NOTES ON PHILOSOPHY OF LAW FROM AN EVOLUTIONARY PERSPECTIVE

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SUMMARY: At one time society was thought to be unique to human beings. We now know that society is common to many life forms that preceded the human species. Human society, however, is unique in the degree to which it is the product of culture, instead of nature. This means that the performance of auxiliary and complementary actions essential to society can not be determined of necessity, but can only be *required*. Since human beings are capable of meeting or not meeting such obligations, human societies must concern themselves with inducing or compelling socially beneficial actions and restraints.

The need for law arose when human beings began to direct and control the formation and preservation of society. When we began to be self conscious about such human direction and control the need arose for credible justification of the required. Philosophy of law has sought to meet this need by grounding the required in the immutably true. This encourages extreme tendencies—no social change, or cataclysmic social change. Grounding the required in the accepted, rather than the true, would enable societies to evolve steadily and peacefully into new forms of organization that accord with a current communal understanding of justice.

The general direction of evolution has been towards more complex organization and more effective exploitation of the life opportunities presented by the environments of the earth. Life on earth began some one to five thousand million years ago with one-cell organisms floating in a warm, protein-rich saline solution. These organisms could take nourishment by chemical processes and could reproduce by cell division. By the time insects made their appearance, some two hundred million years ago, organization had become immensely more complex. Insects are characterized by a hard exoskeleton; a body divided into head, thorax, and abdomen; eyes, simple or compound; antennae; tracheae, or air tubes, opening from the exterior and branching among the tissues; and a highly developed central nervous system.

The insects are an extremely successful life form. They are able to feed, repel enemies, and reproduce in every imaginable habitat on earth, with the one exception of the ocean. Insects can live in the ground; in leaves, roots, and branches of plants; in fresh water; in tropical rain forests, artic tundra, arid deserts, mountain slopes, and the seashore; and parasitically in animals and larger insects. Insects can walk, run, jump, fly, swim, and burrow. They can eat plants, animals, and dead organic matter, or they can live parasitically.

Of course the same insect can not live in all of these habitats. Obviously a grasshopper can not live inside a leaf; but creatures having the basic characteristics of insects do live inside leaves. Other morphological modifications adapted creatures with insect characteristics to all the other habitats, providing wings for movement through the air to gather food or escape danger, and digging appendages for burrowing when the soil provided the only secure shelter. The insects, therefore, are not a single species, but a large class (about 450,000 species) within a phylum.

So far, we have talked of effectiveness in exploitation of life opportunities arising from increasingly complex organization and from structural adaptation to permit effective functioning in various habitats. These are changes in the organisms themselves. Society is the extension of organization beyond organisms to the relationships between organisms.

In a society individuals, or sets of individuals, perform activities that are auxiliary and complementary, each of the activities being performed by some of the members but benefitting all the members, thus increasing the effectiveness of the social group above the cumulative result attainable by independent individual efforts. Among the social insects, sets of individuals are specialized to activities either structurally or behaviorally. Instances of structural specialization are the immense ovaries of queen honey bees, the gonads of drone honey bees who exist only to mate with the queen, the poison-equipped squirt-gun heads of soldier termites, the trail-marking pheremone glands of worker ants. Several instances of behavioral specialization are found at successive stages in the life of the worker honey bee. For the first three days of adulthood, they groom themselves, loiter, and are fed; from the third to the thirteenth day they nurse the immature bees in the hive; from the twelfth to the eighteenth day they produce wax as needed for the comb, and from the nineteenth to the twenty-first day they guard the entrance of the hive. After the third week of adulthood, worker honey bees join the field force for the rest of their lives, and gather water, pollen and nectar.

The success of the insects in surviving and multiplying in nearly every habitat on earth is due to natural processes. By "natural" I mean processes that are independent of direction and control by the organisms involved. First came the evolutionary emergence of the characteristic structure of the insects— separate housings for the central nervous system, the respiratory

system, and the digestive system, all protected by an external chitinous covering. Next came morphological adaptation (modifications of the structure) to the exigencies of different habitats, or environments. The basic structure proved capable of functioning effectively in a great many sizes, ranging from nearly microscopic up to about two inches in length (which approaches the limits of mass that a chitinous exoskelton can contain), and with a great variety of modifications. Then came morphological and behavioral specialization of sets of individuals to specific, auxiliary and complementary activities. Morphological specialization develops the structure needed to perform an activity and suppresses structures not needed for that activity. Behavioral specialization reinforces a specific activity at a given time and inhibits other activities at that time.

Insect society is characterized by necessity in the performance of socially beneficial activities and in the prevention of non-beneficial activities. This necessity is the result of the specificity of qualification for each activity. Sets of individuals are naturally adapted and specialized to a specific activity throughout their lives or during a period in their lives. A set is so prepared for each of the auxiliary and complementary activities that, when simultaneously or serially performed, will result in a society. No sets of individuals are prepared for activities that would be harmful to the society, or that are not needed. Because of the specificity of qualification, harmful or unneeded activities can not be performed. The individuals do not participate in the direction and control of the activities. They have no part in determining their own quilification—what activity and how they shall be made capable of performing it. If an insect individual is to participate in society, indeed in life, it must do so by performing the specific activity at a given time for which it is qualified by processes beyond its understanding and control. Further, it would be meaningless to speak of an insect individual having the choice between performing and not performing the activity for which it is qualified, because natural control of reproduction provides an abundance of fungible individuals for any given activity, and when one drops out another takes over.

When the life form *homo sapiens* appeared on the earth, just a few thousand years ago, organization had again increased tremendously in actuality, but even more in potentiality. Adaptation was not fixed, beyond human control, by natural processes. There are no human beings structurally adapted to specific foods or habitats; none provided with fangs and claws to serve an appetite for meat; none with a ruminant's set of stomachs for grazing quickly in dangerous places and digesting slowly in safe places; none with lungs, mouth and stomachs suitable for living on plankton strained out of the sea as do the baleen whales, and none with winged, miniaturized bodies for catching insects in flight. There are no human subspecies of meat eaters, plant eaters, plankton eaters, or insect eaters.

Similarly, in *homo sapiens*, specialization was not fixed, beyond human control by morphology and mechanized behavior. There are no human beings

with natural weapons, to slash, puncture, or poison enemies; no natural scouts, equipped with special glands to emit a trail-marking substance; no natural workers, equipped with pouches to carry food back to other members of the social unit, or compelled by stimuli beyond their control to sweep the city streets for the first three days of each full moon during the twenty-first through the twenty-fifth years of their lives. Even with respect to reproduction, structural specialization is not specific to the point of excluding other activities, and performance is not dominantly controlled by natural stimuli which are timed to produce breeding and births in naturally determined seasons.

In *homo sapiens* structure was generalized, the brain was greatly enlarged, and adaptation and specialization became dependent upon cultural processes. * Human beings learned to accumulate information, to verify or disprove it, and to transmit it in space and time. We learned about the various environments and alternative responses to problems of existence in each; how to make various responses, and how to teach others to do so; how to make and use sophisticated tools; how to distribute auxiliary and complementary functions by voluntary assumption or compulsory assignment; how to organize and direct cooperative projects; how to regulate and govern inter-personal relationships.

In short, human beings are not directed to ends, and to means for achieving those ends, by natural processes beyond our own direction and control. Given general, cumulative intelligence and great plasticity of behavior, human beings, to a high degree, have taken over from nature the direction and control of events external to our own organisms. This area of external responsibility includes searching out life opportunities, identifying them as ends to be sought, and devising means to achieve them. The means are both material and non-material. The material means is technology. The non-material means is society.

For example, human beings are not equipped by nature with digging, striking, or cutting instruments. When it was discovered that copper and tin heated together produced tools and weapons that were far superior to shaped stones or annealed copper, the artifacts and processes for making bronze became the technology of the day. But, in order to exploit the opportunities opened up by the discovery of bronze, human beings had to form and preserve societies in which the auxiliary and complementary activities would be performed that would obtain and protect sources of copper and tin, make bronze, and effectively utilize the resulting tools and weapons. An order of society had to be formed and preserved that would accomplish the functions of hunting for new sources of tin and copper, digging and carrying from the mines, making copper, protecting mines, smelters and persons and possessions, gathering and preparing food, building shelters.

* Processes within the direction and control of the organisms involved, i. e., human beings.

As soon as human beings began to direct and control the formation and preservation of societies by the cultural processes summarized just above, those societies lost the necessity of performance that characterizes societies directed and controlled by the natural processes of structural adaptation and structural and behavioral specialization. The generalized structure, high and cumulative intelligence, and plasticity of behavior of human beings carried potentialities of more complex, flexible, effective organization of auxiliary and complementary sets of human actions, but they also carried alternative potentialities —for obstructive or destructive actions, non-performance of assigned actions, and simultaneous non-compatible actions.

The absence of necessity in human societies was not a problem, however, until it was consciously adverted to and the consequences considered. Alternative potentialities can be shut out by belief that one has no choice, as well as by absence of choice in fact. Taboo, custom, totemism, and naturalistic religions, in early human societies, supplied the beliefs that made it seem that assigned actions and restraints were a part of an immutable order, beyond human understanding or control. The low level of accumulated knowlegde and experience would lend credibility to belief in the inevitability of social roles. In the bronze age it must have been starkly evident that survival of the social group depended upon performance of the relatively few auxiliary and complementary activities that would assure a secure supply of bronze tools and weapons and their effective utilization.

Ortega y Gasset, among others, has taught us the ordering and controlling influence of a belief —which begins as an idea about the nature of things but seeps into the consciousness of a people until it comes to constitute reality itself, which has to be reckoned with, like it or not.[1] In Fustel de Coulanges' *The Ancient City* one can trace in full detail the structural implications for early Greek and Roman society of the prevailing belief that events are controlled by the gods.[2] If this constituted the reality that had to be reckoned with, then the only way for human beings to do as well as possible under the circumstances, was to get right with the gods. When it came to be generally believed that certain men were themselves demi-gods, having some of the power of the gods because they could bring a boat safely through a storm or overcome an enemy, these persons were treated as the founders of families, who passed their active power to the eldest son so that in each generation each family was headed by a person able to approach the gods, to consult, appease or propitiate them so that the family's crops would grow, and it would flourish in trade and prevail in battle.

If reality were as these people believed it to be, it was eminently reasonable that the paterfamilias should make all decisions that were important to the survival and well being of the members of the family. But to act reasonably

[1] José Ortega y Gasset, *Concord and Liberty* 13-47, trans. Weyl, Norton. New York, 1946.

[2] N. D. Fustel de Coulanges, *The Ancient City*, Doubleday. New York, 1956.

in a reality defined by a generally accepted, but unexamined, belief is not to live the life of reason. Epistemology begins with the Greeks. The study of how we know led inevitably to self consciousness about the human role in constructing the reality in which we live. The best of the Greeks foresaw that assigned activities and restraints would need justification as soon as their providence was seen to be within rather than beyond human understanding and control. Legal philosophy is that justification. Platonic and Aristotelian legal philosophy, from our evolutionary perspective, was essentially the same: It must be acknowledged that performance of actions and restraints essential to society is required, not necessary, but the obligation of such requirements is grounded in objective, universal truth about the nature of human beings and the universe. Necessity is restored as near as may be. Performance of socially beneficial actions and restraints is no longer necessary by morphology, and no longer neccesary by belief, but it is necessary if one is to live in accordance with one's true nature.

The efficacy of Greek natural law philosophy to induce a general law-abiding attitude was not tested in the ancient world, partly because, in effect, ontology overshadowed epistemology. Where the Greek view of reality —rational human beings in a rational universe characterized by knowable causes and effects— had an impact on society it quickly became a new belief, shutting out possible alternatives and thus obviating the need for justification by legal philosophy. In some areas of society the Greek rational view of reality had no impact and justification by legal philosophy would have been meaningless.

The Greek view of rational reality made its impact on society in Rome, in the Stoic version. The impact was tremendous on the relations between persons with respect to commercial transactions, property holding and use, status of persons, contractual and delictual obligations, domestic relations and inheritance, as can be seen in any standard treatise on Roman law, such as Sohm's *Institutes*. These are the relations that are covered by private law. The Roman jurisconsults created the basic concepts of private law that are still in use both in civil law and common law countries.

The rational reality of the Stoics had no impact on the political organization of society, the structure of government, the relations between the governors and the governed. In the whole of Justinian's Institutes, Digest, and Code only a few paragraphs are given to public law, and these are puerile. The assent of rational beings never succeeded in replacing the will of the gods as the source of governing authority in Rome. The acceptance of Christianity modified the nature, but no the fact, of the divine source of governing authority. The Holy Roman Empire expressed this belief for the next millennium.

When the source of governing authority is divine the order of politically organized society is *ordained*, not constituted. Constitutions, of governing institutions, of the relations between governors and the governed, and of

relations *inter se* between self-governing beings, are the work of the modern era. Bodin made constituted societies conceivable, literally made it possible to think of such things, when he pointed out that sovereign authority is within the organized group of human beings.

With the constitutionalism of the modern era, socially beneficial actions and restraints came to be more clearly, and with the rise of mass education more generally, seen as being required rather than necessary. Credible justification of required actions and restraints was increasingly needed, and philosophy of law came into its own.

Most modern legal philosophies justify authority by grounding the required in the unquestionably true. For much of the era, that which was appealed to as unquestionably true was nature. Natural law theories of the ancient world were adopted, adapted and modified. More recently, the unquestionably true has been sought in history (of various sorts), in autonomous social processes, in the general will, or the transcendental will, in the structure of language. Other legal philosophies have been concerned with law at a microscopic level, justifying principles or rules by logical consistency with each other or with a ground norm. These legal philosophies can credibly justify particular exercises of authority, and particular required actions and restraints, but not a whole legal or social order.

The method of justifying authority by grounding the required in the unquestionably true was initiated by Plato and Aristotle. Its power lies in the way of knowing originated by the Greeks. They organized accumulated human experience into abstract conceptual categories whose referents were not objects or events in the observable world of ordinary sense experience, but other concepts in a hierarchically ordered system. The system subsumed all verified human experience and related each part of it to every other part by logical steps that were demonstrably correct.[3] The Greeks bequeathed this way of knowing to the Western world, and in the modern era we have refined it, principally by developing experimental means to prove or disprove its premises and theorems.

Universals, implications, consistencies and inconsistencies, and other aspects of this way of knowing undoubtedly contributed to the development of modern politically organized societies based on shared values and accepted principles instead of a divine grant of authority to king or emperor. On what warrant can government wield official coercion to assure compliance with required actions and restraints if a proposition valid for one is not valid for all?

However, the habits of mind created by this way of knowing, and especially the grounding of the required in the unquestionably true, have fostered the notion that social change can occur only through revolution. Justification for desired social changes is sought in a cognitive proposition that is uni-

[3] See E. Vernon Arnold, *Roman Stoicism*, chap. VI, Routledge & Kegan Paul. London, 1911, 1958.

versal and absolute. All the implications of that proposition must then be advocated as just and all inconsistent propositions and their implications must be opposed as evil incarnate. The same sweep and conviction characterizes the defense of established institutions, procedures or policies whose modification or abolition is entailed by the proposed changes. As a result, extreme tendencies are encouraged —no change, or cataclysmic change.

If I am correct, the formative process of human society is not dominated by the search for an immutably true proposition about human nature and the human condition, the implications of which will dictate the structure of society and the distribution of rights and obligations. Rather, it is dominated by the search for an effective and acceptable distribution of actions and restraints in order to exploit what is seen as a life opportunity. Immutable truth was appealed to, in one stage of legal and social development, not to identify the desirable social order but to justify the retention or adoption of a social order that had been accepted or the acceptance of which was being advocated.

Why is a social order accepted? The evolutionary perspective suggests that a human social order is accepted if it enables the persons crucially involved to accomplish what they want to accomplish —such as exploiting the potentialities of a newly discovered technology, or satisfying spiritual aspirations— and it is *capable of being justified* by appeal to an intellectually respectable cognitive proposition. Acceptance of the social order entails acceptance of the justificatory cognitive proposition.

When the members of a society are presented with potentialities of a major scientific discovery, it must be decided which, if any, of the potentialities are opportunities to be exploited and which are dangers to be avoided. Of the opportunity potentialities it must be decided what technologies and what social changes will be needed in order to effectively exploit those opportunities. In this perspective the concepts and logical connectors of a thought system for the pursuit of universal, immutable truth have too much scope, duration, and presence to serve well. The thought system for this situation should perform the imaginative function, putting forward alternatives tentatively, diffidently; recognizing that its function is to suggest, not define.

All of this suggests that the justification of authority in a society should be communal *acceptance* of a proposition, not its truth. Its truth will influence those who are deciding whether to accept or not accept it. But the warrant to govern flows from its acceptance and ends with withdrawal of that acceptance. Perhaps this basis for justifying authority would be sufficiently efficacious to induce a general law-abiding attitude. Its merit is that it would enable human societies to evolve steadily and peacefully into new forms of organization that are effective for exploiting new life opportunities and that accord with a current communal understanding of justice.