Christianity at least professed by the whites, the persistent urge of Western civilization to an ever greater inclusiveness, and the love of their land shared by South Africans of all colors.

While insisting that education can contribute by exploding some of the myths, like that of racial inferiority, on which *apartheid* rests, Professor Cowen would...
expect to find the real catalyst to change in an overarching counter-fear—the fear of the ultimate consequences of apartheid. Change thus induced would hopefully lead to a true non-racial democracy in South Africa. Extensive legislative reform would, of course, be essential to wipe out the expressions of both racial segregation and separation. Cowen’s primary attention is not on the details of legislation, however, but on the processes and devices of a reformed constitution.

We need not concern ourselves here with the technical problem of how a sovereign legislature brings into existence a constitution significantly limiting its powers. I see no reason to question Professor Cowen’s analysis and conclusion that this is entirely feasible. It suffices to say that Cowen argues for a rigid constitution, that is, one exceedingly difficult of amendment, with substantial limitations on legislative powers. Among these limitations should be safeguards of universal adult suffrage and other fundamental human rights. The latter include “personal liberty and the right to a fair trial; freedom of association and of assembly; freedom of religion; freedom of the press and freedom of speech.” Also included should be non-discrimination and equal protection of the law guarantees. Cowen reviews the arguments for and against the power of judicial review and concludes that it provides by far the most effective protection of such constitutional rights. To an American his arguments and conclusions are perfectly palatable and may appear fairly obvious. They take on added significance, however, against the background of English suspicion of written constitutions and court-guarded constitutional rights.

In addition to a judicially enforced, constitutionally entrenched bill of rights, Professor Cowen proposes certain other constitutional devices for South Africa. Power is safest when divided, and he thus argues for federalism rather than unitary government. He also would favor a second legislative chamber or senate, elected on the basis of a system of proportional representation and having as one of its principal functions the guarding of the constitution and its bill of rights against precipitate amendment. Professor Cowen is rather unenthusiastic about the relatively new-fangled councils of state, but favors the use of special commissions to investigate complaints of discrimination, attempt reconciliation, and this failing, initiate court proceedings. It bears emphasis that Cowen does not see constitutional reform as the universal solvent. In connection with basic psychological and emotional changes, however, he believes it can make a valuable contribution to allaying the fears of South Africans of all colors and to the maintenance of decent government in the Union.

Cowen’s philosophical discussion proceeds on two distinct levels, and the second limits and qualifies the first. After offering non-racial democracy as the only acceptable alternative for South Africa, he carefully analyzes the substantive and procedural aspects of democratic philosophy. As a substantive philosophy of government, democracy involves two basic ideas or principles: (1) primacy of individual human worth as the ultimate determinant of the relationship of man to organized society, and (2) recognition of the variety and complexity of social life. Implicit in the first are the attribution to man of rationality, volition, and responsibility for his actions and insistence that all associations and organizations “exist to enable men to fulfill their nature as men.” The second argues that men’s diverse potentialities will be best realized through efforts of individuals and varied groups, and requires the abjuration by any single association, specifically by the state, of

---

pretensions to being the sole, necessary channel to individual and social well-being. Procedurally, democracy demands the active, manifested consent of the governed for the power of government to be deemed just.

Cowen fully recognizes the complexity of democratic method. Rejecting the notion that South Africa presents a special case, except perhaps for slight restrictions accepted on an interim basis, he favors universal adult suffrage. The actual procedure by which group decisions are to be reached, whether by simple majority vote or by some other means, presents more difficult questions. Cowen's acceptance of majority rule is at best qualified. He insists that majority decision makes little if any moral claim on the minority unless the minority has had full opportunity to express and propagate its view and thus to enjoy the possibility of becoming the majority. Even if these conditions are met in the formulation of group decisions, Cowen still fears the tyranny of the majority. He would, therefore, place the fundamental human rights beyond the easily exercised power of the majority by the constitutional devices mentioned earlier.

Cowen's devotion to such limitations on majority rule leads him to the second level of his philosophical discussion. He seeks higher norms that validate certain values and entitle them to almost absolute protection, even from the adjustments seemingly implicit in democratic method. These he finds in natural law. In a final chapter, "Under God and the Law," he traces the evolution of natural law speculation and indicates his preference for the great formulations of St. Thomas as the "foundations of freedom" in South Africa or in any other country that would effectively bridle arbitrary power of government.

Thurman Arnold once said that "most of the literature of jurisprudence... is tedious, not as hard subjects like physics and mathematics are tedious, but as throwing feathers, endlessly, hour after hour, is tedious." I hope to avoid contributing to the tedium. The case for and against the natural law viewpoint has been restated innumerable times. A further detailed refutation is not needed here. I, too, have great admiration for Aquinas, not only because he posited a view of man with which I can live comfortably, but because he recognized, as few of his followers have, the limits of human reason and thus avoided the absurdity of elevating to a universal and immutable level a variety of transient positive laws.

Certainly today, as rarely if ever before in man's history, there is need for thoughtful and prayerful clarification of attitude on such pressing questions as: Who are we? What are the true non-negotiables in which we believe? How can we give them maximum protection in a hazardous world? The answers to such questions must be meaningfully related to the legal order, to family and social contexts far too delicate for the blunt instruments of the law, and to international relations, which, strictly speaking, know no law. Perhaps one should not cavil when concerned scholars couch their gropings for significant supports for or restraints on the exercise of legal and governmental power in terms of a "natural law." Cavil or no, my own objections remain firm and rest on two basic points:

(1) The exponent of natural law occupies an epistemological position, the unsoundness of which undermines his purpose. He insists, whether the higher norms are said to have a divine or humanistic origin, that they are "knowable" by the use of man's rational faculties. I have no sophisticated theories to advance, here or elsewhere, on the essential processes and limitations of man's knowledge.

I can, however, suggest the difficulty with the epistemological underpinning of natural law argument insofar as the world of practical affairs is concerned. The natural law norm, as such, helps to reconcile competing human desires and wills only insofar as it can be given fairly specific content and its validity then demonstrated to the rational rejector or doubter. The inescapable fact that human history does not reveal stable agreement on the substantive content of natural law norms belies any claim to self-evidence. Beyond that, the difficulties with the usual lines of proof are well illustrated by Cowen's single-sentence leap over the gap between the "is" and the "ought": "ultimately, in God's created order, being and oughtness are identical."\(^3\) This may be so, but modern logic offers no aid in its proof. I do not need to deny the existence of the higher norms that natural law affirms. Far more modestly, I hope, I need only question the transmissibility of claimed knowledge of their existence or content, to make my point for present purposes. Nor, for that matter, do I need to insist that all real knowledge is transmissible. Yet knowledge that lacks this quality is of limited utility at best. At the age of twelve I may have known that I kissed Suzie behind the barn, but if she denied it how could I convince a doubting world that I had the makings of a lover?

Cowen's own attitude on the means of knowing the higher norms and, to some extent, on their substantive content appears ambivalent. If he attributes to all men the essential rationality that discloses the norms, how does he account for the South African Nationalists, and specifically their leaders, many of whom he considers "men of high integrity, no less honorable than their opponents . . . honestly believing their policy to be in the best interests of all."\(^4\) On what basis is the "reason" of such men to be declared less capable of gaining access to the "higher norms"? On the other hand, Cowen declares that he starts "with the premise that when entrusting power to human hands, it is essential not to believe in the sweet reasonableness of man."\(^5\) The meaning of this premise is unclear. It may mean that though all men have reason, they cannot be relied on to use it. It may mean that though guiding norms are rationally perceived, men's actual conduct judged by these norms is unreasonable. Or it may mean that while the dictates of reason provide reliable guides in many areas of human affairs some other control is essential in allocating and channeling power. If the latter is his position, he seriously impugns the significance of his rationally derived higher norms for positive law, which finds its essential character in the reserved monopoly of power or force that lies behind it.

In Cowen's elaboration of the substantive content of the natural law, I find unresolved conflicts or tensions. As he notes, natural law thought became increasingly individualistic in the seventeenth and eighteenth centuries. This he attributes to individual human will's masquerading as reason with the result that the natural law itself came to be merely a derivative of individual rights and not their source. Cowen believes that a system of substantive natural rights could be developed from the earlier natural law while preserving the restraints of a divinely ordered system. As a logical exercise this doubtless could be done, but I am inclined to think that such a change of emphasis would involve great distortion of Thomistic thought. The central concept in Aquinas' discussion of law was "the common good."\(^6\) Quite plausibly it can be argued that maximizing the common

---

\(^3\) Cowen 214.

\(^4\) Id. at 32.

\(^5\) Id. at 118.
good requires opportunity for individual expression and realization of potential. Insofar as conflict arises between such individual interests and the common good, however, Aquinas seems committed to protecting the latter. Cowen, on the other hand, while insisting that individual liberty and social and economic security are not mutually exclusive ideals, and that a viable balance can be prudentially determined, seems to suggest that in the event of ultimate conflict some hard core of individual rights should prevail. Thus he remains in the later individualistic natural law tradition, though insisting that he validates his position by rational perception of a divine order and not by the sanctification of individual desire or will, the sort of thing fellows like John Locke tried to pull off.

With the substantive content poured into natural law molds by many of its exponents, I can readily agree. Yet their insistence that this acceptance rests on knowledge repels. Far better, it seems to me, to say "these values are the fabric not of our knowledge but of our faith, as St. Paul put it, 'the substance of things hoped for, the evidence of things not seen.'" I only fear that the speciousness of a claim to knowledge, at least in any transmissible form, detracts from a solemn declaration of faith, which otherwise might stir men's hearts and kindle their devotion to the basic decencies that civilized life seems to me to require.

(2) The second objection can be stated far more briefly. It is trite to point out that in its historic impact natural law thought has been as frequently conservative as liberal or revolutionary. The tendency to identify the established, the familiar, with the natural is recurrent. Similarly there is a dangerously short step between insistence that only that positive law is valid that coincides with the natural norm and sanctification of the legally enacted itself. Professor Cowen criticizes Kelsen for offering a theory that can "legalize political absolutism, and identify law with sheer power and domination." Perhaps Kelsen has done that, if one understands "legalize" within the framework of the Reine Rechtslehre. It has always seemed to me, however, that a cardinal merit of Kelsen was his insistence that he was not offering a theory of justification, that, in fact, law could not in any sense justify itself. Properly understood, Kelsen thus contributes to a healthy insistence that law, valid law, can also be bad law, and that it must be evaluated by extrinsic standards of ethics, religion, or morals. This insistence is too frequently muted by those who insist that "law" is itself a value concept.

Aside from his natural law persuasion Professor Cowen has made a valuable contribution to thought about law and government in South Africa. He has brought together in highly readable form from literature not readily available to the non-specialist many insights into the South African situation. His constitutional suggestions are of interest, though their practical influence seems doubtful. One can only hope the moderate optimism he professes for developments in the Union is warranted. The international isolation of the Union, the growing resentment toward it in the United Nations, and the seemingly waning patience of its African majority suggest greater agonies ahead. The awakening of Portuguese Africa may in the not too distant future deprive the Union of the buffer provided thus far by Angola and Mozambique against Black Africa's continental pressure toward freedom and justice. If real optimism that change can be accommodated without disaster seems beyond reach, one nevertheless continues to hope.

The voices of Africa are many. In the United Nations they speak in fluent

---

6 Hebrews 11:1.
7 Cowen 201.
French and Oxford accents. They chant “Free-DOM” in Accra and “In-de-pen-DANCE” in Leopoldville. But in the gathering gloom of the Union of South Africa one may hear the insistent murmur of Sharpeville and Cato Manor, of massed humanity facing the guns and armoured cars of the modern state. As Prime Minister Macmillan has warned, the winds of change are blowing through Africa and the white minority in the Union cannot divert them. To them the voices of Time speak out:

Surely a house so strong and bold,
(The wind is rising, my son,)
Will last till Time is a pinch of mould!
There is a ghost, when the night is old.
There is a ghost who walks in the cold.
(The trees are shaking, my son.)

*   *   *

All night long like a moving stain,
(The trees are breaking, my son,)
The black ghost wanders his house of pain.
There is blood where his hand has lain.
It is wrong he should wear a chain.
(The sky is falling, my son.)

William Burnett Harvey*


This work is an important contribution to the understanding of the Soviet legal system because it fills the need for a painstaking study of legal institutions and procedures. A distinguished reviewer had criticized Professor Hazard’s *Law and Social Change in the U.S.S.R.* for neglecting to “discuss the Soviet judicial system, the legal profession, and civil and criminal procedure.” Such a discussion, the reviewer noted, was necessary for full understanding of the substantive law materials presented. Moreover, procedural law is more than an important means of serving other societal ends, but is an end in itself, “an independent source of strength or weakness in society.”\(^2\) With the publication of the present volume Professor Hazard has responded nobly to the challenge.

The book provides a detailed account of the evolution of judicial structures and practices during the first eight years, from 1917 to 1925, of the Soviet regime. More particularly, as the author states in his preface, this is a study of the means of settling disputes between citizens, means that include the criminal law, traditionally one of the methods provided by the state to give satisfaction to an injured party. Professor Hazard does not directly concern himself with “the character and procedure of institutions devised to assure the security of the Soviet state,” but he discusses the evolution of the Cheka and of other special security tribunals “when pertinent to an understanding of otherwise inexplicable development in the

---

\(^1\) Professor of Law, Columbia University, New York.