

Homo Juridicus

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Culture as a Normative Order

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Prologue

The Metaphysics of Culture I

Plato, the acknowledged inventor of the science of metaphysics, had a reason for his invention. As I have explained elsewhere,ⁱ he was seeking a middle ground between the radically rigid skepticism of the Heraclitean doctrine of Flux and the equally rigid doctrine of Parmenides claiming that reality was permanent, unchanging and uncreated. While Plato's reasons for his invention are important, of equal or even greater note is the power of its symbolism. As for his symbolism, we must first note that symbols are creatures of the imagination, and second, as such, they impose no limits on the creative abilities of the mind. Third, this power of the mind is shown by the fact that it can create any symbol it wants and assign to it any signification or meaning it chooses. Indeed "man is an animal suspended in webs of significance that he himself has spun."ⁱⁱ The totality of these webs of meaning constitute culture, and they include symbols and norms, legal and nonlegal.

We shall return to Plato's metaphysics and its relation to culture as a normative order. Of immediate concern is how normativity operates as part of what Geertz calls our "webs of significance." Is Man a juridical animal? If so, to what extent? These questions constitute the central theme of this book, as captured by its first subtitle (on which more later). We use the term "juridical" in the broad sense of denoting legal as well as other relations that promote normative order and are of "significance" à la Geertz. From this broad perspective we may rephrase the above two questions as follows: To what extent are human relations governed by law? Can we do without law? What, indeed, is law? To what extent are human relations governed by normative forces other than law?

These questions require the empirical study of human relations in the broadest variety of normative contexts. This study is thus necessarily *relational*. It deals with the totality of relations between human beings belonging to particular sociocultural formations. Just as it is impossible to imagine a culture in which there are no human relations, it is also a truism that human relations are more orderly than chaotic, structured rather than unstructured; and they occur within certain frameworks of understanding. These understandings regulate behavior in several ways and acquire a *force* proportional to their ability to persuade, incite, seduce, influence, direct, restrain, repress or control particular behavioral acts in particular cultural contexts. Herein lies the essence of "normative force" or "normativity." Of course the word

i. For further detail see ISAAK DORE, *THE EPISTEMOLOGICAL FOUNDATIONS OF LAW*, 48, 58–60, 123–39 (2007).

ii. Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture* in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS BY CLIFFORD GEERTZ* 3 at 5 (1973).

“force” includes the idea of coercion. It can, but need not necessarily, mean physical force. Thus when we encounter the numerous references in this book to “normative force” we must bear in mind that we are (more often than not) not referring to physical coercion but rather to the many nuanced ways in which human relations are *determined*. The idea of normativity in culture, then, evokes the totality of force relations that constitute it.ⁱⁱⁱ

Just as “force” includes physical coercion but goes beyond it, so the idea of normativity includes “law” but goes beyond it. For purposes of this book, a law is the clearest example of a “norm” that has regulative force. But there are many nonlegal norms of the same genre. Thus again we use the word “norm” in the broadest relational sense. Indeed, “law” and “norm” are interchangeable notions in conditions of culture. This approach to culture in essence broadens Jacques Derrida’s thesis regarding the “force” of law which he proposed at his famous lecture at Cardozo Law School in 1989, with the qualification that my notion of *force* is empirical rather than “mystical.”^{iv}

The twin notions of norms and normativity are treated in this book as not only relational but also dynamic. This raises the *problématique* of stability as well as instability, structure as well as antistructure in sociocultural formations. In sum, this book studies culture in normative as well as dynamic relational contexts, with law as just one of its many symbols.

Plato’s doctrine of the Forms is a dazzling example of the power of the mind (or imagination, which in this case, is the same thing) to develop a symbol with a “significance” or meaning. Plato conjured up out of thin air a magnificent world of suprasensible reality that should serve as a beacon of perfection for the sensible world. If the Platonic Form was a “representation” (to use Durkheimian terminology) of perfection, it also contained (as did its Durkheimian analog) the implicit epistemological claim that it was knowable. Put differently, the Platonic Form was: 1. A symbol. 2. It was full of meaning. 3. It was an object of knowledge, and 4. Its meaning was knowable. All tokens of culture have these properties.

But we must take a temporary detour from the philosophical meaning of Plato’s metaphysic in favor of its symbolic aspects, *i.e.*, its shared meaning. Here we make a direct transition into the social function of the Form *qua* symbol. In anthropological parlance anything that has a shared meaning can be a symbol, and the Platonic Form certainly satisfies this definitional requirement, as well as the condition that a symbol is a creature of the mind.

Plato’s metaphysic is also a particularly apposite example for a book dedicated to exploring the normative foundations of culture. This is because Man (the only animal of culture) is largely a metaphysical entity—a proposition that is at the same time self-evident and counterintuitive. It is counterintuitive because one might (understandably) ask how can a human being as a living breathing animal, having a physical

iii. See *generally* Catherine Thibierge (dir) et al, *La force normative: naissance d’un concept* (2009).

iv. Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 *Cardozo L. Rev.* 920 (1989–1990). See also, Nicolas Emeric and Sintez Cyril “Par-delà le concept de force dans la philosophie de Jacques Derrida” in Catherine Thibierge, *La force normative, supra* note iii.

existence, and also having certain definite bio-physiological needs be described as “meta” physical? It is of course absurd to deny the materio-physical aspects of human existence. But humans do not lead a purely brute animal existence; which brings us to the self-evident nature of the proposition. It is self-evident for two reasons. First, culture (of which law is a component) is a metaphysical construct because at its irreducible core lies a system of meanings (“webs of significance”). Second these meanings are *shared by* human beings *qua* human beings given the cognitive abilities of the human brain. Thus in addition to their physical universe, humans necessarily inhabit a nonphysical or metaphysical cultural universe which radically sets them apart from other sentient beings.

Plato’s metaphor shows that humans can, do and perhaps should inhabit the suprasensible world simultaneously with their phenomenal world. This is not unlike the Kantian distinction between phenomena and noumena (*i.e.*, the causal world of sense perception or experience, and the “intelligible” world of “understanding”) and his assertion that humankind inhabits both universes at the same time.^v The French philosopher Alain Supiot makes a similar point when he asserts that human beings inhabit not only “a universe of things but also a universe of signs”.^{vi}

The universe of signs represents the metaphysical dimension, and as noted above, it depends on the limitless power of the imagination. The juridical and normative aspects of human existence belong to this dimension and contrast with the materio-physical dimension. The latter is conventionally understood to refer to the finite physical/material or economic aspects of the human condition, captured as *Homo Economicus*. The metaphysical dimension is infinite and includes, but is not limited to, the juridico-normative dimension. It is this dimension that is captured by the term *Homo Juridicus* in this book. Unlike Supiot’s notion, my notion of *Homo Juridicus* is shorn of its religious (particularly Christian) underpinnings and does not rest on the view of man as *Imago Dei*. Supiot claims that under the Western liberal tradition, inherited from the Enlightenment, the concept of the juridical subject is based on certain indemonstrable propositions positing humans as rational and autonomous beings. This concept of rationality and autonomy has Christian foundations viewing humans as rational, autonomous and free and having been created in the image of God.

It is by transforming each of us into a *homo juridicus* that, in the West, the biological and symbolic dimensions that make up our being have been linked together. The law connects our infinite mental universe with our finite physical existence and in so doing fulfills the anthropological function of instituting us as rational beings.^{vii}

My view of *Homo Juridicus* is based on ethnographic data providing an empirical foundation for the concept. It is this data that must be evaluated critically by us. The contours of this critical evaluation, I suggest, ought to track the following criss-

v. Dore, *supra* note i, at 432–33.

vi. ALAIN SUPIOT, *HOMO JURIDICUS: ON THE ANTHROPOLOGICAL FUNCTION OF LAW* vii (Saskia Brown trans., 2007).

vii. *Id.* at ix.

crossing themes: How convincing is the claim by the classical evolutionists discussed in Chapter 1 that *ubi societas ibi ius*, *i.e.*, that law and normativity are “universal” institutions of human society? What is the *significance* or *meaning* underlying this alleged universality? Is it empirical, symbolic, metaphorical or metaphysical?

How persuasive is the historical particularist claim of the Boasian school (discussed in Chapter 2) that cultural normativity must be studied on its own terms empirically, and that there is no “one-size-fits-all” model for it? In the same vein, how credible is the claim by certain particularists that all norms are products of culture?; that the individual does not create culture but culture creates the individual?

If a symbol can only be understood in terms of its *raison d'être* and social meaning, what social meaning do legal and nonlegal norms have? How persuasive is the claim of Edward Sapir that the social significance of law is best understood by studying the logical and linguistic aspects of legal thought? Is law a creature of the mind, and if so, how is it harnessed by humankind as a social tool? What is its relationship to social order, freedom, oppression, and so on? And what are we to make of the claim of the “culture and personality” school (represented by Ruth Benedict and Margaret Mead) that cultural normativity is connected to individual personality and psychology? That culture is simply individual personality writ large? These themes are also examined in Chapter 2.

I treat culture as occupying a large part of our metaphysical universe, and if law is only a part of the webs of culture within which we find ourselves “suspended,” how does law interact with other components of culture? Here we enter the “structural” and “functional” aspects of normativity, taken up in Chapter 3. This chapter examines various methodological approaches to functionalism and presents case studies based thereon, so that the reader can evaluate critically how the phenomenon of normativity can be best understood. It will be seen that such evaluation involves the examination of the epistemic reliability of these various methodologies and their progeny. Among the important epistemological questions discussed in Chapter 3 is Durkheim’s methodological aim of studying law as a “social fact” *i.e.*, something that is capable of scientific study in the same way as any natural or physical fact, as well as A.R. Radcliffe-Brown’s claimed discovery of the “sociological laws” of human evolution.

Chapters 4 and 5 are respectively devoted to Marxism and Neo-Marxism. The radical anthropology of Karl Marx and Frederick Engels advances a new theory of cultural and normative evolution, claiming it to be scientifically based, and asserting a certain form of determinism and universalism. The methodological approaches of structural Marxism as well as other 21st century variants of cultural Marxism and their case studies will be examined. Again the reader will be invited to compare and contrast critically the epistemic reliability of these methodologies and their claims with those of their predecessors. To the extent that Marxism as a general doctrine unites our physical universe with our “universe of signs” it has created a fertile area of debate, if not controversy. Finally, Marvin Harris’s Neo-Marxist theory of cultural materialism and the materialist approaches of Leslie White and Julian Steward also raise provocative epistemological questions as to the place of normativity within the universe of signs.

Chapters 6 and 7 respectively present an “emic” perspective of law and normativity, in contrast with the “etic” posture of the two preceding chapters. The emic approach is closely associated with “cognitivism,” a school of thought that seeks to understand the cultural universe from an internalist perspective. Its use of the various methods of linguistics, ethnoscience and componential analysis to construct a “cultural grammar” of each subject culture raises further epistemological questions for debate, as does the claim that it can construct a “cognitive map” of any subject culture. Again, the classic question of cultural autonomy versus individual autonomy arises in the context of whether the individual “map reader” is also a “map maker,” and, regardless of how one answers the question, what knowledge does the map produce and how epistemically reliable is it?

As part of the emics of legal and normative cognitivism, Chapter 6 also examines what the poor, the homeless and ordinary working-class Americans think and feel about justice in their own country, and their view of the religious right’s alliance with the power structure and the perpetuation of hierarchy. In the same vein, Chapter 7 is devoted to two important subschools within the overall cognitive enterprise, namely, interpretivism and symbolism. The former tackles once again the internalist perspective, challenging the view that the ethnographer should “go native” in order to capture the internal point of view a native culture. The interpretivist school raises new questions of epistemology as does its methodology of “thick description.”^{viii} Finally, the use of symbols, their social function and their relationship to legal and nonlegal norms shows how significant symbols are as part of our universe of signs. Given that symbols are creatures of the mind, that they are as limitless as the power that produces them, it will not surprise the reader that they can be invented for just about any reason we choose, just as Plato invented his symbolic world to suit his particular philosophical project. However, most symbols are not invented for philosophical reasons yet serve socially useful purposes, both legal and nonlegal.

Chapter 8 is a natural transition from the preceding one in that the foregoing theories of interpretation set the context for postmodern anthropological theory. This final chapter examines the critical spirit of postmodernism towards cultural normativity; its relationship to power and domination both nationally and internationally, as well as the clash of cultures. This is particularly well illustrated by the use of the cultural defense doctrine when a member of a cultural minority is indicted under the criminal law of a dominant culture for violating the fundamental cultural mores of the latter.

Naturally, the foregoing are only some of the thematic highlights of the book. Its interdisciplinary approach captures a wide range of themes cutting across several disciplines of social science such as law, anthropology, sociology, psychology, linguistics and philosophy. For these you must plow forward, and, as they say here in France, I wish you “bonne continuation”!

viii. GEERTZ, *supra* note ii at 3.

