

PHYLOSOPHY OF LAW AND SOCIAL PHILOSOPHY IN THE THOUGHT OF ADAM SMITH

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Adam Smith is known to the world for his great work on economics, *The Wealth of Nations*. Anyone who has read that book in entirety will know, however, that it is not confined to economics. It contains a great deal of sociology and something of political science. It also draws upon a detailed knowledge of historical, legal, and anthropological information relevant to economic and sociological themes. And while the book is certainly not a philosophical work, Smith's treatment of some of his major themes (notably freedom of trade in relation to a wider concept of liberty) shows a philosophic cast of mind.

This last feature is not surprising in an author who was a Professor of Moral Philosophy. Adam Smith wrote two books for publication in his lifetime. The first, *The Theory of Moral Sentiments*, is a straightforward contribution to moral philosophy. Although it is not a landmark in the history of that subject, as *The Wealth of Nations* is in the history of economics, nevertheless it is quite an important work with distinctive ideas from which we can still learn something today. *The Theory of Moral Sentiments* arose out of the first half of the lectures which Adam Smith used to give as Professor of Moral Philosophy at the University of Glasgow. The second half of his lectures dealt with "Jurisprudence", which in that context meant not simply the principles of law but also a systematic discussion of government. This was traditional in courses on Moral Philosophy at the Scottish Universities during the eighteenth century. At Glasgow, Adam Smith's teacher in the subject, Francis Hutcheson, had included the principles of political economy in his account of government. Adam Smith followed Hutcheson both in the general plan of his lectures and also in some of the most prominent features of his doctrines. Both in ethics and in economics Adam Smith was greatly influenced by Hutcheson, although he developed and added to Hutcheson's views

to a degree which properly entitles him to be regarded as a thinker of great originality.

Having produced a book on ethical theory from the first part of his lectures, Adam Smith hoped to produce two further books from the second part. Originally he intended to write a single book on the principles of Jurisprudence, which would include government and economics as a matter of course. As time went on, however, Smith found the economics section growing under his hand to form a much longer work than *The Theory of Moral Sentiments*, or, presumably, the parallel work which he had at first contemplated for "Jurisprudence" as a whole. The result was the separate publication of *The Wealth of Nations*.

We know how Smith's treatment of economics appeared within the context of his lectures on jurisprudence because we have two reports of those lectures as delivered towards the end of his tenure of the Professorship at Glasgow. The earlier and longer report is an almost verbatim account taken by a student in the session 1762-3. The later report is more condensed. It is dated 1766, but this date simply refers to the year in which the manuscript was copied from a version of Smith's lectures as given in session 1763-4, Smith resigned his Professorship in January 1764 and arranged for a young assistant to deliver the latter part of his course of lectures for him. I think it is quite possible, even perhaps probable, that the second, more condensed, report of his lectures on jurisprudence is a copy of the manuscript which Smith left to be read out by the young assistant. At any rate we see from these two reports how Smith's economics arises out of his treatment of the history of law and government. They explain why *The Wealth of Nations*, an elaboration of the final part of his lectures, draws upon some of the earlier material in its digressions on sociological topics and on the role of government. The report dated 1766 was edited by Edwin Cannan and published in 1896 (by the Clarendon Press, Oxford) under the title *Lectures on Justice, Police, Revenue and Arms* by Adam Smith. The more ample report of 1762-3 came to light in 1958. It has been edited, together with the report dated 1766, by R.L. Meek, D.D. Raphael, and P.G. Stein, and published in 1978 (by the Clarendon Press) under the title *Lectures on Jurisprudence* as Volume V of the Glasgow Edition of the Works and Correspondence of Adam Smith. In this volume, the report of 1762-3 is referred to as LJ(A) and the report dated 1766 is referred to as LJ(B). I shall follow this practice in the present paper.

Having separated out the economics section of his work and developed it to form *The Wealth of Nations*, Adam Smith hoped to

produce a further book from the remainder of his lectures on Jurisprudence. In a letter of 1 November 1785 to the Duc de La Rochefoucauld (Letter No. 248 in *The Correspondence of Adam Smith*, ed. E.C. Mossner and I.S. Ross, Clarendon Press, 1977), Smith describes the work as “a sort of theory and history of law and government”. It was to go along with another planned work, “a sort of philosophical history of all the different branches of literature, of philosophy, poetry and eloquence”. This, too, he probably intended to work up from a set of lectures (on “rhetoric and belles-lettres”) and from some essays he had written in earlier days on the history of science, logic, and metaphysics. Neither of these plans came to fruition. However, one can acquire from the *Lectures on Jurisprudence* a reasonably clear notion of the leading ideas which Smith would have stressed in his projected “theory and history of law and government”. In this paper I propose to pick out a few points from Adam Smith’s *Lectures on Jurisprudence* where he makes a definite contribution to the philosophy of law of social philosophy.

Apart from the intrinsic merit that his individual suggestions may have, Adam Smith’s treatment of these matters is a good illustration of the close connection between the philosophy of law and social philosophy. Smith usually began his examination of a philosophical subject with historical inquiry. His interest in general jurisprudence, the philosophical principles of justice which underlie the positive legal systems of particular nations and the rules of international law, led him to examine the history of three systems of law of which he could easily acquire knowledge, Roman law, Scots law, and English law. This enabled him to form ideas about the development of these legal systems, and from there he naturally went on to the development of the society in which each of the systems operated. Since he was examining three systems, he was able to draw some comparisons and to suggest generalizations which might apply to most societies. In other words, he used historical inquiry as a source for comparative sociology.

Adam Smith was, of course, not the first thinker to adopt the approach of comparative sociology in a study of the principles of law. He derived that idea from Montesquieu, to whom he frequently refers for facts, or alleged facts, about exotic societies. Although Smith did not have access to any systematic body of knowledge about legal systems other than the three of Rome, Scotland, and England, he realized from his reading of Montesquieu that information concerning law and society can be gleaned from casual references in the literature of a people and from the reports of travellers. Two

obvious sources of such information for a member of the intelligentsia in the eighteenth century were the literature of ancient Greece and the Bible. Smith saw that the epic poems of Homer and the Old Testament each disclosed a picture of the social structure (including the political and legal structure) of an early stage of culture. Greek writers such as Herodotus added information about other cultures, e.g. those of Egypt or Scythia. Tacitus did the same for ancient Germany. Furthermore, the pictures obtained from these literary sources of earlier times could be compared with accounts brought back by travellers from non-European societies such as the American Indians.

Smith's treatment is more systematic than Montesquieu's in having a firmly historical structure. His inquiries into the historical development of law led him to use a general theory about the history of society. According to Smith, there are four stages in the history of society, hunting, pasture, agriculture, and commerce. He argues that the first stage, the age of hunters, needs little or no government; government and law proper arise in the age of shepherds. The reason for this, according to Smith, is that the notion of property first becomes substantial when animals are not just hunted for immediate consumption but are kept for future use. Once property is introduced, some people acquire more and others less, there is a distinction between rich and poor. Property makes government "absolutely necessary". Property is "the grand fund of all dispute. . . Laws and government may be considered. . . as a combination of the rich to oppose the poor" (LJ(A) iv. 22-3). "Till there be property there can be no government, the very end of which is to secure wealth, and to defend the rich from the poor" (LJ(B) 20).

Adam Smith may or may not have been the originator of this idea of four stages of society differing in their mode of subsistence and, as a consequence of that, in their political structure. He was not the only thinker who employed the notion at that period and who preceded Marx in holding a materialist theory of the history of society. Several other members of the Scottish Enlightenment gave expression to the same sort of view, though it now seems likely that they originally obtained it from Adam Smith's lectures on jurisprudence, which he delivered to public audiences in Edinburgh a year or two before he took up his Professorship at Glasgow. A somewhat similar approach to the history of society is also found in the writings of the French Physiocrats, beginning with some of the early work of Turgot. (For all this, see Ronald L. Meek, "Smith, Turgot, and the "Four Stages" Theory; *History of Political Economy*, iii.1, 1971.) The essentials of

Adam Smith's sociological theory are repeated in *The Wealth of Nations*, and no doubt Marx was influenced both by this and by the writings of the Physiocrats when he developed his own materialist theory of the history of society. He must surely have been especially impressed by Smith's trenchant remarks about the connection between property and government. The gist of the statements which I have quoted from the *Lectures on Jurisprudence* is retained in *The Wealth of Nations* with the sentence; "Civil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all" (V.i.b.12).

Both Smith and Marx intend observations such as these to be taken as statements of fact, not as value judgements. One may suspect that in Marx there is a concealed value judgement of hostility towards an arrangement which defends the rich against the poor. In Smith this is not the case. Smith had no objection to class distinction based on wealth as much as anything else. He believed that it was inevitable and a necessary condition of economic growth. Nor did he think that it caused much resentment. Despite the implication that, in the absence of government, the poor would seize the property of the rich, Smith believed that "the rich and the great" receive admiration and deference from a sympathetic pleasure at their exalted station (LJ(B) 12-13).

Adam Smith did not accept the view of John Locke that there was a natural right to acquire property. He followed his teacher Hutcheson in holding that natural rights were confined to life and liberty, and that the right to property (or "estate") was an "adventitious" right. Locke had argued that the natural right to acquire property was an extension of the natural right to ownership of one's own body, since this includes "the labour of his body, and the work of his hands"; if a man "mixes his labour" with something outside himself he thereby makes it his property. When he gathers apples, they become his property by the work of picking them. (*Second Treatise, Of Civil Government*, SS27-8.) Smith does not state expressly that he rejects Locke's view. In fact he does not actually refer to Locke at all. But he implies disagreement when he considers a dispute between two people in gathering an apple. If one man has got the apple into his hand but lets it fall and the second man snatches it up, this (according to Smith) is not quite a breach of the right to property. But if the first man has actual possession of the apple, has it firmly in his hand, and the second man tries to snatch it away, that is a definite breach of the right to property. (LJ(A) i.41-2.) In each of these two hypothetical

situations, the first man has done the work of picking the apple, so Smith's view implies that the right to property in the apple is not conferred simply by the work of picking it but by having taken possession of it. He probably thought that there was no need to criticize Locke's theory because it had already been effectively criticized by Hume, who had pointed out that the idea of mixing or joining your labour to a product is merely a metaphor and that in any case it cannot be applied to some types of work (David Hume, *Treatise of Human Nature*, III.ii.3, second footnote).

Neither Hume nor Smith offers anything very striking as an alternative explanation to that of Locke. Hume says that we pick upon first possession because that "always engages the attention most". Smith refers back to his general theory of moral judgement in terms of an impartial spectator. Speaking of his two hypothetical situations, he says that the impartial spectator would think that snatching the apple in the first case was bad manners but not a breach of the right to property, while in the second case the spectator would agree that there was breach of a right and would approve of the use of force to recover the property. But this merely restates in other words the initial judgement of when a right exists; it does not explain why the right comes into existence with possession.

Smith is more enlightening in his philosophical remarks about the duty of allegiance, i.e. the duty to obey the laws of the state. Like Hume, he rejects the theory of social contract or consent. His arguments for rejection are: (1) The theory is peculiar to Britain. (2) Contract proper would have bound only the founders of a state and not their present-day descendants. (3) Consent is in no better case, for most members of a state are members willy-nilly. (4) Citizens who leave a country are not treated as having thereby divested themselves of the duty of citizens. (5) Immigrant aliens conform most to the conditions of the consent theory but they are treated with some suspicion rather than with greater trust. (6) If the contract theory were correct, an oath of allegiance upon accepting a public office would be superfluous. (7) Breach of allegiance is a greater crime than breach of contract and a greater duty cannot be founded on a lesser. (LJ(A) v.115-19; LJ(B) 15-18.) The first of these arguments is mistaken; although Rousseau's *Du contrat social* was published after Smith wrote the first version of his lectures on jurisprudence, Smith should have known that the social contract theory goes back as far as Plato. The remaining arguments, however, all have force. Smith derived some of them from Hume but others appear to be his own additions.

To replace the theory of social contract Smith puts forward the view that the duty of allegiance depends partly on “the principle of authority”, derived from a natural deference to those of superior status, and partly on “the principle of utility”. He believes that both principles apply in all governments, but the idea of authority is more prominent in monarchies and aristocracies and among Tories, while the idea of utility is more prominent in democracies and among Whigs. Here again Smith owes a good deal to Hume but has added something of his own.

Smith’s personal political sympathies, however, were less conservative than those of Hume. He was a Whig rather than a Tory and he made liberty his guiding light. Both thinkers, like Hutcheson before them, believed that freedom of trade was necessary for economic progress. But in the *Lectures on Jurisprudence* it is apparent that Smith saw freedom of trade as one facet of a wider concept of liberty which was characteristic of social progress as a whole. He treats the history of law and government as a fairly steady march towards the growth of liberty, and writes at times as if this were the main reason for undertaking his whole enterprise. One can almost say that for Adam Smith the history of law is the history of the development of liberty.