The Ellul Forum

For the Critique of Technological Civilization

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Jacques Ellul on Human Rights

About This Issue

Welcome to Issue number 23 of the ***Ellul Forum.*** This issue focuses on Jacques Ellul's views on human rights. Although human rights come up in a variety of places in Ellul's work, he wrote surprisingly little directly on this subject. Our guest editor for this issue is Gabriel Vahanian, Professor Emeritus of Strasbourg University. Professor Vahanian asked two of the most impressive new Ellul scholars from England and France to analyze Ellul's views on human rights and to respond to each other's papers. The first, Andrew Goddard, on the theology faculty of Oxford University, analyzes Ellul's views on law, rights and technology. The second, Sylvain Dujancourt, a pastor in the French Reformed Church, examines the themes of natural law and covenant in Ellul's treatment of rights. Vahanian's own essay both introduces and responds to Goddard and Dujancourt. These authors manage to pull together Ellul's views on human rights, evaluate their adequacy and offer some creative insights of their own. We owe them a debt of gratitude for framing the issues, suggesting constructive future directions and encouraging further dialogue among us on this important theme in contemporary ethics.

In This Issue

Forum: Ellul on Human Rights

Human Rights and the Natural Flaw

By Gabriel Vahanian

Obviously, this specialist on institutions that was Jacques Ellul, was by and large, in his writings if not in his personal life, rather unappreciative of a chief and once most conspicuous one amongst them, the church. At best, he was scarcely more appreciative of it than he was suspicious of the state. Just as he shunned developing a theory of the state, he seems to have deliberately refrained from investing in a theory of the church. A jurist and, therefore, a debunker of all that claims to repressent the law (Droit) together with the rights (droits) it implements, he does not believe in the technicalized and sociological promotion of human rights, deeming them to be non–biblical. A theologian, he revels in the linguistic anachronisms of a so–called biblical theology and never thought real help if any might ever come from philosophy. Influenced by Barth's *Church Dogmatics* as he was, his own theology is more ethically oriented than it is church–bound. At best, it aims at a future church above and beyond its current confessional or denominational demarcation lines.

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As a matter of fact, with the advent of modernity the church is bound to be no longer as it used to be. Better put, or worse yet, the church itself can no longer afford to be as it used to be, if only for one reason, namely religion. Religion is on the path of shrinking further and further, but what is actually shrinking is religion in its traditional structures. And it will unavoidably go on withering until or unless it is grasped through a different set of parameters, as for example Schleiermacher will point out. But, then, how different? From religion as feeling of absolute dependence to the emergence of the absolute state by way of papal infallibility, the fact is that belief is becoming more a matter of private choice than of social consensus. Even the private individual is turning from believer to citizen. And that probably explains, in part. why both sociology and ecclesiology come into being as inventions of that same modernity, no facet of which is spared from Ellul's unrelenting critique, sooner or later.

By training as well as by calling, Ellul inevitably becomes aware of the fact that a significant, and probably not the least, upheaval caused by the rise and spread of modernity came precisely in the wake of the gradual – and perhaps not so gradual — process by which ecclesiology was supplanted by sociology, though perhaps more in the latters pretense than in its actual appearance. Not that the demise of the church was not echoed in the larger cultural arena. But even the overshadowing of ecclesiology by sociology might legitimately be viewed as expressive of yet another need, namely a new understanding of the church.

Indeed, if the shift from ecclesiology to sociology does point to various aspects of the secularization of a social order till then informed by the Christian faith and shaped in the shadow of the church, whether in its sacerdotal and sacrificial or in its prophetic and charismatic guise, a question still remains. Insofar as, in keeping with the Christian tradition, the secular does not exhaust the religious but is fulfilled through it, and vice versa, is not that shift in the construal of the social scheme of Western culture to be understood as becoming really radical only if, and when, from religious to secular or, for that matter, from mythological to technological, it is viewed as beckoned by the need for a new albeit somewhat repressed understanding of the church, rather than its mere demise?

The shift becomes radical only to the degree in which the church, instead of being superimposed on society and overshadowing it, is viewed at one and the same time as concomitant with and iconoclastic of the social order. Or put differently, to the degree in which the church implements a principle inherent to its faith and whose focus consists in changing the world rather than changing worlds rather than, as seems to be the case with Ellul and his penchant for the two kingdoms, driving a wedge between creation and redemption. That such seems still to be the case with Ellul is to me undeniable, though not beyond a point of no return. He does compensate for that wedge, somehow. He thus exhibits a rather incongruous if genuine emphasis on an alternative, not to say an oxymoron: universal salvation. Which he pits against another type of oxymoron, predestination. Claiming, though perhaps for the wrong reason, that the latter is for him much too philosophical a notion, he nevertheless construes it in chronological rather than eschatological terms, historicistically rather than temporally, and so to speak as a story rather than as a scenario – as a plot in search of actors rather than on account of actors in search of the plot, yet one in constant re–enactment, much in the sense of repetition.

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Given their task, neither Dujancourt nor Goddard use this kind of language. They keep to Ellul's own whose re–establishment does in some way approximate re–enactment, at stake in which is the life lived here and now, once and for all, in and through that autonomy which enforces the secular, allowing it thereby at once to come into its own and to be put into question. However muted, it seems to me, a sense of this pervades Ellul's re–establishment, although Dujancourt, correctly, hears it in terms of the God who saves against whose blocking of the God who creates Goddard rightfully protests – and all of them, however, overlook the God who reigns. This is the God who is all in all, only because, whether as God who saves or as God who creates, God was and is as God will ever be – radically Other. So radically other that in Christ there is neither Greek no Jew, that Zion is no place unless it is a birthplace for all people, and that if I am created in the image of God, then God is closer to me than I am myself. No self being self–sufficient, I have no self unless I am claimed by another. I have no rights unless they are granted by others, or by that God who is radically other.

Rights are gifts,not "givens". Gifts that can be denied only by those who take them for granted as givens. And what through them is at stake is what the Jews called Torah, i.e. religion overcoming itself,while the Greeks called it nomos, i.e. physis overcoming itself, allowing for nature to become second nature. Moreover, what Jews' and Greeks' have in common is the fact that neither the Jews nor the Greeks approach is immune from the confusion of the theological and the juridical. This confusion can feed on a misbegotten craving for some Natural Law, just as it can profit from a short–changed, adulterated Divine Law, since no God is worshipped that cannot become an idol or since even the individual Jew who as such has no rights before God compensates for their lack by claiming the right not to be like other people. A sham, for which the people of the Covenant are rebuked by the prophets and Jesus alike. The very person who becomes an individual by reason of a divine calling ends up behaving as though it was by some inalienable self–justifying right. Which amounts to courting Ellul's critique of rights under the guise of which and hence under any kind of sky, Jewish or Greek, always "the strong man is right." But no sooner is the gift spun off into a given and human rights are taken for granted than they hark back not so much to the Law, whether Torah or nomos, as to a flaw whether natural or supernatural.

Not that Ellul is wrong all the way. Solidarity is not always the winner when, under the guise of human rights, what is sought after is scarcely more than the satisfaction of some newfangled tribalistic drive. But his critique of both Natural Law and human rights as stemming from a basic flaw of it, does not fully shelter him from a perhaps equally grievous suspicion that of substituting a supernatural flaw for a natural one. Not that he is unaware of this temptation, or that he succumbs to it entirely. Somehow he even warns against it,especially when, as Dujancourt reminds us, he rejects von Rad's contention of a supposedly biblical distinction between a profane law (droit) and a sacred law (loi). To the contrary, Ellul argues that not only does the Bible know of no profane law, but that it even secularizes the law. But then, paradoxically, therein seems to lie for him the root of his rejection of all pretention to human rights. This makes no sense. On the one hand, he correctly repels the dualism of sacred and profane and adheres to the biblical dialectic of the holy and the secular which he perhaps inadvertently reduces to the dualism of the two kingdoms. On the other hand, he sticks to a purely spiritualistic understanding of the law, altogether shearing it of any secular authentication. It is as if there could be a Promised Land, but no Canaan. It as if Ellul the theologian has been shortchanged by Ellul the sociologist. And, by the way, considering the extent to which sociologists have been addicted to the dualism of sacred and profane, it is safe to assume that, likewise, they too have fallen short of understanding the impertinent relevance of secularization as a way of implementing the biblical dialectic of the holy and the secular. Or is it that Ellul simply does not let his theology interfere with his sociology? That would sound like him.

Are we then in a quandary? Yes and no, for the simple reason that there is no Christian ethic, a contention vastly and deeply demonstrated by Ellul's own construal of an ethic of hallowing. But – given his reservations about human rights fanned by flaws of a technicalized nature – would he go so far as to construe this ethic of hallowing as an ethic allowing for the re–enactment of a secular morality always in need of forgiveness or, simply, always reformable? There is no answer to that question unless it is a reformable one. Even more significant is the fact that, rather than letting us wallow in our holier–than–thou presuppositions, Ellul has led us to the brink of such a question.

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All the more regretful to my mind is therefore Ellul's general conception of technology: as Goddard points out, it is much too sociologically and materialistically oriented. Nor am I in turn surprised that, accordingly, "his" ecclesiology, even as interface of faith and culture, is much too sociologically and spiritualistically oriented. No wonder the anarchist that he was deserves to be rescued from the bear–like hug of sociology or from the swan song of theology. And he fully deserves it, especially since he does impel us towards a new conception both of the church and of society if we must cope with the globalization of our parochial questions, yet without penalizing the human person – much less when that person must cope with the worldhood of a world come of age, with the secular as theater of the glory of God. The wholly other God is not God at the expense of the person each of us is, whether by grace or by virtue of so–called rights. However usurped, should they be shunned? Admittedly, in terms of a person's relation to God they are undeserved. And so they are neither more nor less deserved or, for that matter, usurped than the grace of God. A God whose sun shines on the just and on the unjust.

Ellul correctly construed Christian involvement in the world in terms of an–archy,categorically refusing thereby all subservience to any sacralized order of things. No gap hence needs to be kept yawning between holiness and the secular, between *Dieu et mon droit.*

Law, Rights and Technology

by Andrew Goddard

Jacques Ellul wrote so much on so many different subjects that few realise that his primary area of academic expertise was law. Apart from his five-volume untranslated legal textbook, *Histoire des Institutions*, legal issues are discussed briefly in a number of his other works but it is only his first published book which focusses on the subject. [[1] *The Theological Foundation of Law*, Doubleday, NY, 1960]. Unfortunately, this book and over thirty subsequent journal articles developing an elaborate sociology of law and re-formulating his earlier theology of law have attracted little attention, even from Ellul scholars. In the short compass of this article my aim is to highlight four central theses in Ellul's work relating to law, rights and technology. I shall then sketch three proposals of my own which seek to demonstrate that both in the history of Western thought and in our contemporary world there are important inter-relationships between these four Ellul theses.

Thesis 1:

The modern world is dominated by Technique and the State in a way which renders our society qualitatively different from all previous societies in history. This is probably Ellul's most famous and widely known argument which, from the time of his earliest unpublished personalist writings in the 1930s, drives and shapes his varied sociological studies.

Thesis 2:

Law today is not only technical law (a phenomenon found in other periods of history), it has undergone such a total transformation that it is no longer truly law. One of the great strengths of Ellul's classic work, *The Technological Society*, was that it traced the effect of Technique on so many aspects of human life, including law [[2] *The Technological Society*,pp291-300]. In several articles from the 1960s onwards he further develops this argument, providing an analysis of the transformation and dissolution of law in the modern world. His central claim here is that such factors as the non-normative status of law and its subordination to the state means that law no longer has the functions it had in all historic civilizations and that what we still call "law" has now become the means of state administration and regulation.

Thesis 3:

We are now obsessed with the idea and language of subjective rights. This is probably the least controversial of Ellul's theses presented here but it is also the thesis he develops least in his writing. His major discussion of the subject bemoans the wholesale juridicisation of our society and claims that "The idea of 'having rights' has become essential in contemporary human and social relationships...Everyone in our society demands 'his rights'" [[3] "Recherches sur le droit et l'Evangile" in Cristianesimo, Secolarizzazione e Diritto Moderno no 11/12 (1981), Luigi Lombardi Vallauri & Gerhard Dilcher (eds.), pp116,122].

Thesis 4:

There are serious dangers in any conception of rights which focusses on the individual as a possessor of rights. Although Ellul uses the language of "rights" in his initial theological foundation of law, this becomes less prominent in later writings. He consistently takes care to emphasise that "human rights" in his understanding are not the human rights of modern liberal rights theory and are most certainly not natural, inherent rights of individuals: "Man cannot have any rights except as part of society...It is therefore man in relationship...who has rights. These are not inherent in his bare existence". [[4] *Theological Foundation of Law*, op. cit., p80]. This is one reason why, throughout his later writing, Ellul remains highly sceptical of all Charters of Human Rights and unsympathetic to the many Christians who seek to provide a theological justification for human rights [[5] Amongst the most influential Christian theologies of human rights are the writings of Jürgen Moltmann and Jacques Maritain. See Ellul's comments on WCC discussions on rights in "Some Reflections on the Ecumenical Movement", Ecumenical Review Vol 40 (1988), pp387-8]. These four theses are central to Ellul's thinking on law, rights, and technology but each is developed and discussed largely without reference to the others. With the obvious exception of the first two theses (where Ellul demonstrates at some length that the fundamental change in the character of contemporary law is derived from the dominance of Technique and the State in our society) there is no sustained attempt to develop the important inter-connections between them. In what follows I will therefore attempt a more holistic approach by proposing that Ellul's theses are inter-related in three significant ways:

(1) The conception of rights currently dominant in the Western world (which is focussed on the individual as possessor of rights) arises from the same nexus of ideas as that which also fuels the growth of Technique and the power of the state.

(2) This "liberal" conception of rights (and its dominance in popular thinking about law) can take a form which represents another distinctive and dangerous feature of contemporary law.

(3) The substantive content of subjective rights is now highly elastic and constantly increases as a result of the state's increasing power and the development of new techniques.

The Common Theoretical Roots of Modern Liberal Rights Theory, Modern Technique & the Modern State.

"This century of technique was also the century of the 'Rights of Man'...The idea of human rights appeared at the same time and in the same country as modern technique, and I do not think that there is much that is accidental in history, certainly not here" [[6] *The Technological Bluff,* Eerdmans, Grand Rapids MI, 1990, pp128,129]. These sentences, framing a very short discussion of human rights in Ellul's last major volume relating to Technique, show that he had a sense that this first proposal was correct. Ellul however did not develop that sense in any detail and this omission reflects a wider problem in Ellul's account of the historical development of modern Technique: its neglect of philosophical developments and an over-emphasis on material, sociological changes. As with each of my three proposals, what follows may often appear to be as much a matter of assertion as a fully developed argument but its aim is to begin to plug this major gap in Ellul's work and thereby also to assist further reflection on the inter-relationship of law, rights and Technique in our society.

Attempts are often made to trace the history of rights back to the ancient world, including the Old and New Testaments. Although some small traces of continuity may be discernable, our contemporary conception of rights (certainly in the West) is totally unknown to the world of the Bible or Roman civilization. Its origins can perhaps be traced back to scholastic writers of the thirteenth and fourteenth centuries but its full formulation was the work of seventeenth and eighteenth century thinkers, notably Hobbes and Locke who "typify the emergence and classical consolidation of the liberal ideology of individual rights" [[7] Ian Shapiro, *The Evolution of Rights in Liberal Theory,* CUP, Cambridge, 1986, p19. See also Joan Lockwood O'Donovan, "Historical Prologomena to a Theological View of Human Rights", *Studies in Christian Ethics* (9), 1996].

Three fundamental philosophical shifts occur in the course of these two centuries. They provide the necessary intellectual context for the rise of Technique, shape liberal rights theories, and alter the character of both law and the state. [[8] A number of modernity critics have discussed these philosophical shifts at length. See particularly, Charles Taylor, *Sources of the Self,* CUP, Cambridge, 1992]. First, there is the diminution and effective disappearance of the previously dominant classic Christian conception of objective laws higher than human law (natural and divine law) which determine "right" in human society and provide a normative limit to the human will and human activity. Second, centre stage in social and political theory is seized by the abstract individual who contracts with other individuals. The primary significance previously attached to community and persons-in-relation within human society is thus lost. Third, the goal of human freedom not only becomes of much greater significance but it ceases to be conceived of as set within a wider objective, limiting order and is instead replaced with the ideal of the individual's will being free from external constraints and free to create its own order. Ellul's account of the reasons for the eighteenth century explosion of technical progress does not acknowledge the significance of these three key developments in the history of ideas even though they provide the intellectual foundation and justification for many of the social changes he highlights. The first shift brought to an end the constraint on technical development previously exercised by Christian moral judgment which required that every change "had to fit a precise conception of justice before God" [[9] *The Technological Society,* op. cit., p37]. The second fuelled the campaign against natural social groups and so increased social atomization and plasticity [[10] Ibid., p51]. The third provided the spur both to removing taboos and to the creation of a "technical intention" [[11] Ibid., p52]. These developments not only provided the necessary theoretical context for the modern dominance of Technique, they also transformed the theory and the reality of both human law and political power (and they did so in large part via rights theories).

In social and political theory conceptual priority is given to the individual subject who is held to have fundamental, natural rights. These rights are anterior to any social or political relationships and are not founded in any divine law which would impose obligations as well as granting subjective rights. As a result, in relation to the law and the state, most individuals today view themselves as rights-bearing and rights-claiming subjects and the actual content of these putative subjective rights is increasingly shaped by the belief that individuals should be free to live as they wish without external influence or powerful social constraints such as the law. Political power is, from this period onwards, regularly viewed as something derived from a contract in which individuals divest themselves of certain individual rights, powers and freedoms and grant certain rights and powers to a governing authority. Law is also re-conceived. It is no longer a society's common work which is formulated, perhaps through a representative ruler, with reference to some higher normative law. It becomes instead the locus for establishing individuals' competing rights-claims as legal rights in positive law and the means by which the political authority, usually claiming popular sovereignty, exercises its own rights and powers in order to shape the social body according to its free and sovereign will.

Rights as a Distninctive & Potentially Dangerous Feature of Modern Law

"I have a right to....". This form of statement is now a commonplace in both legal and moral debates. Its dominance is one of the most important distinctive features of modern law. It is also potentially a very dangerous one for law because a focus on individual rights-claims can help to undermine law's traditional relationship to an agreed social morality and set of values. Ellul argued that whereas historically law always reflected a particular society's values and represented a common objective for that society to attain, modern law had become purely technical. Our contemporary concern with "rights" and the law as adjudicator in disputes over competing rights claims has played a significant role in this transformation because it has meant that the important quest for social agreement on the good is often forgotten or ignored in legal disputes.

This development is sometimes positively encouraged by those who extend the traditional liberal belief that there are certain areas of the moral life on which the law should not pass judgment into the much more dubious claim that the law

should not be concerned with any definition of the good because law is a matter of limited public social regulation while morality is a matter of private individual preference.

The importance of the phrase, "I have a right to...", demonstrates two major problems which arise from any concentration on individual subjective rights rather than the formulation of a community consensus on what is right. First, except in those cases an individual protests that a clearly defined legal right has been violated (e.g., the legal right, after a specific time under arrest, to be either released by the police or charged with a crime) the claim to a right is actually equivalent to a moral claim. Despite this, the legal system and society as a whole is often reticent about engaging in serious moral debate about substantive issues concerning the conception of the good implicit in any particular rights claims. This is in large part because the modern intellectual framework pushes both the legal and moral discussion into the terms of individual freedoms and subjective rights without addressing in sufficient detail the more fundamental issues of the content of the good and what is right.

Second, although claims to rights are common currency and this form of expression is now almost universally accepted as valid, there is clearly only limited agreement as to the substantive content of claimed rights. Globally, there are regular debates about whether non-Western countries must accept liberal democratic conceptions of human rights as universally valid. Nationally, we find regular and often heated contention over rights-claims. In the United Kingdom this has recently occurred over different elements of "gay rights" (e.g., an equal age of consent and protection from discrimination in employment) and the meaning of "the right to life" in relation to artificial feeding of people in a permanent vegetative state. Even where it might be thought rights are clearly stated and legally agreed upon, we discover strong disagreements (e.g., the rulings of the European Court of Human Rights are often vehemently opposed by many who recognise its legal standing as interpreter of the Convention on Human Rights).

In short, the dominance and widespread agreement on the importance of "rights-talk" can prevent discussion of the more fundamental moral question of a society's common conception of the good and the shared values which must be the foundation of rights claims. It can also mask the fact that the often heated disputes over rights really reflect that the protagonists each have "a different view of humanity, society, and power, and of the relation among them" [[12] *The Technological Bluff*, op. cit., p129]. The effect of these changes on any legal system is serious. Rather than providing procedures to enable civil peace based on an agreed set of values shared in society as a whole, the legal system regularly becomes an open battleground between the competing and conflicting rights claims of individuals and cause groups.

This battle is of such significance to the participants because contemporary law now functions, in part, as an effective technical means by which society as a whole is given its shape and direction. The most powerful group will therefore benefit greatly if they succeed in establishing their conception of rights within society's law. Unfortunately, the result is often that the law becomes a means of securing power and so sections of society become increasingly alienated from the legal system. This occurs, of course, in other legal systems but in our Western technological and democratic society, the liberal conception of rights plays a much more important role than is often recognised. The underlying reason for this was stated by Ellul in his first book, "The affirmation of one's rights actually becomes the justification for oppressing others...Whenever man pretended that he could found his rights on his own strength and contain them within himself, his pretention was built upon violence. Any distinction between violence and justice breaks down. The strong man is right" [[13] *The Theological Foundation of Law*, op. cit., p84]. Any doubting the validity of this analysis need look no further than the long-standing conflict between "right to choose" and "right to life" groups campaigning over abortion legislation in the heartland of liberal, democratic, technological society.

Technique, the State and the Demand for Rights

The demand for legal recognition of claimed rights is often driven today by technological progress and the increasing power of the state. Our conception of rights therefore provides an important medium by which these dominant social forces shape both our juridical system and society as a whole. The importance of the state in relation to rights theories can be traced back to the origins of modern liberal rights theory outlined above. [[14] See Paul Marshall, *Human Rights Theories in Christian Perspective*, Institute of Christian Studies, Toronto, 1983, p11-16]. As the power of the state has increased this century, citizens have responded by attempting to limit it by the legal entrenchment of basic rights.

With the development of more and more sophisticated techniques in the hands of the state (e.g., in relation to surveillance and the invasion of privacy), there arises the need to claim and to defend new rights in order to protect individuals against the state and the techniques it can employ. Of course, as Ellul regularly pointed out, the basic problem is that the state itself now so dominates the legal system that it is almost impossible to limit state power effectively by legal means. In addition to this negative source of the demand for legal rights in the face of growing state power, there is also the increasing claim to certain positive rights arising from the development of powerful new techniques in numerous spheres of life. [Paradoxically, these rights (especially in relation to social welfare) are often demanded from the state in its more benevolent guise]. Oliver O'Donovan has argued that, "technology derives its social significance from the fact that by it man has discovered new freedoms from necessity. The technological transformation of the modern age has gone hand in hand with the social and political quest of Western man to free himself from the necessities imposed upon him by religion, society, and nature" [[15] Oliver M.T. O'Donovan, **Begotten or Made** ?, OUP, Oxford, 1984, p6].

That social and political quest is now often expressed in the juridical language of rights with claims that there is a right of access to new technological developments (e.g., in health care) which assist the individual's quest for liberation from traditional necessities. Due to technological innovations and the intellectual environment created by the three philosophical shifts noted above, this right of access to technical progress in turn generates previously incredible rights-claims which can become widely accepted and defended (even almost unquestionably) in modern society. Perhaps the best example of this is the claim, based on the growth and success

in the development of reproductive techniques, that any woman has a right to her own child (and, increasingly, her own healthy child). This utilisation of the language of "rights" by those who would benefit (financially or physically) from new techniques makes it increasingly difficult for society as a whole to place effective and long-standing legal limits and controls on their development and deployment. When this difficulty is combined with the speed of technical advances we discover that modern law finds itself lagging far behind the social reality it is meant, in part, to shape. Even when one country does attempt to use the law to restrain newly developed techniques, other countries will refuse to do so and eventually legal constraints will become increasingly redundant and have to be relaxed or removed. [[16] This is illustrated by the recent British case of Diane Blood's claim to a right to artifical insemination with her dead husband's semen. She was eventually allowed to export the sperm to another European Union country even though its use in the UK was judged illegal because the original removal and preservation of the specimen had occurred without her late husband's consent]. In contrast to these legal problems generated by the conjunction of technical progress and rights-claims, there is a further important correlation developing between technology and rights. Not only do the beneficiaries of Technique seek to prevent legal inhibitions on technical progress by reference to their rights but those who wish to defend those suffering in contemporary society (particularly as a result of elements of the modern technological enterprise) likewise reach for the terminology of rights." Thus, as already noted, opponents of the massive rise in abortions performed in technological cultures seek to reform the law by advocating rights for the foetus and, similarly, in the face of the impact of Technique on man's relationship with the natural world (particularly in relation to food technologies and genetic manipulation), there is a growing acceptance of the validity of "animal rights" or even "creation rights". The scope and the specific content of rights claims is therefore highly elastic and it is the powers of the state and Technique which now play a crucial part in setting the agenda for defining new rights and generating much of the legal debate.

Conclusion

Ellul always insisted it was impossible to understand any particular social phenomenon without reference to the wider society of which it was part. His own work applied this in an illuminating way to aspects of law within the context of our technological society. This article has recalled four of Ellul's central theses concerning law, rights and technology and argued that there are important inter-connections between them which were not developed in Ellul's own work, largely because he did not give sufficient weight to the fundamental intellectual shifts of the seventeenth and eighteenth centuries which underlie both the rise of modern Technique and the development of modern liberal rights theories.

Comments on Goddard

By Sylvain Dujancourt

Often taken for a philosopher, Ellul had always been careful not to make such a claim for himself. For a good reason: dealing as his works do with technology, their major concern is the fruit of a method of social analysis as simple as it is original. Intimately steeped in Marx's thought, and convinced that "If Marx lived today, he would make neither the same analysis of society nor the same proposals for the correction of its ills," Ellul wondered "How would Marx describe the dominating central phenomenon of this society of the twentieth century?" And it is fortunate that, in order to answer this question, Ellul did not try to philosophize about it. Otherwise, given what philosophers have written about technology or about law, one could easily bet that his work would be devoid of any relevance; it would lack depth as well as breadth. Abstraction, insofar as it only engages in a game of the mind, hardly interested him.

One should not, however, draw any hasty and erroneous conclusions: he does come to grips with philosophy in the formulation of his thought and the expression of his work. One need only read his assessments of ethics and realize how inseparable they are from his analysis of technological society before one is immediately convinced not only that Ellul had a perfect knowledge of philosophy (his lectures and conferences were regularly studded with quotations from and references to the best philosophers), but also that he used certain philosophical tools, if only to criticize them. In this respect, one can usefully go back to the pages devoted to the axiomatic foundations of ethics in *Le vouloir et le faire.*

It would accordingly seem difficult to hold that Ellul gave little attention to the fundamental transformations of our conceptual framework, in particular those that took place in the seventeenth and eighteenth centuries. His historical output amply shows the preeminence of ideas over facts, even in the making of history. To wit, his five-volume *Histoire des Institutions*, not to mention his dissertation on the *mancipium*. And with respect to liberal theories, a mere glance at his impressive bibliography would suffice to show that he not only knew about them, but also knew them well enough to be their keenest critic – and the same of course applies equally to liberal or subjectivist theories of law.

Admittedly, Ellul did not produce a systematic work, in the manner of a philosopher, whether on law or the history of ideas. But that would be a lack if it were not compensated for by references scattered throughout the exposition of his thinking in the pursuit of an original position. And were it a lack, it would possibly hinder a better assessment of his work. But even so, would that not be sufficiently offset by the creativity this work displays, especially in an area as fluctuating as is that of law?

Natural Law or Covenant?

Human Rights and the Rights of Others

by Sylvain Dujancourt

(Translated by Andrew Goddard)

There can be no real dispute that Ellul wrote much on a variety of subjects and that he did so with talent, pertinence, erudition, lucidity, and perhaps even prophetic insight. His writing on so many areas (often where he was not a specialist) sometimes evidence a bulimic character which can damage the literary quality of his work, if not its intelligibility or coherence. Nevertheless, his numerous publications are marked by a paradox: this jurist by training, this historian of law, this specialist on institutions from Antiquity until the present day (the success of his five volume *History of Institutions* has never been denied and Ellul willingly confessed in private that most of his royalties came from this volume), this teacher of Roman Law at Bordeaux's Law Faculty, wrote little on the subject of law. He published only a single work on law: *Le fondement théologique du droit*(1) and a number of articles, generally on the philosophy of law.(2)

The paradox is even greater when it comes to human rights. Ellul's work is contemporaneous with the expansion of human rights in the juridical realm and in the world at large. Developed after the First World War, the internationalisation of human rights declarations became prominent after the Second World War: Universal Declaration of Human Rights (10 December 1948), International Covenant on Economic, Social and Cultural Rights (16 December 1966), International Covenant on Civil and Political Rights (16 December 1966), American Convention on Human Rights (1969), The Helsinki Final Act (1975), African Charter on Human and Peoples' Rights (1981), UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), Universal Declaration of the Rights of AIDS and HIV Sufferers (1989), Declaration of the Rights of the Family (1989), UN Convention on the Rights of the Child (1989). Despite all these occurring while Ellul was writing, it is not possible to find any article by him specifically devoted to this highly debated discipline within modern law, and Joyce Hanks' bibliography contains very few references to human rights. In fact, anyone wishing to know Ellul's thinking on this subject is condemned to reading his work as a whole (especially the articles) in order to discover here and there, always within discussions on some other subject, scraps of analysis of human rights.

This is not noted simply to highlight the difficulty of dealing with this subject over a number of pages. It is noted above all to draw attention to how much Ellul ultimately felt rather uncomfortable with the law as a social phenomenon and an object of theological reflection, and how much his opinion on the subject of human rights was a critical and negative one. It is significant that, in the fifth volume of his *History of Institutions*, the treatment of human rights is kept to the bare minimum with only three pages on the subject (mostly devoted to a critique) and no reference to "Human Rights" in the index. Similarly, the exhaustive bibliography of Ellul's works produced by Joyce Hanks, does not contain "Human Rights" in its subject index while in her index of publications on Ellul, although "Human Rights" appears, the entry is empty and refers readers instead to the articles under "Humanism."(3) The explanation for this silence, which almost amounts to a defiant refusal to discuss the subject, is twofold. On the one hand, his reasoning as a jurist, his distancing as an historian, and his analysis as a sociologist lead him to perceive human rights more in a political and ideological framework than a juridical one. On the other hand, his theological stringency, his bringing of everything back to the Bible as the basis of his ethics, pushes him to discern the profound spiritual ambiguity and perhaps even the incompatibility of human rights with biblical faith. This is despite the fact that a number of theologians, especially Protestants, have sought to demonstrate that human rights have a biblical and evangelical origin.

In my research, I have found only a single article by Ellul entirely devoted to human rights. This appeared in the weekly *Réforme* (7 January 1989) in the bicentenary year of the Declaration of the Rights of Man and of the Citizen which was issued on the 26th of August, 1789. The ironic, mordant and polemical title gives the tone of the article: "Du vinaigre dans la Déclaration des Droits" (Vinegar in the Declaration of Rights). In a few lines, he delivers a juridical reading of articles that in the 1789 Declaration refer to equality and liberty. Noting first that equality is not classified among the "imprescriptible" rights belonging to man in his standing as a human being, he observes that the extent of equality is greatly weakened by recognising only equality "in rights." This is done in such a manner that in fact real inequality (rich and poor, superiors and inferiors) is legitimated by the "common good." For Ellul, liberty is an imprescriptible right which attains "bliss" in that it permits resistance to oppression. But for Ellul, oppression today lodges itself in technicalised administration and in the offices which produce decrees, circulars, regulations, and other orders. And so he exclaims, "Citizens, to arms ! Take your hunting rifle when Bridges and Roads wishes to expropriate your land, or Electricté de France wants to build a Power Station, etc. You have the law *[le droit]* on your side — the very Declaration of Imprescriptible Rights. If you prevent the works, you are not terrorists, but the representatives of these rights !" Concerning private property as the proclaimed guarantee of liberty he

insists: "It is with a gun in the hand that it is necessary to defend one's own property [....] Private property, inviolable and sacred ! Well, pardon the expression, but that makes me laugh." Few readers of this article will respond positively to Ellul !

Human Rights and The Natural Law

These criticisms by Ellul of the 1789 Declaration are already expressed — although in a less scathing style — in his *History of Institutions*. Presenting human rights as "the affirmation of natural rights, attached to man's nature, superior to the State and to the Nation itself" he uncovers several sources of these rights, quoting the teaching of the Roman Catholic Church, then the 1776 American Declaration of Independence, Enlightenment philosophers, and the precedents of the French Monarchy. This list largely summarises the standard presentation of the sources of human rights although it should be noted that the theological source is here given first place and there is no reference to the British antecedents which are generally referred to in the history of human rights. Describing succinctly the Declaration's content, Ellul emphasises the preamble that adheres "to the doctrine of natural law based on the existence of God, as the foundation of the social order"

The Declaration of the Rights of Man, like all subsequent declarations and conventions on the subject, emanates from natural law. Ellul underlines this because it is this which constitutes the original and conceptual flaw within human rights. If there is a constant within Ellul's juridical thought it is certainly his opposition to natural law. All his students who followed his doctoral course on natural law will admit that he knew his subject perfectly and that his arguments ended up by convincingly "deconstructing" this natural law. What is natural law for Ellul ? "The confusion of the theological and the juridical," Ellul replies.(4) Whether they be philosophical, juridical, or theological in form, theories of natural law have never found favour in Ellul's eyes. He reckoned that particularly those theories of natural law elaborated by theologians have in common the desire "to find a common ground for encounter between Christians and non-Christians."(5) They rest either on a conception of man as not totally separated from God by the Fall and on a conception of justice as eternal and something which man can know by himself (the catholic idea), or on a conception of God's Law, with opposition between the Law and the Gospel (the Protestant idea).

Ellul never changed in his opposition to natural law.(6) For him, natural law does not exist, whether inherent in human nature, created by God, woven into the order of creation, formulated in the Revelation of the Torah, written in the human conscience, or produced by reason.(7) His criticisms of natural law are both juridical and theological.

Natural law is a "creation of the human mind," and rests on a "blurred notion of nature," a "variable common principle," and "doctrinal differences."(8) What is more, it no longer corresponds to the current state of the law and is ineffectual for all the new rights which have arisen with Technique: "this doctrine is based on juridical observations related to a situation which has ceased to exist."(9) Ellul adds that natural law is "anti-scientific"(10) and observes that this doctrine "has been ineffective in preventing the evolution of our law in a direction which is absolutely contrary to it."(11) That direction, which Ellul challenges, is the technicalisation of law, its submission to the state, and its assimilation to being merely a social fact.

To these sociological and juridical arguments, Ellul adds theological considerations. Already in 1939, he wrote that "every theory of natural law is a negation of the eschatology of the Kingdom."(12) It allows man to define what is suitable as a social rule. He reproaches natural law theory for reducing God to "a convenient hypothesis" and refusing God as "Creator, Saviour and Revealer." (13) Natural law allows man to escape from the "radical nature of revelation."(14) Ellul thus shares with Niebuhr the refusal "to seek some common ground between Christians and non-Christians on which they are able to agree among themselves and construct a juridical system."(15)

By taking this position, Ellul places himself in a current of Christian theology which, although a minority one, sets itself apart from the naturalist temptation of law and seeks a foundation to law other than that of nature. "Wherever nature comes to an end, there creation can begin" writes Vahanian,(16) adding that "nature ignores God as, indeed, it ignores evil,"(17) meaning thereby that the categories of nature are not those of God nor those of morality. Which "means that since God is no longer confused with nature or bound to history, at the same time man is removed from determinism, from the realm of necessity characterizing history and nature."(18) In other words, with the Bible nature is no longer divinised nor to be feared any more than it is to be ignored or ridiculed, because man is no longer dependent on it. Consequently, it seems difficult to accept human rights which originate in natural law.

But Ellul adds others arguments in opposition to human rights: the reduction of man to the individual, the ideological function of human rights, and their ineffectiveness. Ellul does not make man into a value. He never considers man as Man with a capital M, because he rejects the idea of an abstract, perfect man of whom therefore nothing new can be said in his life. This man does not exist for Ellul who, following in the line of Marx's thought, knows only men and women in their situation. Ignoring human nature, he knows only the human condition.

That man has rights is not a recent invention. The learned historian that he is, he can say that the idea is very ancient. Apart from the Stoics, he can also appeal to the Bible: "You shall not violate any of these rights, you shall not show partiality" (Deut 16.19). The problem with rights as they have been conceived and formulated since the eighteenth century is, according to Ellul, that they no longer concern people but individuals. The individual is an abstraction which places the person outside of humanity, opposing them to other people and to society. These human rights are thus opposable rights to use the juridical terminology. On the contrary, man is the person included in society, within humanity, who is situated among his contemporaries but also in relationship with his ancestors and his descendants. He is a man who is representative of other men. This man does not oppose his rights to those of other men but rather transforms rights into obligations. The notion of duty or obligation constitutes the most interesting critique addressed to the traditional idea of human rights. Outside this milieu, man loses his rights, says Ellul, either because he abolishes them or because he cannot profit from them. In contrast to the individual who places himself in a situation of conflict, man

places himself in a situation of reciprocity in his relation to others: "Man is called upon to acknowledge the rights of others, since he requests his own to be recognised."(19) According to Ellul, to claim to found human rights on the individual reverts to founding law and right on a relationship of permanent forces, on violence, and on the reason of the strongest.

Privacy and the Bible

For Ellul, the Bible shows that man is man only when he is in relationship with others, particularly with his God whose revelation confirms to him once and for all that he is no longer alone in life. Just as there is not any individual in the Bible, similarly there is no private life, no sphere reserved to man from which God will be excluded. "What appears surprising to me is that in the Bible man appears to me extraordinarily delivered over to others. He is always a prey to others."(20) The only moment, Ellul concedes, where this man becomes alone is when God calls him. Calling is always individual, a call by name which extracts a man for a time from his social group in order to place him in that unique and revelatory relationship with his God.

Ellul calls into question not only this reduction of man to the individual by human rights but also their ideological function. In his commentary on the 1789 Declaration he underlines two characteristic elements of the political function of human rights: the Declaration aims first to destroy politically the Ancien Regime, and it rights have the purpose of limiting the State, essentially the king. The theoretical reference implicit to it all is the law-abiding state *(l'Etat de droit)*. This is an idea that will carry different meanings, from the 19th century German school of public law (which, inspired by the Hegelian conception of the State, subjugated law and right), to the narrow linkage between the law-abiding state and democracy which dominates today. For Ellul there is no possible doubt — the creation of the notion of the law-abiding state is "a subterfuge."(21) The great fear Ellul felt in the face of the state is well known. He saw it as the focus of most of the powers and oppressions of the twentieth century. He was never a positivist jurist nor a supporter of human rights because he always reckoned that the law could not stand up to the state in a situation where it was principally the state which created the law. The idea of limiting — indeed judging — the state by the law seemed perfectly unrealistic to Ellul, who at the most would concede that the law is able to act as a "guarantee against the arbitrariness of the state."(22)

It is on this basis that Ellul also raised the argument of the ineffectiveness of human rights. Concerning the Declaration of 1789 he notes that, despite the proclamation of liberty, of equality, of defence against the encroachments, abuses and arbitrariness of the royal state, "this declaration does not protect all the classes of the nation,"(23) mainly because of the absence of any interest in social and economic questions. In his thought on the new powers generated especially by Technique, Ellul coherently shows that this Declaration "does not protect citizens from the eventual tyranny of powers other than the King." But for Ellul this lack of effectiveness is inherent within human rights. He judges the principles of these rights to be "very theoretical and hardly revolutionary," noting that from the beginning there was set up a discrepancy (which increasingly grew) between the actual politics of the revolutionary assemblies and the Declaration. That "politics of pretence" will justify the multiple derogations from the principles of the Declaration such as basing the right to vote on a property qualification.

This analysis of a jurist taking formal note of the distancing of human rights from an effective, accepted law, evolving by osmosis with opinion — and we must not forget that for Ellul the model of law remains the Roman law, the opposite of a law with an ideological connotation and function(24) — explains his distrust and even automatic rejection of the principles related to human rights. His outlook as an historian and jurist prevails over that of the moralist who will not let himself be deluded or fooled by words or declarations. We can take as one example that of private life and information. Here are two areas that, from the viewpoint of human rights, clash as regards principles: the right to respect for private life and the right to information. Observing that information is, as well as a communication, a participation in society and therefore only a matter of organisation, Ellul concludes there does not exist a right to information belonging to the individual because he is human. "It is useful, in the society in which we find ourselves, to be informed; this is something on the level of the useful and there is no need to inscribe that in the great principles, in the charters of the rights of humanity. It did not exist one hundred years ago and perhaps will not exist any longer a hundred years from now. It is a transitory matter on which we need not focus our attention."(25) The same relativisation of principle is found concerning private life in regard to which Ellul insists on the haziness that surrounds this notion whose content varies in different societies. Sparta ignored the private life whereas two centuries later Rome erected around the domus a wall which could not be breached even by the lictors. It is necessary, writes Ellul, "to reject all private life that has a static character, that is simply the private domain, [....] to show that there is no clear, objective, marked limit to what we call private life."(26) Ellul strengthens his argument with more biblical and theological considerations. According to his biblical analysis, man has no private life before God. This is because he hasn't a private domain — this God touches all aspects of man's life, even the deepest. To put it differently, any private life would be subverted by that relationship with God which reaches "all of man and all men" (G. Vahanian).

From Natural Law to Covenant

We are now able to examine Ellul's theological views on human rights more deeply. There are here two arguments to consider, that can be summarised in two theses: man has no right before God, his right is in God through Jesus Christ.

Claiming a biblical basis, Ellul holds that man has no right before God. This affirmation is not his alone as it is also the opinion of Barth and Bultmann: "The Jew as such has no right before God."(27) Such an assertion raises two questions. Firstly, why is there law from a theological viewpoint ? To which Ellul replies that it is quite simply because man is a sinner, living in the order of sin and a ruptured relationship with God; but that, because no human community would know how to live without such "rules of the game" (which is what the law is for Ellul), the existence of human law is a sign of the patience of God towards these human sinners. Secondly, where is the right of man? In God,

replies Ellul. More precisely in that particular relationship God establishes with man called the covenant and in that particular act of God towards men which is the act of judgement.

The word "covenant" betrays a juridical connotation that it is helpful to clarify. According to Ellul, the covenant explains both the situation of human law and the origin of human rights. What is this covenant ? It is a gracious act, an election, a choice of God to find a partner for himself in that relationship of love which characterises him and which is brought to us by his word. Over and above this bond with this quality, the biblical covenant also has a content: the Law which defines the conditions of the covenant. These conditions, according to Ellul, have certain similarities to "a contract requiring adherence,"(28) a contract in which one of those contracting fixes the totality of obligations such that the other partner can only accept or refuse (as, for example, in the contract represented by a train ticket).

The covenant, as the fruit of God's revelation to a person or to his people, restores that relationship which was broken by sin. It is far from static and so the Bible knows several covenants (Adam, Noah, Abram, Moses) with the last covenant being with Jesus. In covenant, the law of God is nothing other than "the prerequisite for maintaining the situation which God has re-established in his covenant."(29) It is in this framework of the covenant that God recognises human rights and Ellul cites a number of examples: to rule the creation, to be avenged if one is killed, to kill for one's own food. This list is not complete and we could never know an exhaustive list because "the biblical revelation does not contain a chart of human rights" and "the content of these human rights is essentially contingent and variable."(30) These rights are determined by thought-forms, political and social structures and economic constraints, but above all by two elements: the mission conferred on man by God and the demand of personal rights judged necessary if man is to be able to live.(31)

The main consequence of the covenant is the acceptance by God of human law. Between God and man, man is little, God is all, and the relationship between the two, being one of faith, turns out to be differentiated and unequal. Ellul shares the opinion of Bultmann: "The distancing of God has the same origin as the proximity of God, that is to say the fact that man belongs to God and that God issues him with a law."(32) But he goes much further than his illustrious Marburg colleague and insists on the absence of any interference between the law of God and human law: "the law of God cannot be used to elaborate a human law."(33) However, countering von Rad who distinguishes sacred and profane law *(droit)* in the Bible, Ellul supports the thesis of the secularisation of law by the Bible in such a manner that he does not hesitate to assert that there is no profane law *(droit profane)*, (34) nor any "sacred law *(loi sacrée)* on which all human laws depend and which measures all law."(35) This remark is crucial and very revealing of the deep reason for Ellul's indifference, even hostility, to human rights. In effect, his theological approach to law opposes all the foundations habitually attributed to human rights. To nature it opposes the covenant, a gracious act of God. To the "metajuridical normativity" advocated by some philosophers of law(36) it opposes a refusal of any objective law from which all other rights could be derived. To so-called imprescriptible principles that would be the measure of all law it opposes the apprehension of law in concrete situations. To a law that organises it opposes a law that is "a condition for life imposed on man [by God]."(37) And Ellul categorically concludes, "Anything that man builds up under the name of law is precisely non-law. It engenders the antijuridical situation."(38)

If Ellul sharply separates human law and the law of God, he separates just as sharply two conceptions of law and refuses as energetically the idea that human law could take its source in divine law. There is law and law for Ellul. The reference of law is the justice of God, understood as the manifestation of the divine will. The law is therefore an act of God in that it is formed by the judgements of God, formulated in relation to human rights, rights here understood in a positivist sense as the totality of the law elaborated by human beings. But for Ellul that justice is fully expressed, revealed and affirmed by Jesus on the cross, which, in a quasi-mystical formula, he describes as the "ultimate manifestation of God's justice." (39) In Christ re-establishment (a fundamental notion for Ellul) is at work: the reestablishment of the relationship between men and God, the reestablishment of the relationship between men, the reestablishment of the situation of humanity for all men, the reestablishment in the juridical order of man in his rights. This is because, Ellul clarifies, the judgement of God intervenes "according to the law of man" (in reference to Ps 7:9). It is in the covenant with Jesus Christ, a covenant "giving meaning and value to all previous covenants"(40) that God fully shows his justice. This covenant is distinctive because Jesus Christ, being the only man God has accepted, is de facto by his blood — and why not de jure — a man who contracts with God for all humanity and "through him God views all mankind."(41) Thanks to Jesus, man acquires rights in an absolute manner and becomes the subject of law. In the framework of his covenant with God, Jesus acquires new rights that, since he acts for all men, he shares with all those who from now on relate themselves to him. By the miracle of substitution, no one is any longer without a right, the first right being the ability to claim Jesus Christ for oneself.

From this theological perspective, Ellul draws two conclusions. The first is that Jesus accepts human law, all the more easily than the covenant which does not provide this law with some sort of divine meaning. Jesus makes of this human law "an instrument for the justification of man."(42) Inspired by Proverbs 29:26 and John 5:30, the second conclusion is that God makes himself the guarantor of a person's right when that right is held up to ridicule by other men. For Ellul, quoting Is 49:4, because the right of man is in God, the right of the powerful or the rich is not a right. On the other hand, God is supremely concerned with the right of the widow, the poor and the orphan, who are those to whom the law gives its full attention. He is concerned in order to assure or preserve for them a just relationship with others even though, as those cursed by every society, they do not have at their command the strength or money to assert their right.

It is obvious that we are here far from the habitual conception of human rights which was more ideological than juridical, more moral than theological. Even if Ellul did not explicitly do so himself, it is possible to extend his thought through the development of a juridical ethic valid for and shared by all men whether Christian or not, whether they refer to the Bible or not. It is well known that Ellul found repugnant the idea of a "ready-to-consume" ethic and preferred to leave his readers and hearers to elaborate for themselves their own ethic through reflection on the elements

which he provided for them.(43) It is clear, however, that for Ellul human rights do not constitute an ethical base relevant for the modern law which elsewhere he judges to be in crisis. From his analysis there arises the need for a deepening and an elevating of our law and of our relationship to it. Perhaps, despite their incantatory character, human rights conceal the difficulty of taking into account the spiritual dimension which inhabits all acts of social and human life, particularly the law. Ellul is able to make his own Bultmann's phrase : "At every instant the law of God reaches man. That signifies that man is in decision, in the here and now"(44) — all the more so because, Bultmann insists, the man who has rights does not hold these rights simply "in his bare existence, but only in his situation as a responsible human being."(45) Man has these rights on the basis of his capacity to take decisions, to develop responses to problems, to face up to difficulties, and to establish, in the face of life vicissitudes, some distance for reflection, a return to fundamental values and engagement.(46)

Concluding Remarks

Our purpose is not to minimise the distinctiveness of Ellul's thought but rather to detect some of the influences and the original manner in which he uses them to elaborate his Christian ethic. The most profound influences are theological ones and so any understanding of his work is incomplete unless it takes into account his theological choices. It is by that measure that it is also necessary to appreciate his work concerning human rights for it is, we believe, that which truly clarifies all his thought. This is shown, for example, by his conclusion of a very penetrating juridical analysis of the Nuremberg trial. This trial marked the revival of natural law in the 20th century since it used all the juridical concepts which arise from natural law. For Ellul, this trial also marks the degeneracy of contemporary law in that it shows contempt for the bases of law and profits a perverse use of the law in which it is reduced to being a political instrument and part of the propaganda of power (in this case that of the victors of the Second World War). Here retroactivity, circumstantial laws, the creation of penalties after the crimes, the invention of unknown juridical concepts after the facts, and the superficiality of human rights are all seen clearly and Ellul does not fail to denounce them. Is this just the backward-looking reaction of a jurist fascinated by Roman law, the bitterness of the humanist who sees the nobility of principles made fun of by raison d'Etat, the excessive rigour of a moralist who refuses to accept that one can get away with talking a lot of hot air, the disarray of the Christian before a change judged to be incompatible with his faith ? Here, in this area and on this occasion as in others, Ellul displays clarity of thought and rigour but also a hope. These establish the richness of his thought and encourage us to pursue working through his oeuvre. The judicial history of human rights justifies the precocity of his critique. The long drawn-out trial of Maurice Papon arouses an uneasiness comparable to that generated by the other trials of war criminals accused of crimes against humanity. A recent international conference(47) has underlined how much the struggle against such crime overturns the traditional principles of criminal law such as individual responsibility, the non-retroactivity of laws, the presumption of innocence, and prescription. At the end of the war, in which his life was a semi-clandestine one of resistance, and at the moment where the growth of human rights was asserting itself, Ellul furnished us with a proposition on human rights which appears both original and representative of his thought:

"The only humane international law will be that which, valid for all countries, assures, within each country, a minimum of rights for all people, guaranteeing them a minimum of freedoms and an individual security which allows each person to choose their own destiny and to respond, by themselves, either 'Yes' or 'No' when God speaks."(48)

Notes

1. ET *The Theological Foundation of Law*, SCM Press, London 1960.

2 For details see, Sylvain Dujancourt, *La pensée juridique de Jacques Ellul* (Mémoire de maîtrise, Faculté de Théologie protestante), Strasbourg 1989.

3. Joyce Main Hanks, *Jacques Ellul: A Comprehensive Bibliography*, Research in Philosophy & Technology, Supplement 1, 1984, JAI Press Inc., Greenwich, Connecticut, p.266.

4. Jacques Ellul, "Loi et sacré. Droit et divin, de la loi sacrée au droit divin," in Enrico Castelli,ed., *Le sacré: Etudes et recherches* (Actes du colloque organisé par le Centre international d'études humanistes et par l'Institut d'Etudes philosophiques de Rome, Rome 4-9 janvier, 1974), Aubier/Montaigne, Paris, 1974, p.194.

5. *Theological Foundation of Law*, op. cit., p10.

6. Jacques Ellul has also very often shown his doubts about any explanatory doctrine without practical and concrete consequences. So, in the introduction to his thesis, he expresses his annoyance with "theories, based on easy solutions, with the appearance of cohesion" (Jacques Ellul, *Etude sur l'évolution juridique du mancipium*, Delmas, Bordeaux 1936, p5).

7. *Theological Foundation of Law*, op. cit., pp10-12.

8. Ibid, p36.

9. Jacques Ellul, "Le droit occidental en 1970 à partir de l'expérience française," *Bulletin SEDEIS* (Société d'Etudes et de Documentation Economiques et Sociales), no 840, supplément no 2 (1963), p18.

10. Ibid, p5.

11. Ibid, p19.

12. Jacques Ellul, "Droit," *Foi et Vie* (1939) 2-3, p279.

13. *Theological Foundation of Law*, op. cit., p11.

14. Ibid.

15. Jacques Ellul, "Christianisme et droit. Recherches américaines," *Archives de Philosophie du Droit*, 5 (1960), p31.

16. Gabriel Vahanian, *God and Utopia: The Church in a Technological Civilization*, The Seabury Press (A Crossroad Book), New York 1977, p141.

17. Gabriel Vahanian, *Dieu anonyme ou la peur des mots*, Desclée de Brouwer, Paris 1989, p24.

18. Gabriel Vahanian, *God and Utopia*, op. cit., p27.

19. *Theological Foundation of Law*, p83.

20. Jacques Ellul, "Information et vie privée: perspectives," *Foi et Vie*, Vol 66, No 6 (novembre-décembre 1967), p60.

21. Jacques Ellul, "Remarques sur l'origine de l'Etat," Droits, revue française de théorie juridique, 15 (1992), p14.

22. Ibid.

23. Jacques Ellul, *Histoire des Institutions*, Presses Universitaires de France, 6ème édition, tome 5, Paris 1969, p12.

24. "Human rights are part of the attempt to give a feeling of security to the law" wrote Ellul, "Sur l'artificialité du droit et le droit d'exception [suite]," *Archives de Philosophie du Droit*, 10 (1965), p192.

25. "Information et vie privée: perspectives," op. cit., p58.

26. Ibid, p61.

27. Rudolf Bultmann, *Jésus, mythologie et démythologisation*, Seuil, Paris 1968, p61.

28. *Theological Foundation of Law*, op. cit., p50.

29. Ibid., p55.

30. Ibid., p81.

31. Ibid., pp81-2.

32. Bultmann, op. cit., p165.

33. Jacques Ellul, "Loi et sacré," op. cit., p187.

34. *Theological Foundation of Law*, p49.

35. Jacques Ellul, "Loi et sacré," op. cit., p187.

36. Mireille Delmas-Marty, *Pour un droit commun*, Seuil (La librairie du XXe siècle), Paris 1994, p138.

37. *Theological Foundation of Law*, p55.

38. Ibid., p49.

39. Ibid., p47.

40. Ibid., p56.

41. Ibid., p57.

42. Ibid., p58.

43. See Dujancourt, "Technique et éthique selon Jacques Ellul," *Foi et Vie*, XCII (décembre 1994) 5-6, pp29-41.

44. Bultmann, op. cit., p165.

45. *Theological Foundation of Law*, p80.

46. Other writers have often highlighted the profound influence of Karl Barth on Ellul's theological thinking. This is certainly the case regarding his juridical thought looked at from a theological viewpoint. The ideas used by Ellul are all found in Barth's *Dogmatics*. [For example: Re-establishment: "The death of Jesus Christ preceded His resurrection. God established and maintained His own right against man and over man, and the right of man Himself. This makes it clear in what sense in the resurrection of Jesus Christ He willed to justify both Jesus and Himself, and has in fact done so, proclaiming His own twofold right and the right of man as His creature as they were there established and maintained to be the basis and the beginning of a new world" (Karl Barth, *Church Dogmatics*, IV/1, 59.3, p311) — Judgement: "Divine judgement in the biblical sense means that God vindicates Himself against man, but that in so doing He vindicates man against all that is alien and hostile to him. It means that God does what is right for Himself and therefore for man" (op. cit., III/2, 43.2, p32). — Grace: "the divine grace is the mercy and justice of God operative and revealed in the divine decision" (op. cit., III/2, 44.3, p164). — The role of Jesus Christ: "[Jesus Christ] lives in His time as the Judge by whose Word and work the right of God is vindicated in the sight of men, and therefore that of men is vindicated before God and among themselves; by whom the kingdom of God is thus established among men and His covenant with them fulfilled" (op. cit., III/2, 47.1, p439).]

47. "Du procès à l'histoire," Berlin Colloquium, 25-27 January 1998, organised by Centre Marc Bloch (the German extension of Ecole des Hautes Etudes en Science Sociales), Centrum Judaicum of Berlin, and the Einstein Forum (cf. Le Monde, 25 Feb 1998, p10).

48. Jacques Ellul, "Notes sur le procès de Nuremberg," *Verbum Caro*, Vol 1 (Aug 1947), p112.

Jacques Ellul and Human Rights — A Short Response to Sylvain Dujancourt

Andrew Goddard

"Is there any other point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.

—Sir Arthur Conan Doyle

Sylvain Dujancourt's article powerfully draws attention to the curious incident of Ellul writing almost nothing on human rights. The strangeness of this is increased given Ellul's regular engagement with his socio-political context, his own legal expertise, and the brief outline of a theology of human rights in his first published volume. By focusing on this curious incident Dujancourt offers an illuminating account of the various reasons — sociòlogical, theological, legal and political — for this relative silence.

There is little I would dispute in Dujancourt's account of this although I would, I think, add one further major reason for Ellul's refusal to follow those of his contemporaries such as Moltmann and the World Council of Churches who were developing a theology of human rights. That is Ellul's consistent and fundamental opposition to all forms of justification. This stance, rooted in his Protestant objection to man's self-justification by his works, is perhaps most memorably expressed in his unpublished 1975 lectures on authority:

"Although it is our permanent temptation we do not have to add a small spiritual hat to whatever exists. This is always the risk. The power of the state exists. How are we going to explain that doctrinally, theologically ? The power of the head of the family exists (well, it no longer exists, it used to exist). How are we going to justify that... Understand that from the moment where you engage in this system of justification, you set yourself to justifying everything."

To my mind there can be little doubt that as he looked at the political and juridical world around him with the prevelance of human rights Ellul felt exactly the same — the sudden rush of certain Christians to baptise this language and ideology was simply another form of the temptation into which the church regularly fell and which he constantly resisted.

Dujancourt's article does not, however, only shed light on Ellul's refusal to address human rights in more detail. He also signals some ways in which Ellul's wider theology of law and his largely unexplored critique of modern technical law may be constructively elaborated into a more positive response to the dominance of human rights theories.

In particular, Dujancourt's sympathetic account of Ellul's rejection of the individualistic emphasis of modern rights theories and the need to develop a more personalist understanding in which obligations play a role is one which merits further development. It is one which has been much aired in recent liberal-communitarian debate in political philosophy and on which some biblical work has already been done by the Old Testament scholar Christopher Wright. In sketching a biblical account of human rights Wright argues that "to say that B has certain rights is simply the entailment of saying that God holds A responsible to do certain things in respect of B...Rights do not exist apart from the demand of God upon someone."(1) Dujancourt's work, in dialogue with Ellul, offers further important contributions to this task of developing a fuller conception of "human rights" in which humans are viewed not as abstract individuals but as persons in a wider community under God.

However, as Wright's work shows, any Christian attempt to reshape contemporary rights theories must also pay close attention to God's purposes in creation and here the spectre of "natural law" looms. Dujancourt emphasises that human rights theories grow out of natural law, highlights Ellul's criticism of all traditional natural law theories, and claims that "Ellul never changed in his opposition to natural law." He helpfully sketches the diverse arguments Ellul advanced to "deconstruct" natural law. While all this is certainly true it fails to recognise that elements in Ellul's legal thought share some important common features with certain natural law theories and that these may in fact prove necessary for the task of developing an alternative Christian account of human rights.

In the 1939 article, which Dujancourt cites to show Ellul's early explicit opposition to natural law (n12), Ellul gave the Decalogue and human conscience a role in relation to human law which in his later book he rejected as too similar to natural law theories. However, even in that book (on which Dujancourt relies for most of his account of Ellul's theology of law), Ellul's theory of institutions given in creation again presents ideas which, in his own earlier writings, he had accepted were a "sort of natural law." This important strand of Ellul's juridical thinking was partially developed in a number of later articles but as with his early writing on human rights it unfortunately remained an aspect which failed to get the further attention it deserves.

By failing to recognise this part of Ellul's juridical thought and by giving insufficient attention to some significant changes within his developing theology of law, Dujancourt has perhaps missed an important point of tension in Ellul's own work. One focus of that tension is found in Dujancourt's own account where he begins by stressing Ellul's rejection of a common ground between Christian and non-Christians in the creation of a juridical system (n5 and n15) but later writes, "it is possible to extend Ellul's thought through the development of a juridical ethic valid for and shared by all men whether Christian or not." It may well prove that any such shared juridical ethic and any substantial account of "a minimum of rights for all people" (for which Ellul calls in the final quote by Dujancourt) must ultimately be related to a more substantial theological account of the calling and function of human beings as created beings within a wider created order such as that originally sketched in his account of human institutions.

Ellul, perhaps because of his voluntaristic emphasis on freedom and his antipathy to both natural law and teleological ethics, failed to provide such a theological account. As a result, despite the great insights shown in his critique of much modern human rights theory, his attempt to refound rights on God's covenant remains rather insubstantial. We are left with only the rather general statement that these rights are "essentially contingent and variable" (n30) as they are founded on "the mission conferred on man by God and the demand of personal rights judged necessary if man is to be able to live" (n31). In a century which has witnessed not just the growth of human rights language but, as Ellul himself pointed out, the ineffectiveness of that language to prevent a terrifying increase in man's inhumanity to his fellow humans, that statement is not sufficiently specific to be of any real practical use. If, however, it is to be made more concrete and given subtance, then a deeper study of the covenant of creation, an explanation of some form of created order and institutions, and the calling of human beings within that is — despite its overtones of natural law — probably required.

Notes

1. C.Wright, "Walking in the Ways of the Lord," Apollos, Leicester, 1995, p253.