LAW IN MODERN SOCIETY

Toward a
Criticism of
Social Theory

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has any real substance at all. For it suggests that there was never any necessary link among the elements of post-Renaissance European civilization.

The need to reconstruct the perspective of modernization without losing the insights it made possible determines the questions this chapter seeks to answer. What in fact was the dialectic of belief and experience in early modern or, as I shall call it, liberal society? What is the relationship of that society to the form of social life which follows it? And what is the significance of the similarities and differences among the main types of contemporary industrial society?

These issues will be studied with regard to their bearing on legal history. The transformations of law provide a viewpoint from which to survey the panorama of modernity. This theme is all the more appropriate because of the central place occupied by the rule of law ideal in the most influential justifications of the liberal state.

To carry out the program outlined, we must first have a framework within which to compare societies. With the help of this comparative scheme, we shall be able to inquire into the origins and the nature of the modern liberal state and to understand the type of law and of legal thought with which that state was peculiarly associated. Once this is accomplished, it will be possible to investigate the ways in which the transformation of liberal society is revealed in the evolution of its normative order. We can then go on to the broader issue of the relationship among the different types of modernity and among their respective kinds of legality. What we learn about the fate of the rule of law may enable us to define some of the major prospects and responsibilities of modern society.

Throughout the argument, historical illustration and detail will be at a minimum. For the effort is to identify, on the basis of more particular historical studies, the "deep structures" of different forms of social life and the possibili-

ties of change or conflict within these basic patterns. These patterns may stand as tentative guides to further research, ready to be corrected and superseded.

THE COMPARISON OF SOCIETIES: A PRELIMINARY FRAMEWORK

Elements

To formulate a rudimentary grammar for the comparison of societies, I shall contrast three forms of social life: the tribal, the liberal, and the aristocratic. Each of these will be distinguished by the way it deals with three basic problems of human association. For the moment, it is enough to treat these types of society as categories of analysis that may be useful in clarifying the principal options faced by a society even though they may not describe any historical situation in particular. Lastly, it should be clear that the concepts of tribal, liberal, and aristocratic society are meant to be parts of a comparative scheme rather than stages of a universal evolutionary sequence.

In all but the smallest and most isolated societies, individuals interact in two different kinds of contexts. The first type of encounter is the one in which an individual, the subject, meets a person he is able to identify as a member of a group to which he himself belongs. The person who appears to the subject as a co-member in a significant group is the insider. The significance of a group can be loosely defined as the importance membership in it has for the way the subject defines his self-image and therefore his place in society.

The insider is often someone with whom the subject has face-to-face encounters: a relative, a friend, or a colleague. In this case, the group has to be small. But not all the persons the

subject habitually deals with join him in a significant group, nor are all significant groups predicated on direct interaction. Thus, to illustrate the latter point first, the subject may view members of his own race or religion as insiders without ever having met them, as a Jew might distinguish between Jew and Gentile. On the other hand, though two persons of different castes could have worked side by side in traditional Hindu society, they might not have considered themselves bound by any tie of common membership in a significant group. Each would have been a stranger to the other.

The stranger is the opposite of the insider. He is someone whose relationship to the subject is a more or less open question; there is no firm setting of group life to cast that relationship in a definitive mold. The subject must always view the insider as a person like himself, as one capable of participating in the same sorts of social relations the subject recognizes as indispensable to his own personality.[1]

As long as the insider remains an insider, he may be hated, but he can never be completely denied by the subject the kind of humanity the latter attributes to himself. The stranger, by contrast, may be seen and treated, though he need not be, as a being with none of the decisive attributes that make the subject what he is. In consciousness, in actuality, or in both, the subject can easily reduce the stranger to the condition of a tool of his own ambitions or of an obstacle to their attainment. When this happens, the stranger is likened to the impersonal forces of nature, beneficent or dangerous, which establish the circumstances of the subject's life and choices.

Several qualifications are in order. Because social relations may be equivocal and asymmetrical, one who views another as an insider may in turn be viewed by the latter as a stranger. Moreover, a person who encounters another as a stranger in one context may meet him as an insider in another.

Finally, the distinction between strangers and insiders, which is never absolute, may tend to disappear under conditions I shall later enumerate.

A second general question one can ask about a society is a follow-up of the first. On what basis do members of significant groups hold together and how do insiders deal with strangers? The previous issue goes to the anatomy of groups; this one has to do with the very nature of the social bond. It draws our attention to the fundamental correspondence between the ways in which social relations are in fact ordered and men's images of self and others. Every society will have groups that may be viewed as characteristic of it in the sense of exerting the greatest influence on the quality of everyday life. If, for example, a certain kind of family community turns out to be the typical significant group in a society, it will be especially important to discover the principle of association that governs its internal life.

Were we able to answer the two preceding questions with respect to any given society, there would remain a third matter that would require elucidation before we could be said to have understood the meaningful core of a society's organization and culture. This third aspect is the way people tend to define the relationship between what their experience is and what it ought to be, between actuality and the ideal. Just as the second problem grows out of the first, the third issue is suggested by the second.

When I distinguished the varieties of law, I pointed out that to comprehend the specifically social aspect of human conduct, we can never stop with the description and explanation of factual regularities. The character of a set of social relations remains misunderstood until we elucidate the ideas or sentiments of obligation by which men shape their reciprocal dealings and praise and blame one another. A study of the social bond calls for an appreciation of the sorts of normative

order that surround social relations with precepts, symbols, and beliefs. Sometimes this normative order will be all but completely identified with social practice: actuality will be idealized and the ideal actualized. This is what we have seen happen in customary law and in the immanent religions. At other times, however, the ideal and actuality will be contrasted, as they are in the other types of law and in the transcendent religions.

The distribution of individuals among significant groups, the character of their relations to each other as insiders or strangers, and the interplay between conceptions of the ideal and understandings of actuality constitute the elements of a framework for the comparative study of forms of social life. What can this framework help us learn about tribal, liberal, and aristocratic societies?

Tribal society[2]

Imagine a society in which every individual belongs to a very small number of significant groups but in which each of these groups occupies a large part of his life. Thus, activities that in a different kind of social life might be connected with a variety of distinct groups are in this society concentrated within a few collective bodies. At first, the only significant group may be one whose membership is determined by real or hypothetical kinship ties. But in almost all societies, other significant groups, such as territorial entities, have also acquired a measure of relative independence from the family group.

A consequence of the paucity of significant groups is that the contrast between insiders and strangers can be drawn with a sharpness that would otherwise be impossible. If every individual belongs to a multiplicity of specialized groups, he is likely to encounter persons who are insiders in one context

yet strangers in another setting. In this way, the images of familiarity and strangeness, attached to the same persons, easily become confused and weakened in the subject's mind. Besides, the more narrowly defined the scope of each of the significant groups that make up a society, the less is each of them likely to engage the whole personalities of its members. As a result, strangeness or familiarity may be attributed more directly to roles or activities than to the persons who perform them. The strong contrast of strangers and insiders, together with all this contrast implies about the nature of significant groups, is the first characteristic of tribal society.

Not even in the most extreme cases of tribalism is there ever an absolute line between insider and stranger. The universal prohibition against incest offers the classic demonstration of this thesis. The set of persons of opposite sex whose sexual relations with the subject fall under the incest prohibition always partially overlaps the kinship group as it is defined for nonsexual purposes. For example, the mother may belong to the latter, but not to the former; in one context she is a member of her son's group, whereas in another she is excluded from it. Thus, the separation of significant groups arises from the most elementary and universal facts about the family.

Let me now pass on to the second part of my scheme: the nature of the way insiders in the society's characteristic groups are drawn together and the quality of their encounters with strangers. The chief point to grasp is that in tribal societies very different standards of behavior are imposed on relations among insiders and on those between insiders and strangers.

Along these lines, much was made in the literature of social theory of the way premodern (read nonliberal) societies distinguished between the intragroup and the intergroup exchange of commodities. Thus, whereas dealings among insiders might be tied to some seemingly inalterable standards

of reciprocity, one's economic relationships with strangers could be governed by a purely predatory conception that allowed each party to take as much as he could get from the other. Communal solidarity in one sphere of life is opposed to unharnessed economic warfare in another.[3] An example of this phenomenon, which became famous because of its importance to the development of capitalism, was the history of the prohibition against usury in the West.[4] The Deuteronomic precept, which forbade the charging of interest to fellow Jews, allowed interest to be charged Gentiles.

The organization of capitalist markets required that profit-guided trading take place within groups from which it was previously banned. But capitalism also depends on an individual's being able to trade with strangers in the assurance that they will abide by well-defined rules. The profit motive, if it is not to destroy the institutional foundations of a market society, must work itself out within constraints that preclude the taking of goods by material force and that permit a relatively impersonal price system to develop.

At the heart of the difference in the way insiders treat each other and the way they deal with strangers lie two utterly different kinds of social relations. Insiders do not recognize strangers as persons with whom they share anything important. In contrast, the members of the group believe themselves tied together by a deep and lasting communal bond. Typically, this bond rests both on a natural fact and on a sharing of common beliefs or ideals. The natural fact is the fate of being born into a family, a territory, a religion, or a race. But this predetermined circumstance is important only insofar as it contributes to a mental experience, which is the very core of tribal community: the sense of having a view of the world and of the good in which others participate, a view whose hold over the group is so strong that it need never be spelled out. Communal solidarity is precisely the condition of

extensive, coherent, concrete, and intense moral communion identified earlier as a foundation of custom.

Thus, the stage is set for putting to the tribal society the third question suggested by my conceptual map. How will individuals who relate to each other in the manner described tend to conceive of the place of the ideal in actuality? Surely, they will have no conception of the right or the good as something towering above the natural and the social world that surrounds them. Their tightly bound community of sentiments and ideas will encourage them to identify what ought to be with what is by denying them the experience of moral doubt. Hence, their law, their religion, and their art will all express the view that the ideal and actuality are at root inseparable. Indeed, the very notion that nature and society might undergo a basic change must remain alien to a people who have not yet broken the nearly closed circle within which everything in the tribal society moves.

Liberal society

Take now a society that stands at the opposite pole from the tribal and call it liberal.[5] In such a society, every individual belongs to a large number of significant groups, but each of these groups affects only a limited part of his life. Thus, personality is carved up into a long list of separate or even conflicting specialized activities. The reverse side of this specialization is that the whole person comes to be seen and treated as an abstract set of capabilities never tied together in any one context of group life.

Such a mode of association undermines, though it does not abolish, the tribal contrast of strangers and insiders. As significant groups grow in number, they intermesh more and more. Hence, the frequency with which men who are insiders for some purpose become strangers for another increases.

The extent to which a subject can define himself and his fellows by reference to their shared experience in a group diminishes. At the same time, as individuals interact more often in impersonal contexts, like markets and bureaucracies, the position of the stranger is itself robbed of much of the foreignness, hostility, and fear with which it is connected in tribal society. Thanks to these convergent trends, impersonal respect and formal equality edge out communal solidarity toward some and suspicious hostility toward others. In place of the insider and the stranger, there emerges the abstract other to whom one shows neither love nor hate.

The distinction between strangers and insiders never wholly disappears under liberalism. It persists in the form of national, ethnic, and local attachments, and, above all, as a contrast between the public world of work and the private life of family and friendship. Yet the impersonality of the public realm and the communal character of the private one are always changing positions. On one side, there is the search for colleagueship in the workplace and the tendency, within and outside state law, to apply standards of good faith and fairness to commercial dealings, for the sake of business needs. On the other side, familial relationships are abandoned to the exploitation of power advantages within the family under the guise of respect for the integrity of the family group. In liberal society, the law of communal solidarity is repeatedly imposed upon public life in the name of the law of the jungle, and the law of the jungle upon private life in the name of the law of communal solidarity.

What precisely is the nature of the social bond that relegates intragroup community and intergroup enmity to subordinate positions? I shall call this intermediate tie the association of interests. The basic premise of the association of interests is that men will abide by relatively stable standards of interaction because they believe it to be to their mutual

advantage to do so rather than because they participate in an identical vision of the truth and the good. In other words, the subject accepts and obeys a structured framework for reciprocal dealings with others as a means to the achievement of his own ends. Such a system cannot work by its own motion; what moves it? One traditional answer is that conduct violative of the rules will be so sanctioned by governmental punishment or informal social controls that most people in most circumstances will find that it pays to play by the rules. The trouble with this response is that it leaves unexplained why obedience to the rules continues even when overt sanctions seem inadequate or unimportant to the agent.

To gain a deeper understanding of how the association of interests works, one must inquire into the conception of personality and into the psychological experience bound up with this form of social life. In tribal society, individual consciousness tends faithfully to reflect collective culture. The mechanism by which the passions are stopped from wreaking havoc upon the established arrangements of society is an unthinking obedience to the official culture; order in society presupposes and evokes order in the soul. In this sense, Plato's doctrine in the *Republic* and the Confucianist social ideal were both attempts to work out the conditions under which the tie between personal and political harmony might be reestablished at a higher level of consciousness and refinement. But what is to hold the passions in check when the moral community on which tribal society depends has fallen apart? To this question various answers, none of them entirely satisfactory, have been offered in the theory and practice of liberal societies.

First, it is pointed out that allegiance to common values lives on in liberal society under new disguises. Groups like the family may continue to approach the condition of communal solidarity and even the society as a whole may move upon

the shared though shifting ground staked out by its collective past. Nevertheless, it remains true that the greater the independence of the passions from the common culture, the more urgent the need to find an alternative basis for order among and within men.

Proust's remark that "our social personality is the creation of other people's thoughts" suggests the master device for the guarantee of social and psychological stability under liberalism. Each individual occupies a place in the various specialized groups to which he belongs. The parts he plays and the way he plays them determine the content of his desires as well as the means available to him to satisfy them. By shaping how others view him, his roles shape his view of himself. This social image of the self steps into the vacuum created by the chaos of the passions. It gives the individual an illusion of coherent personality in exchange for his submission to the demands of the group. Among these demands is the need to strive for mastery of the skills required for the performance of his roles. In this manner, each individual's supreme interest in the image of self becomes the linchpin of social order; he is led, indeed forced, by that interest to keep the savage passions at bay.

Against the background of what has been said above about the nature of group life and of the social bond in liberal society, it is possible to infer the kinds of beliefs about the relationship of the ideal and of the actual fostered by this society. As interest association replaces community solidarity, the basis for seeing social arrangements as expressions of the good, the beautiful, or the holy collapses. No longer is there a living and all-inclusive tradition that can be perceived as instinct with the ideal. On the contrary, the most pervasive experience of life becomes that of the diversity of conceptions of good, beauty, and holiness, and the main puzzle of social thought, that order can prevail despite this diversity.

In tribal society, reason is the awareness of a highly concrete ideal implicit in reality. Reason of this kind knows no distinctions between *is* and *ought* or between theory and practice. But in liberal society, a different view of the link between the ideal and actuality, and thus of the nature of each, carries along with it a change in the conception of mind. Reason must now be broken up into distinct faculties: the choice of means for the achievement of one's interests and the perception or statement of abstract ideals; the former devoted to what is, the latter to what ought to be; one instrumental, the other contemplative. Between them stands still a third faculty whose relationship to the other two remains obscure and ambiguous: the theoretical knowledge that, though concerned with the actual world, is pursued for its own sake rather than as a handmaid to interest.

Aristocratic society

The last form of social life in my comparative framework is in many ways a synthesis of the two previous ones. The task is to determine just wherein the synthesis lies. Many societies commonly described as feudal or oligarchic approximate the features of what I shall call aristocratic society, though perhaps its most perfect example remains the European *Ständestaat*. It is a unique category in the logic of social types, as unified in its internal structure as tribal or liberal society and as irreducible as they to one of the other types.[6] If this hypothesis is correct, a reconstruction of the category of aristocratic society is an indispensable part of any effort to work toward a general social theory and to understand with its help the modern social world and its vicissitudes.

Liberal society tends toward universalism; it is inclined to draw people together under the rule of formal equality. Tribal society is particularistic; the subordination of the individual to

the group and the rigidity of group differences suppress the acknowledgment of a common humanity in which native and foreigner alike participate. Aristocratic society is best understood as a peculiar combination of universalism and particularism. Both its strengths and its weaknesses spring from this alliance.

The commonest form of the synthesis is a secular one. Each individual belongs to a specific group, his estate, that confers on him a broad range of entitlements and obligations and largely predetermines his outlook on society, on nature, and on himself. These strata, sharply divided from one another and decisive in setting the quality of individual life, constitute the particularist element in aristocratic society.

The significant social groups are not on a relatively equal footing, as they tend to be in tribal society. They are steps on a single, continuous hierarchic ladder rather than coequal partners or antagonists. Precisely because of this configuration, the plan of an aristocratic order is relatively simple and clear. Hence, it constantly brought home to individuals no matter what their rank. In belonging to a particular estate that stands apart from all other estates, each person is also aware of fitting into a universal order of society. Up to a point, the members of each estate are strangers to the members of other estates. But they are also joined together by the ties of superiority and subordination typified in the feudal bond. They recognize each other as complementary parts of the same society and, in this sense, as joint insiders within a broader community.

In European feudal societies and *Ständestaaten,* the blend of particularism and universalism was given a still more dramatic form by the dominant theological beliefs. A tribal society identifies the sacred with itself—with arrangements, objects, or forces it believes peculiar to its own experience. It will abandon its view of the immanence of the divine in

actuality before it stops seeing itself as God's preferred stage for His deeds. The history of Judaism exemplifies this pattern. In liberal societies, by contrast, religious universalism is the reverse side of social universalism. People will begin to think of God as a universal person without special commitments to any one nation, and they will develop a relativistic view of the worth of the religious beliefs of different countries and ages. Both traits were brought out by the rationalist deism of the European Enlightenment.

The Christianity that so pervaded life and thought in pre-Enlightenment Europe found a middle position between the extremes of religious universalism and particularism. Though it acknowledged in principle a universal brotherhood of man, it emphasized the separation of Christendom from the surrounding pagan world or from infidels within Christian lands. Thus, it was possible to believe that all men were called to membership in the same Christian community while acting on the fact that all were not yet members of it. The denial of the absolute strangeness of another person, required by the idea of the common fatherhood of God, could be reconciled with the element of distance in the Christian's posture toward the religious outsider.

The secular and the theological combination of particularism and universalism in aristocratic society tell us a great deal about how people treated with each other under that regime. A rigid hierarchy of ranks presupposes and implies the breakup of any closely knit and all-inclusive community of values, for its exposes each rank to a distinct experience and imposes on it unique responsibilities. Yet the same social circumstances that dissolve the tight moral community also preclude what I described as the association of interests. Such an association is based on the premise that individuals can come to view themselves as persons who transcend the groups to which they belong and who, despite their class

differences, encounter one another on a footing of relatively equal worth, expressed by their formal equality of political rights. Neither assumption holds in aristocratic society. Much of the individual's life plays itself out within the confines of a single group, his estate. Moreover, by virtue of his rank, he has privileges and duties that establish his unalterable hierarchic relationship to men of other ranks.

The leading principle that holds the aristocratic order together is honor rather than communal solidarity or interest association.[7] Honor is the recognition by others that one excels in the virtues peculiarly suited to one's rank in view of the entitlements and obligations that attend it. Every individual is caught forever within the same social circle that limits what he can do, know, and feel. Thus, for example, rather than being a person *with* a nobleman's jobs, he *is* a nobleman. For himself and for others, his social place exhausts his humanity and is inseparable from it. One can be a good serf or a good cleric, but one cannot be simply a good man. Hence, the struggle for self-expression and approval by others must appear in aristocratic society as the desire to realize in one's own existence the peculiar mode of humanity proper to one's rank. The force of this desire gives life to the paraphernalia of estate privileges and obligations, making each individual see their preservation as self-defense.

Because the aristocratic order has a single stable hierarchy, in contrast to the multiple unstable rankings that distinguish liberalism, its top stratum, the aristocracy, plays a uniquely important part in determining the character of the entire society. The aristocracy's preeminence over all other estates gives it the independence necessary to perfect the relation between individual and group that the principle of honor implies: the assertion of the corporate spirit of the estate in the deeds of its members. The same independence explains the peculiar loftiness of ambition and the self-assured

possession of self that set the aristocratic ethos apart and have often been identified with the idea of honor itself. The non-aristocratic estates, however, are all more or less under the political control and cultural tutelage of the aristocracy. Insofar as they serve and emulate the nobility, they can never fully work out the modes of consciousness and of existence that express their own corporate nature.

Here lies the deep contradiction in their circumstance. When trying to assert their own modes of communal organization, they are constantly frustrated by the power interests of the aristocracy. Yet their own identity as estates is inseparable from a hierarchic order in which the nobility occupies the dominant position. This is precisely the contradiction that dominated the relationship between peasants and merchants, on one side, and nobles, on the other, during the emergence of the European nation-state and during its passage from the aristocratic to the liberal type of social life. The peasants rebelled and the merchants plotted for greater privileges of self-government within aristocratic society. They could not get what they wanted, however, without crippling the aristocracy. They thereby transformed the character of social life in such a way that they ceased to exist as separate corporate groups, a result no one may ever have intended or wanted. The free development of commerce, for example, helped create a mercantile society in which the market was open to everyone rather than being the meeting place of a distinct category of persons.

Each type of society has a focal point of tension, a hidden flaw in its characteristic way of defining the social bond. When, for whatever reason, the weakness becomes manifest and has clear-cut consequences, the society disintegrates and takes on a new form. For tribal society there is the danger that the community of shared values may fall apart, victim to group conflict. Liberal society is vulnerable to the implications

of its uniquely unstable system of ranking: some groups in fact have more power than others, yet no group seems entitled to dominate the others. Hence, a continual struggle takes place between the quest for equality and the need for authority. The analogous tension in aristocratic society is the conflict between the power of the aristocracy and the struggle of the other estates to affirm their autonomous identity and to develop their own internal community. History shows us the consequences of the disintegration of tribal and aristocratic societies. But to what other form of social life does the decline of liberalism lead? The answer to this question remains only partly known, and will be a theme of later sections of this chapter.

The last step in my analysis of aristocratic society is to suggest its typical way of dealing with the relationship of the ideal to the actual. In this, as in all other aspects of its existence, we should expect to find an intermediate position, a point midway between the tribe's identification of *ought* with *is* and liberalism's remorseless contrast of the two. Once again, the issue may be usefully approached from the standpoint of the reconciliation of universalism and particularism in group life.

The particularist element in aristocratic society encourages each estate to equate the good, the beautiful, and the sacred with its own honor, that is to say, with the strivings and virtues that mark it off from other ranks. At the same time, however, the universalist component leads each social stratum to seek, and allows it to grasp, a more inclusive conception of the ideal, which rises above the estates and applies to them all. When aristocratic society accepts the claims of a transcendent religion like Christianity, the antagonism between the tendency to sanctify existing social arrangements and the tendency to oppose them to a higher heavenly perfection becomes still more intense. As a result of this tension, we can

expect to find in the culture and in the everyday experience of aristocratic society an oscillation between a joining together of ideals and actuality and a breaking apart of them.

Take, for instance, the place of the Christian vision in medieval European society. One of the most striking features of this period was the aristocracy's attempt to identify its own ethos with the Christian life by carrying the latter down to earth and taking the former up to heaven. The product of this double ascension and descent was the Christian knight and his code of chivalry.[8] Nevertheless, an aspect of social life at least as prominent pointed in the opposite direction. This contrasting feature was the radical disjunction between the brutality of everyday existence and the serene Christian purity displayed in monastic communities as a way of life and in Christian liturgy as an episode in everyone's life. Thus, there was a constant swing between the practice of otherworldly detachment and the quest for mundane comfort, power, and glory.

For all its semblance of ordered hierarchy, aristocratic society is the stage of a war, carried out within individual souls, among visions of the good, the beautiful, and the holy. Therein lies that society's peculiar pathos and the chief inspiration of its highest accomplishments.

Social change

Though this typology is not offered as a scheme of universal evolution, it has certain implications for the understanding of social change. The degree and character of significant change, far from being identical in all societies, vary with each form of social life. The deepest root of all historical change is manifest or latent conflict between the view of the ideal and the experience of actuality.

In liberal society, there is a constant and overt struggle

between what men are led to expect of society and what they in fact receive from it. The high point of this conflict is the combination of an intense need for organized power with a baffling inability to justify any kind of power at all. Another aspect of the conflict is the adversary nature of the relationship between high culture and society. Still another is the tendency of material demands vastly to exceed the resources available for their satisfaction. Because of this many-sided antagonism between ideal and actuality, change in liberal society is rapid and pervasive in comparison with other types of social life.

In an aristocratic society, aspiration and experience are felt to be more at home with each other. The gap persists in half-veiled forms: the ambitions of the nonaristocratic estates cannot be harmonized with the social order, and the moral or religious vision of the society seems both to legitimate and to condemn the established hierarchies. In such a society, change may be both slower and less apparent than under liberalism.

Finally, in tribal society there is merely the possibility, seldom realized, that the communal consensus will disintegrate, making it possible for beliefs to emerge that challenge familiar ways. But, for the most part, such change as exists tends to be noncumulative and unconscious. Structural change is an aberration rather than a normal fate.

The view of social change I have sketched poses, but does not answer, two questions—dark riddles at the outskirts of social theory. First, how could tribal society, which is surely the type most applicable to the earliest forms of human association, ever change? Second, are there any general reasons why one form of society turns into another?

To answer the first question, one must postulate that in any society that can be characterized as human there is always a potential rift between ideal and actuality. This inherent

possibility is simply a particular manifestation of that more general power to transcend the forms of one's existence which is a defining attribute of humanity.

If there is a solution to the second problem, it might be a speculative hypothesis about the relationship between the way societies change and the way human nature develops in history: each type of social life would at once reveal and invent new sides to human nature, and the historical succession of societies, when viewed as a whole, would show a movement toward a more perfect reunion of conflicting impulses in humanity. It is not my purpose here to elaborate or to justify this frankly evolutionary idea. I mention it only to suggest the form of a possible answer and thereby to indicate once again how the problems of social theory may force one back to a more basic puzzlement about human nature and its relation to history.

LAW AND EUROPEAN ARISTOCRATIC SOCIETY

Between feudalism and liberalism

The framework outlined in the previous section provides us with the beginnings of a language through which to compare societies. More specifically, it gives us a vantage point from which to approach for our own purposes a theme that loomed large and appeared under many guises in classic social theory: the way modern liberal society developed out of aristocratic society in European history. Sometimes the inquiry was given a still broader evolutionary scope to include a theory of the passage from tribal to aristocratic orders. Almost always it focused on how the novel society recast the relationship of consciousness to existence and on what it portended for mankind's future.

If we are to retain any hope of progressing beyond the point where the classic social theorists left off in the analysis of modernity, we might do well to begin where they did: with an interpretation of what was involved in the emergence of modern European society from the preexisting mode of social life. Such an interpretation is already implicit in my earlier contrast of aristocratic and liberal society. The task now is to make it more concrete and to relate it to law without dissolving the theoretical discussion into a morass of historical particulars.

It has become commonplace to describe the sort of European society that followed the feudal order, but preceded the liberal state, as the society of estates, or *Ständestaat*. Both medieval feudalism and the *Ständestaat* may be considered species of aristocratic society, but it was the latter that served as the immediate forerunner of Western liberalism. A good way to define the *Ständestaat*'s place within the broader category of the aristocratic order is to recall some familiar characterizations that emphasize the arrangement of power.

First, the society of estates was marked by two basic splits. One was the rift between the mass of the people, composed largely of the peasantry, and the elite. The other cleavage separated the different social ranks or estates within the elite from the princely power.[9] Both dichotomies—mass and elite, estates and prince—were indispensable to the *Ständestaat* though neither was peculiar to it. Distinctions within the elite were shaped mainly by hierarchic yet reciprocal ties of military and political obligation. The coexistence of elite and populace, though also colored by such factors, could more accurately be described as economic domination.

Second, the estates that made up the elite were corporately organized into assemblies, like the French *états,* the Austrian and German *Stände,* the Italian *parlamenti,* and the Spanish *cortes.*[10] Within these assemblies, each estate spoke

for itself, rather than for some alleged general interest; each defended its own peculiar privileges against the pretensions of the other estates. In the zealous defense of corporate privileges, identified with unchanging law *(ius),* lay, as Montesquieu and Tocqueville were to point out, the kind of freedom typical of this aristocratic society.[11]

Third, the system of estates developed against the background of the commercial capitalism of the trading towns and of bureaucratic centralization in the service of princely power. Wherever merchant interests gained the upper hand in their own right or through alliance with the aristocracy, the estate assemblies moved toward parliamentarianism. Whenever, on the contrary, the prince succeeded in retaining control of government and drew upon the third estate to set up an elaborate bureaucratic staff, the estate assemblies withered into puny judicial adjuncts of an absolutist state. The repeated attempts of commerce and bureaucracy to tame each other and the relentless encroachment of both upon the traditional hierarchy of ranks constituted a third feature of the *Ständestaat.*

Of these three characteristics, the first links estate society to feudalism and the third to liberalism, whereas the second describes its unique institutional nature and defines its special place within the genus of aristocratic orders. Hintze has shown how the *Ständestaat*'s distinguishing feature, the corporate organization of the estates, took two main forms.[12] It is worthwhile to dwell on the differences between them because they will turn out to be useful in explaining the double path that led from the *Ständestaat* to liberal society.

The oldest type, the one least influenced by the feudal system and closest to tribal roots, was the bicameral system that developed in England, Scandinavia, and much of Eastern Europe. The wealthiest and most powerful nobility sat in an upper chamber; other elite groups, like gentry and free cities,

were represented in a lower chamber. The high chamber almost always began as the king's great council, whereas the lower chamber had the character of a general convocation of the privileged elements of the nation.

The second type of estate structure was tripartite. Nobility, clergy, and professional-commercial groups were organized into corporate bodies with an indissoluble set of legislative, administrative, and judicial prerogatives. Such a system became characteristic of France, much of central Europe, and the Kingdom of Naples. In these countries, most of them within the orbit of the former Carolingian empire, the feudal system had disrupted, to a still greater degree than in the other countries, the clannish nature of tribal life and had opened the way to a centralist territorial reorganization of society. Princely ambition had brought into existence a group of scholar-bureaucrats, increasingly trained in the Roman law, who had their own corporate identity and occupied, together with merchant groups, an important position within the third estate.

These were the specific institutional features of the *Ständestaat*. If we now combine these traits with the attributes of consciousness and existence I ascribed to aristocratic orders in general, we shall have a basis upon which to grasp the nature of law in this preliberal society.

Law in the Ständestaat

Remember that bureaucratic law usually includes two sharply contrasting components. The first is a profane realm of discretionary commands, an area in which the ruler is more or less free to move according to his conceptions of princely expedience or social welfare. The second aspect is a sphere of social life immune to the ruler and subject solely to some sacred, suprapositive order. This law, allegedly higher than

politics, ought not to be mistaken for tacit custom; most often it takes the form of God-given precepts whose exegesis is entrusted to a cadre of learned priests or scholars.

Several examples have already been given of civilizations that superimposed such a double-layered normative order upon custom. Sometimes, as in certain epochs of ancient India or Islam, the sacred element in law prevailed so decisively over the profane that even the exercise of princely discretion was judged by religious standards. In these societies, which developed under the overwhelming impact of a shared religion and under the influence of priestly or scholarly groups, the prince was expected above all to perpetuate the sacred law, to season its rigors in extreme cases, and to adapt its principles to changing circumstance. At other times, however, as in the China of the Warring States period, no coherent religious tradition or well-entrenched social groups checked princely power. In these latter cases, discretionary command, enforced through bureaucratic domination, best characterized the law.

From the perspective of this scheme, the law of European feudal societies and *Ständestaaten* was notable for its balance: in many European societies, over a long period of time, royal discretion and higher law complemented each other. Their very equilibrium created a situation in which the barrier between them broke down. But rather than one side's triumphing over the other, both changed into a wholly novel kind of law, and the premises of consciousness and existence on which normative order had previously rested were revised. To understand this seemingly paradoxical process of balance and transformation must be the chief task of any study of postfeudal law in the West.

The contrast of the two faces of preliberal law is underlined by the traditional distinction between *Polizeisache* and *Justizsache*. The former were the matters that fell under the

prince's competence to keep the public peace, supervise his subordinates, and gather the resources necessary for the perpetuation of his power. This activity, in which the modern categories of legislation, administration, and jurisdiction were confounded, took the form of edicts, *ordonnances,* or *Landesordnungen.* The royal law constituted the discretionary part of the normative order.

Over against it stood the *Justizsache,* the matters pertaining to the privileges and obligations of the estates of the realm. Portions of this corporate law might come to be written down in a variety of ways: as royal charters recognizing entitlements that were supposed to preexist them, as anonymous popular compilations, or as scholarly treatises. But regardless of the form, the principle persisted that the written word described a law that preexisted it. The two parts of the system, represented in the contrast of *lex* (police regulation) and *ius* (fundamental law), came together in the person of the king, who was both maker of edicts and protector of the constitutional order of the estates. Any attempt by him to violate that order in the exercise of his police powers entitled the estates to resist his incursions.[13]

The elements that make up a legal order—the attributes of positiveness, publicity, generality, and autonomy—were therefore distributed in such a way that no real legal system could exist or even be conceived. The law of princely ordinances was neither general nor autonomous in the modern sense, and the law of estate privileges neither public nor positive. Let us now look more closely at each of these statements and piece out their relationship to my earlier remarks about the nature of aristocratic societies in general and of *Ständestaaten* in particular.

The lack of a commitment to the ideal of generality in the royal law manifested itself in that law's freedom from the modern contrast between legislation and administration. The

prince's commands within the boundaries of his police power were not meant to promulgate or to execute general rules applicable to abstract categories of persons and acts. The same type of order, with the same kind of justification, might be addressed to a single individual or to the entire realm, without any stopping point on the continuum from individualized directive to universal precept other than respect for the law of the estates. At the outset, the conditions were not yet at hand that would make generality an indispensable requirement rather than an accidental characteristic of law and thereby separate administration from legislation.

The law of edicts was likewise alien to the modern dualism of administration and adjudication. Such a dualism, with its characteristic contrast of institutions, methods of discourse, and occupational groups, reflects a sustained effort to protect the authoritative interpretation of law, as a sphere of rule-determined decisions, from politics, as a realm of prudential judgments. The chief problems of modern jurisprudence involved showing how prudence might be disciplined by law in administration and law tempered by prudence in adjudication. In the period we are discussing, however, the prince's discretion was unhampered by a commitment to general rules, and it could therefore dispense with a technique for their uniform application. Moreover, the royal police power was already limited by the privileges of the estates. Another limit would be sought only after this one began to crumble.

Throughout the history of the *Ständestaaten,* rulers were engaged in a struggle to expand the scope of their power into areas of social life formerly the domain of the suprapolitical prerogatives of the estates. The revolutionary significance of this struggle is shown by the fact that it resulted in the development of a positive and public law at a time when such law was still considered a special or even extraordinary device.

Insofar as it was positive, the king's regulation asserted the principle that ever broader ranges of social experience might be manipulated by acts of political will. Because it was public, a law that only the central government could lay down, it presupposed and fostered the separation of state from society and of political right from social status.

The law governing estate prerogatives presented a reverse picture of the king's ordinances. This fundamental, constitutional law, a system of *ius* rather than of *lex,* already had the beginnings of a commitment to generality and autonomy. As the law of an aristocratic society, it could not admit a formal equality that cut across distinctions of rank, nor could it allow the free development of specialized legal institutions, personnel, and arguments.[14] Yet it established the obligations and entitlements of broad categories of individuals; it was perceived as beyond the reach of politics; and it was expected to be applied impartially. Thus, it was from the start something more than mere custom.

This part of the law also differed from monarchic command in its initial lack of a public and positive character. It was not at first made by the central government, for it preceded the state's appearance and limited its power. And though it might occasionally be articulated and written down, it was seen as an order whose existence and validity preexisted human deliberation.

The neat line between royal and corporate law faded away. But the social forces behind both aspects of the law were so matched that the distinction collapsed in both directions, and this fact is of the utmost significance in understanding the later history of law in the West.

On one side, the prince was increasingly held to standards of legal generality and autonomy. An ever larger area of his police power became subject to the demand that individual interests be regulated only under the authority and within

the limits of preexisting laws, addressed to broadly defined categories of persons and acts. Thus, the contrast of administration and legislation gained a foothold. The separation of administrative and legislative power made it important to establish an independent judiciary, with its own personnel and procedures, to oversee the administrative use of legislation. This might be done through a differentiation of tasks within the prince's staff or through the assumption of more specialized judicial responsibilities by the corporate assemblies.

Some aspects of these developments seem to have been largely unintended consequences of the growth of bureaucracies designed to serve the prince's interests. But this alone would not have been enough, as the Chinese comparison suggested. It was crucial in Europe that the aristocracy, the third estate, or both together always remained sufficiently powerful to restrain the prince.

While the law of ordinances was being organized and domesticated in this fashion, the law of estate privileges underwent a remarkable transformation of its own. The institutionalization of corporate assemblies and the rivalry of estates with each other and with the prince encouraged even sharper and more explicit formulations of the entitlements and duties of each estate. It became steadily more important for all parties to determine where royal authority stopped and fundamental law, above politics, began. If these determinations were not made by the state, they nevertheless constituted the social compact that defined the structure and limits of national government.

Thus, the law of estate prerogatives began to acquire a public and a positive character without entirely losing its earlier identity. For it continued to be viewed as an order that was higher than government itself and that ought not to be meddled with lightly. In this way, the law of privileges

became the core of modern European constitutional law and remained so, at least until the French revolutionists' assertion of omnipotent popular sovereignty introduced a rival tradition of constitutionalism.[15]

The development to which I have referred did not occur everywhere at the same pace or with the same emphasis. There were countries in which the centralizing impetus of the monarch prevailed over the autonomy of the estates and the defense of their law. The idea of fundamental law was almost wholly destroyed, despite occasional rebellion and resistance by the estates. The prince bent large parts of the aristocracy and of the third estate to his own service and created from their midst a numerous corps of state servants. In these countries, the *Ständestaat* was followed by bureaucratic absolutism.

In other societies, however, a renewed aristocracy, often in alliance with enriched merchants groups and with professional people, captured a major part of the state machine. Princely power suffered accordingly. And the doctrine of fundamental law was enshrined as the safeguard of the established social hierarchy and as an assurance of the limits on the ability of groups in government to use their position against groups outside government. A large public staff was slow to develop. In these societies, parliamentary constitutionalism succeeded the *Ständestaat.*

Bureaucratic absolutism and parliamentary constitutionalism were the two main routes of transition from the society of estates to liberal society. They might be illustrated, respectively, by Prussia and England.[16] Bureaucratic absolutism flourished chiefly in the territories characterized by a tripartite *Ständestaat,* where the imprint of feudal organization, as a premature bid for a centralized state system, was deepest. Parliamentary constitutionalism appeared within the area of the bicameral type of *Ständestaat,* in which the estates had always retained a greater measure of independence. Russia is

an altogether different case, a society in which imperial authority was so absolute and personal from the start that no true system of estates can be said to have ever existed.[17]

Bureaucratic absolutism provided the context for the nondemocratic variety of liberalism, which offered the middle classes protection from governmental "arbitrariness," but largely denied them direct participation in government affairs. Parliamentary constitutionalism led to liberal democracy. The passage from bureaucratic absolutism to the liberal democratic state might be accomplished, as in France, through revolution.

The contrast between bureaucratic absolutism and parliamentary constitutionalism should not, however, blind us to the features that, in contrast to other civilizations, both had in common. In no *Ständestaat* was the prince powerful enough to impose his ordinances on the basic activities of social life without satisfying in some measure the requirements of legal generality and autonomy. In this sense, he had no choice but to uphold the rule of law.

The reasons for this astonishing development are surely difficult to surmise. Yet the argument of Chapter Two suggested some of the factors that may have been involved. Among these, two were singled out for special attention: the complex of circumstances that allowed a broad spectrum of groups to maintain or to assert their identities in the face of state centralization and the acceptance of religious ideas and institutions that invoked a universal moral order to which even state law was subject. My earlier discussion of these factors may now be offered as a tentative explanation of the evolution I have just traced.

The pluralism of groups and the vision of society associated with it made the untrammeled assertion of bureaucratic law impossible. It contributed first to the persistent, though often ultimately unsuccessful, defense of estate prerogatives, then to the modern outcry for formal equality and impartial

justice under law. The belief in a God-given natural order, whether accompanied or not by an independent church, gave a cosmic support to the confinement of state power by the fundamental law of the *Ständestaat* or by liberal constitutionalism. The modern rule of law emerged from the double-edged process by which the law of edicts acquired the trappings of generality and autonomy and the law of estate privileges became public and positive.

LIBERAL SOCIETY AND ITS LAW

My comparative framework and my analysis of the *Ständestaat* provide tools with which to begin the study of liberal society and its law. The intention of my approach is to emphasize the relationship between prevailing belief and external organization. Thus, I begin by discussing the situation of consensus in liberal society as a way to uncover the central paradoxes of a dominant ideology. Then, the argument points to the roots of these paradoxes in a unique form of social hierarchy. The proposed understanding of the interplay between commitment and experience under liberalism permits a reinterpretation of the place of law in liberal society. And this reinterpretation in turn advances our insight into modernism. Finally, some of these themes will be illustrated by reference to German legal history. For the moment, I shall use the concepts of liberalism and modernity synonymously, though it will turn out that the former is only a special case of the latter.

Consensus

The comparison of forms of social life suggested that the central theme of consciousness and existence in liberal society is a peculiar set of interdependencies among three factors.

The first element is the multiplication of significant groups with the diminishment of the area of individual life dominated by each group. Roles are specialized, but every person occupies a variety of them. The second basic feature of liberal society is the disappearance of a sharp distinction between strangers and insiders. The social order becomes an association of interests that plays on men's need for each other's approval. Third, ideals are opposed to actuality.

Taken as a whole, these aspects of modern society give new urgency to the question of how persons with conflicting views of the good and of reality can live at peace with each other and with themselves. Even peace is not enough; society must be set up in a manner capable of justification in the eyes of its members. Without such a justification, an ordinary life, lived in obedience to the conventions of its time and place, loses the overwhelming reassurance on which it can count when social practices seem to embody natural necessity or holy right. As a consequence, the experience of the arbitrariness or meaninglessness of existence invades the routines of work, play, and family, routines which had previously been the bulwarks against that experience. How does this predicament, the deepest and most frightening hallmark of modernity, arise from the defining attributes of liberal society, and how does it bear on society's preferred forms of law?

Universalism, interest association, and the estrangement of ideals from actuality have two major effects on consensus. They endanger the possibility of extensive, coherent, concrete, and intense agreement about the rightness or goodness of social arrangements. More importantly, they undermine the willingness to accept the fact of agreement as a sign that one has discovered the good or the right.

The universalism of liberal society lies precisely in its tendency to multiply the number and to diminish the individual importance of the group settings in which each person lives. A traditional example is the parceling out of tasks once