

PERVERSIONS OF FUNCTIONS

«And, in general, for all things that have a function or activity, the good and the excellent is thought to reside in the function, so it would seem to be for man, if he has a function. Have the carpenter, then, and the tanner certain functions or activities, and has man none?... What then can this be?... we are seeking what is peculiar to man.»

ARISTOTLE, *Nicomachean Ethics*, 1097^b 26 ff.

In what circumstances do questions about the function of a thing arise? Here is one possibility: someone notices that a valve is allowing oil to flow over a wheel; he asks, «Is that its function?» The question is prompted by the thought that something may be amiss. Is the valve working as it should, or is it malfunctioning? Our questioner does not know what the valve is for; he is ignorant of its role in the operation of the machine. A knowledge of the valve's function would enable him to judge whether the device is doing what it is supposed to do. He could then assess it as satisfactory or defective and, if necessary, sound an alarm.

Something like this must be behind Aristotle's concern about the function of man. For he raises that question in the course of inquiring what is good and excellent in the way of human lives: if he can determine what the proper work of man is, he will be able to say whether a given man's activities are in accord with what a man is supposed to be doing. He will be able to specify what is defective in this or that man's life, and what is proper in some other man's.

Some thinkers find it natural to ask a parallel question about the function of laws. Their question is surely prompted by concerns similar to Aristotle's. One is tempted to think like this: if only we could determine what the purpose of law is, what a law is supposed to do, we would be in a position to say whether the law is in fact performing its function, doing what it was meant to do, and then we should be able to say whether its operation is correct or perverted.

Something is wrong with this line of reasoning. One obvious confusion is evident in confounding questions about the function of a *particular* law or about particular legal devices with questions about the function of Law —not this or that statute, ordinance, or procedure, but Law *überhaupt*. Law *qua* law. From the fact that we understand what question is being asked when we discuss the function of a particular law or procedure, it does not follow that we understand the more general question, nor does it follow that its meaning is analogous. Aristotle jumps too quickly from the observation that a carpenter and a tanner have a special job to do to the conclusion that something similar can be said about man *qua* man. He seems to assume that because we can understand and answer the questions, «What is the proper work of a carpenter?» and «What is the proper function of an eye or a foot?» the same must be true of the question. «What is the proper function of man?» But if this question is to mean something like «What is man *for*?» then it is by no means clear that we do understand it. Similarly, even if we understand what someone asking for the function of a particular law is after, we may not understand what a similarly phrased question concerning law *as such* is meant to elicit.

But we *can* understand the question. «What is the function of this particular law?» so let us focus our attention on it (1). Someone hearing that the city of Eugene, Oregon, has enacted an ordinance prohibiting certain public displays of affection («obscene touching») may ask, «What is the function of that law?» One could respond by pointing out to him the city council's concern to protect people from indecent and offensive sights, the local merchants' eagerness to discourage disreputable young people from lewd behavior that might embarrass respectable shoppers, the concern of some city council members to placate these merchants, the community's desire to express its opposition to Bohemian life-styles. The functions of the law will thus become clear to him. What had seemed to be an arbitrary piece of legislation or a gratuitous bit of public moralizing becomes an intelligible (though not necessarily wise) interdiction. In the same way, someone might be puzzled about the function of certain provisions in the U. S. tax laws. «What is the function of oil depletion allowances?» he might ask. Or «What is the function of tax write-offs, tax credits for certain investments, dividend exclusions?» Or again, someone —someone naïve or hopelessly ignorant— may be

(1) The question of what sense we are to attach to a demand for the function of law in general deserves a much fuller discussion than I can offer here, though I hope that some of my observations are relevant to it.

in doubt about the function of South Africa's *Apartheid* laws and ask what it might be. These questions would arise quite naturally, as would the questions concerning the oil valve and the touching ordinance. There is first the suspicion that something is not working as it should, then the thought that this suspicion could be allayed by discovering the function of the particular laws in question. «The function of oil depletion allowances is to encourage investment in oil exploration.» «The function of tax credits is to stimulate industrial expansion and economic growth.» That is the kind of answer that seems appropriate to such questions.

The word «function» (or *ergon*, in Aristotle) is used in a rather special way here. We sometimes speak of the functions of a thing in explaining what it can do. For example, the functions of a tape recorder (often listed in the instruction manual under the heading, «Functions») are: play, record, erase, rewind, fast forward, sound-on-sound, etc. In this sense of the word, we could easily investigate the functions of man and the functions of laws. We could see what sorts of things a law does: e.g., that it enjoins and penalizes various kinds of conduct or misconduct, regulates and facilitates commercial transactions, confers public benefits, arrests, interrogates, tries and imprisons people, protects or represses their freedoms, etc. (2). And we could see what sorts of things human beings do: breathe, ingest, digest, grow, reproduce, wear clothes, make war, reason, et. But if these are 'functions' of law and man, respectively, this use of the word «function» does not correspond to Aristotle's *ergon*, and it is not, I think, the sense in which, in our examples, someone sought a knowledge of functions in order to be able to make valid assessments of a law. For, in the first place, it is not just *anything* a thing does that is its *ergon*, not just any work that is the proper work of a carpenter, a tanner, or (on Aristotle's view) a human being. A carpenter may take a job as a cook, a tanner may write articles for a music magazine, yet these would not be the functions of a carpenter or a tanner, respectively. The functions of a thing must be «peculiar» to it, Aristotle holds. So Aristotle is not going to allow all the things a man does as part of man's function; indeed, he specifically rejects perceiving, growth, eating, and whatever else goes into «nutritive living» as not the *ergon* of man, on the grounds that other creatures do these things as well.

Similarly, it is not just *any* function or work that the law performs that constitutes its *peculiar* function. If it is the latter that someone is

(2) SEE R. S. SUMMERS, «The Technique Element in Law», 59. *California Law Review*, 733, ff., for a fuller list of functions discharged by legal techniques.

seeking when he asks for the functions of law, then a description of what actually happens in legislatures, courts, prisons, police stations, election campaigns, and society generally, is not enough. For even if such descriptions should tell someone what the law does, they would not indicate what it is that *only* the law can do. It is conceivable, for instance, that the control of misconduct, the adjudication of disputes, the regulations of commerce, etc., might be managed by private arrangements, religious institutions, or other devices, rather than by the machinery of laws. What laws do then is not necessarily their unique function.

The question of the uniqueness of law's function in the sense of its ability to achieve this or that effect is not, however, the only doubtful element here. Even if only laws could bring about certain ends, it would be an open question whether those ends were desirable. Again there is a strong analogy with Aristotle's defective argument: from the fact that something has a peculiar ability, nothing follows as to whether that ability should be exercised. A certain poison, say, has the ability to kill a victim without leaving any trace of itself. Human beings have the unique ability to make the planet uninhabitable. No sane person would conclude from this that these potentialities should be actualized (3). Similarly, if we were to discover that laws have a special or unique ability to function as instruments for legitimizing certain kinds of repression or for casting an aura of holiness over the status quo, or as a means of expressing the public's desire for vengeance and retribution, we could not conclude, without begging important questions, that these functions were *proper* functions of law.

One obvious feature of the «logic» of claims about functions, in the sense of «what something is for,» is that the truth of such expressions implicitly depends upon the purposes of those beings who create, design, or employ those things. What laws do, we have noticed, even what they alone do, is not necessarily their function in this sense. To discover their functions, in the examples mentioned, we had to refer to the purposes for which they were enacted, the reasons why and the ends for the sake of which they became laws. The functions of laws, in this sense, depend on the purposes of their authors. Since those purposes may be wise or foolish, beneficent or nefarious, enlightened or benighted, the success of the laws is doing what they were meant to do may be a

(3) Unfortunately not all human beings are sane: something like the kind of reasoning illustrated here is tragically evident in the fields of weapons research, military planning, and other technologically oriented thinking guided by the maxim, «If it is technically possible, it ought to be done.»

cause for celebration or lamentation. There is no guarantee that the fulfilling of function is a good thing. Nevertheless, we often speak of a thing's function being *perverted*, or of a thing being misused, and these expressions carry with them the idea that some things at least have *proper* functions, distortion of which is an evil. Are these opinions based on unwarranted assumptions?

A skeptic who thought so might argue as follows: «The idea of «proper» and «perverted» functions are empty rhetoric. Whose purposes are we to take as guidance in determining the «proper» functions of law? The legislator? The man who benefits from it? Or the man who is its victim? Even in the case of common artifacts —an automobile, e. g.—, it isn't possible to say what their proper function is. Cars are used for transportation. But they also function to keep the economy going, to provide jobs for workers, excuses for more highway construction, demands for various resources. Not least important for the sociology of American mores, they function as status symbols, power surrogates, and places for sexual liaisons. To a commuter, their proper function is transportation. To the industrialist and labor union leader, their proper functions is to produce jobs and profits. To a couple in Lovers' Lane, those functions may be unimportant. If you call a given use a misuse, you are only saying it doesn't conform to your purposes or to the purposes of the people whose interests you take as authoritative. One man's perversion of function is another's recreation or profit. The «proper» function of anything is simply the function a given speaker intends the thing to serve.

«Similarly (our skeptic continues) with laws: if you like what a law does, you call that its «proper» function. Some laws function to enhance the economic power of those who already have wealth —that is what the legislators who enact those laws intend them to do, it is what the laws are *for*. You will call it «proper» or «perverted» depending on your economic philosophy. Some laws function to protect basic liberties, others to perpetuate injustice, still others to reinforce the traditional institution of family structure. If you think the law has no business doing these things, you will say they are inconsistent with the proper function of law, misuses of law. A misuse is simply a use of which you disapprove. There is no objective way of determining proper and improper functions.»

The grain of truth in the skeptic's argument seems to me to be this: the claim that a given purpose or result represents the proper function of a thing may be, in a given case, only a disguised way of expressing one's interest in or approval of that function (4). This may be seen most

(4) To illustrate, I recently heard the President of the Southern Baptists claim,

clearly where there are many functions performed, many purposes realized, and perhaps many different purposes motivating those who participate in bringing into being the thing that is assessed. There so many different functions served, e. g., by criminal proceedings —the «bringing the malfasant to justice», the ceremonial function of public, institutionalized condemnation of certain conduct, the social prophylaxis, to name but a few— that any simple pronouncement as to its «proper» function is likely to be arbitrary and one-sided. The skeptic's case is correct also in regard to controversial laws, laws that benefit some while harming others, where the decision to call a given function a perversion of the «proper» function of the law depends on whom we ask. Is it a perversion of tax evasion laws to use them in order to convict and punish racketeers whom one would like to convict of murder or extortion but can't? The racketeer's attorney might say so, but those whose interest is in stopping the racketeer will call it an adaptation rather than a misuse of the law. Was it a misuse of the Interstate Commerce clause to employ it as a device for ending racial discrimination in restaurants? We do not regard a thing as having its function perverted just because it is used for a purpose other than that for which it was created. It does not pervert the function of a screwdriver to use it as a can opener, nor is it a misuse of a fine painting to hang it so as to cover a plaster crack. A misuse or perversion must be not only contrary to the original purpose of a thing; it must be viewed as a bad thing to do, or as an act that has undesirable consequence.

What the skeptic's argument ignores, however, is that there are clear cases where this is so, where a law is put to an evil use, where its function is indeed perverted (5). It is not false, arbitrary, or one-sided to point out the perversion of the institution of the Grand Jury into a political device or its misuse when it is made to function as an arm of the prosecutor's office. There is no mistake in citing the attempted use of anti-riot laws to throttle political opposition and the free expression of ideas as instances of the law's perversion. What we must avoid is begging the questions (1) whether the functions of a law, in the sense of the purposes it was meant to serve, are themselves laudable, and (2) whether, when the function of a law is at least reasonable, a utilization of that

«The *true function* of religion is not education or social welfare but to represent God on Earth.»

(5) Analogously, there *are* uses of automobiles —e. g., in destruction derbies, or as instruments of homicide— that no one would be inclined to call their proper function.

law for some other ends is pernicious. But not begging these questions need not mean avoiding them. What is needed is a case by case inquiry to determine wheter what a given law or legal device accomplishes is worthy and just. That will tell us whether a given job done by the law is its proper work rather than dirty work.

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II

La función del Derecho y el sentido de la normatividad.

La fonction du Droit et le sens de la normativité.

The function of law and the meaning of normativity.

Die Funktion des Rechts und der Sinn der Normativität.

