

Order, Justice, Law and Agreements in a Shrinking World

Alberto Ortega Venzor¹

Prepared for presentation to
Vincent Ostrom: The Quest to Understand Human Affairs
Indiana University Bloomington
May 31 – June 1, 2006

Abstract

The hermeneutical exercise to follow Vincent Ostrom's profound and pluralistic thoughts presents certain complexity.

By digging into the building of his concepts - harmonized in a cadent manner, expressed with compound sentences, and overwhelmed by reason, perhaps the foundation becomes at least partially visible. This foundation, at the same time, establishes the constitutional option built in *the art and science of citizenship*, which rests on the cornerstone of Vincent's greatest idea and *ritornello*: **“Common Knowledge, shared communities of understanding”**.

© 2006 Alberto Ortega Venzor

¹ From December 2000 until April 2006, Alberto Ortega was Head of the International Affairs and Competitiveness Unit of Mexico's Presidential Office for Public Policy, assisting the President of Mexico with the follow-up and implementation of actions and mechanisms related to international and business affairs and those on the national competitiveness agenda. On April 24 2006, President Vicente Fox appointed him Chief of Staff for Public Policy. Alberto Ortega has a Phd. in Philosophy from the University of Navarra, Spain, and graduate studies from the *Instituto Panamericano de Alta Dirección de Empresas* (IPADE).

Culture is an artifact created by the artisans that set up the rules that allow individuals to coexist. These rules are based on such virtues such as truthfulness and justice, which are means of conflict resolution and allow **agreements** to be reached. The latter is also due to a self-governing process that facilitates citizens living together. In language, this set of **laws** translates to terms that reflect an agreement that, in many instances, goes beyond the laws themselves.

It appears that the path to be followed starts from the general **order of reality**, manifested to the community as **justice and righteousness**, and the platform for particular laws. Nevertheless, these laws, in everyday life and in many instances, are replaced by agreements, which are becoming more and more important in **a world that is smaller each day**.

Where are the principles to understand, through human reason, the needed order for individuals to live together in a community? This is the question.

Introduction

It would be unfair not to recognize the impact that Vincent Ostrom has had on my professional life, especially over the past 15 years, in which I have journeyed through public service; first

as an official in the government of the State of Guanajuato and, currently, as part of the staff of the Mexican President.

Common knowledge and shared community of understanding, time after time and in the most diverse circumstances, has been and is the guideline for my proceedings. It is, enlightened thought, which summarizes in a sentence a complete guide to interact with diverse social groups, as well as to respond to different interests. Furthermore, this thought reveals principles that are present in both the individual and social nature of human beings.

In a world that is becoming smaller each day, a good exercise is to look into what seem to be the principles of natural order and its later evolution, which has been a product of human thought throughout history and, in the so-called western world, has given birth to today's institutions, which are more inclusive. The increasing economic, political and cultural interaction between societies, which is now a practice that spreads along the four cardinal points, presents important challenges for institutions.

These challenges have been particularly greater than before as the Asian countries have increased in importance, especially China and India - without reducing the weight of other players in that region.

Looking at the Middle East, and at its energy resources, which today, more than ever, are considered essential and strategic, it is clear that the relations of interdependence have become very complex. We are now facing a new complexity of global magnitude. Withstanding this reality, human nature still requires individuals to be part of social groups that respond to particular ways of thinking, feeling, and acting. For more than five millenniums, these ideas, which are still valid today, have driven thinkers to look for explanations that have followed a long process of evolution, having moments of stagnation and turmoil, as well as times of great acceptance and advancement. In my analysis, the road map is as follows: order, justice, law and agreements.

Order

In ancient times, Greeks observed with astonishment the existence of order in the *universe*, in the margins of its existence, and in the proper order of existence. Aristotle, by intuition, discovered the existence of a *micro-cosmos*, which was conceived as the bare minimum replica of the *macro-cosmos*.

Human beings and their reality are located in a *meso-cosmos*, located between the *macro-cosmos* and the *micro-cosmos*. They believed in an ordered, well-balanced, stable, and harmonic reality, which existed among the immense pluralities of objects, and although it was altered on some occasions by a particular phenomenon that caused temporary adjustment, and in time returned to the pre-established order of things.

The Greeks labeled this sense of order as *dikê*, which was also a synonym for balance, stability, harmony, and organization.

Disorder and chaos, opposed to order, generate the loss of balance, stability, and harmony, turning reality into an *aporia* that would discourage individuals in their efforts to reach their *telos* or purpose. In the context of an ordered reality, happiness would only be obtained by reaching one's end. In the material order of the *macro-cosmos*, the *meso-cosmos* and the *micro-cosmos*, the dynamics of reality respond to a network of processes and events which are linked by causes and effects.

Justice

How order in the universe is displayed in the frame of the relationships of individuals in the *meso-cosmos* whose rationality is different from that of the rest of the existing beings?

Freedom is the capacity to choose between different options and alternatives. Does this capacity necessarily lead individuals toward chaos among the members of the group in which their existence takes place, since, unlike objects, individuals are relative owners of themselves?

Greeks answered this query by stating that individuals, who by nature live in groups (society or community), replicate *dikê*, the order of the universe, which was known as *dikainos*, which means acting with order, or *dikaiosune*, which is the first notion of justice. With the order, balance, stability, and harmony that justice adds to the relationships and interactions of individuals in society, they can reach their goals as individuals and as part of a community.

As expressed by Vincent Ostrom, this group of rational beings, who are free, can attain better development when the habit of *common knowledge and share understanding by the community* is acquired.

There is a certain contradiction in terms when *theory of justice* is addressed, since justice as such, only exists when it is practiced, when it is applied, and when it is experienced under a fair *order*.

In the light of the above, justice is a habit of practical reason and not of speculation. Justice as theoretical reason is only an

ideology and not a habit that orders the relationships and interactions between individuals. This seems to be suitable, but we have to go one step further.

Law

For Greeks, law is *nomos* (*νομος*), which means the wall that marks the limits of individual right and the place where the rights of others begin. It has a topological meaning: what is inside are one's rights and what is outside those rights are the rights of others; inside is the place where one's rights are exercised and not the rights of others. Law determines one's space and the space of others who do not have one's rights. An individual, in turn, does not have the rights that belong to others in their own space and in their own rights. Maintaining this "rule of law" ensures order in the spaces belonging to each individual. Giving and recognizing the space that belongs to each individual is justice itself and the principle of order in the relationships of humans who live in an orderly community. It is a social cosmos vis-à-vis its opposite, which is social chaos.

The social cosmos represents harmony, while social chaos is the anarchy in which nothing can be constructed or processed and, even less, developed or fulfilled to achieve goals and happiness, which, for humans, entail the double dimension of being individual and social at the same time.

In this regard, the law is something that lies in the sphere of practical reason, which determines that its goal is to achieve happiness and that it is the yardstick for human activities that give order to action, since fair and legal things build and maintain the happiness of individuals in the political community.

In fact, the cause of the law is not any person, but the political community: those who live in the *polis*, the city.

But for the law to be applied, and workable, it should be well-known, be sufficiently enacted, be a certain regulation of reason for the common good, and be promulgated by those who care for the community as a decision of practical reason, which is true when it complies with honest consideration of what is workable

in the community and in harmony with the individuals. That is why Saint Augustine pointed out that what the law has of justice it has of law; and that the law is fair to the extent that the rule of reason is applied. The legal system (*ius–iustitia*), which is embodied in specific laws is not something abstract or ideological, but rather a real relationship in the community and among persons. It is a human relationship, based on human rights. It gives priority to real humans over the rationalism of the norm, and is a system in which the law is not an end in itself, but rather aimed at attaining order in the inter-human relations of which the legal system consists.

The term justice can be applied to the legal system when the law explains and applies it and the judge exercises it by issuing a judgment based on prudence (*jurisprudence*) and consultations (*jurisconsulto*) and hands down a sentence, which is like a conclusion.

When we refer to justice and prudence, we are talking about ethics and its *bearing* which are values that must be taught in the educational process. We are full of laws and violations of the

law. What is needed is the good faith resulting from education in ethics.

Here, there is a clear reference to the thought of Vincent Ostrom. *Common knowledge and shared understanding by the community* is needed.

As Arthur Hoque says:

True law is right reason, consonant with nature, diffused among all men, constant, eternal... It needs no interpreter or expounder but itself, nor will there be one law in Rome and another in Athens, one in the present and another in time to come but one law and that eternal and immutable shall embrace all peoples and for all time and there shall be as it were one common master and ruler, the god of all, the author and judge and proposer of this law.ⁱ

Agreements

In a world that is becoming smaller and smaller each day, we feel an enormous need for order, justice and common laws to reduce the vast differences between regions and nations. These

disparities puzzle our conscience and summon us because they involve real human beings as individuals and members of a community who are unable to develop their potential and be happy, which, as in the case of all humans, is the goal of their nature.

Laws may be better or worse in each nation, but the *dikê* or justice, which is the way in which the order of the universe manifests itself in the community, has a common denominator that the Romans called common law. Rafael Domingo, in reference to the *Fourth Commentary of Institutions* by Gaius, says:

*All people ruled by law and customs use, in part, their own law and, in part, the common law of all men, since the law that every people establishes for itself is its own, and is called civil law, which is to say the city's own law. In contrast, the law that natural reason establishes among all men is observed uniformly among all peoples and is called the law of peoples, which is to say the law that all nations use.*ⁱⁱ

Viewing the reality of the universe and of the molecular world, we see that they respond to common principles and forces that govern their behavior. Human beings, for their part, are no exception to what is real and consequently share common principles and processes that guide their behavior. These common principles are embedded in their nature and respond to a particular complexity that results from rationality by which individuals choose among different options. This is what we call freedom, but this freedom has limits for its ordering and just exercise in the journey through our existence together with other human beings. When we are free and thus able to choose what is good for us although it may be bad for other members of the community, it is essential to build agreements and enter into covenants as a constitutional option of common law. But the first condition of pacts is that they be fully observed as a result... *of the true and free desire of the parties...* dictated by natural reason: *pacta servanda dictat ratio naturalis*ⁱⁱⁱ.

Ulpiano (D.2.14.7.7), in fact, says that pacts should be fulfilled *pacta sunt servanda* and that their fulfillment is a condition for conserving peace *Pax servetur, Pacta custodiatur*.^{iv}

Rafael Domingo himself says in his cited work, *Principios de Derecho Global*, that the *pacta sunt servanda* principle is the true cornerstone of the international law embodied in Article 26 of the 1969 Vienna Convention on the Law of Treaties. This article states that every treaty in force is binding upon the parties to it and must be performed by them in good faith.^v According to this rationale, it seems that good faith is an essential factor.

Vincent Ostrom responds to the latter by stating that *the need for legal systems was not merely a practical political one. It was also a moral and intellectual one. Law came to be seen as the very essence of faith* (1983, 521). *These are the grounds for the common knowledge and shared community of understanding among the peoples constituting democratic societies.*^{vi}

But for good faith and faith to be operational in a global community of a covenantal nature, it seems necessary to recognize that there are common principles sown in human beings to which Vincent Ostrom refers when he says:

People in a democratic society depend on a Transcendent Order, whether called God or the Way of Heaven, to recognize the place of human nature and nature as being grounded in a common Source of Creation.^{vii}

In this world that is becoming increasingly smaller, the twilight of this new stage in the history of humankind allows us to see that something like the science and art of being citizens of the world must be constructed, because it will not just happen.

The future place of democracies in human civilization will not just happen; it will be constructed and will require attentive care. Those concerned with the future of democratic societies are required to give critical attention to the development of a science of citizenship and civic enlightenment.^{viii}

The construction of an art and science of being a citizen in a small world like ours is based on the capacity of association, agreements and pacts, says Vincent Ostrom following Tocqueville:

I conclude then that Tocqueville new science of politics needed for a new world is a science of association that is appropriate to an art of

association to be exercised by citizens in self-governing societies. Such a science and art of association would be compatible with the exercise of authority relationships in a system of governance marked by Lasswell's attributes of self-responsibility, impartiality, dispersal of authority, challenge ability, voluntarization of relationships, and balance. I also presume that such a science of association is consistent with Dewey's concern for the creation of coherent communities of relationships among inchoate publics in their search for becoming self-conscious, articulate identities.^{ix}

This enlightening program to construct communities based on the principle of *common knowledge and shared understanding* cannot leave out the responsibility of each individual. As Vincent Ostrom said, *the first step on the way to becoming self-governing is to presume that each individual is first one's own governor rather than one gives up one's right to govern oneself to some sovereign representative as Supreme Authority.*^x

Nonetheless, we cannot make a colossal leap from the individual to the global community. The expanding wave begins with the individual, but it must go through a series of waves that originate in this epicenter and must have the guiding line offered

by the principles of order, justice, law, agreements and the indispensable moral principles that respond to the golden rule that says: *Do unto others as you would have them do unto you.*

In the final analysis, we are talking about building a culture, understood as a way to understand the world and journey through our existence.

Culture refers broadly to activities in human associations. Politics from this perspective, then, would be concerned with using ideas to pool, rearrange and compromise existing interests while creating and maintaining the working arrangements administration, management of households, settlements, communities, cities, and presumably the larger domains of authority relationship through the matrices of languages in accordance with moral principles.^{xi}

Vincent, I thank you for your enlightening thought, your untiring work and your teaching. Thank you for your friendship and thanks to Elinor for giving you her support. Thank you.

References:

- ⁱ **Arthur R. Hoque**, *Origins of the Common Law*, p. 9, Liberty Fund, Indiana University, 1966.
- ⁱⁱ **Rafael Domingo**, *Textos de Derecho Romano*, p. 39, Editorial Aranzandi, Navarra, 2002.
- ⁱⁱⁱ *Ibid.*, **Rafael Domingo**, p. 183
- ^{iv} *Ibid.*, **Rafael Domingo**, p. 183
- ^v *Ibid.*, **Rafael Domingo**, p. 183
- ^{vi} **Vincent Ostrom**, *The Meaning of Democracy and the Vulnerability of Democracies*, The University of Michigan Press, 1997, p. 188
- ^{vii} *Ibid.*, **Vincent Ostrom**, p. 193
- ^{viii} *Ibid.*, **Vincent Ostrom**, p. 271
- ^{ix} *Ibid.*, **Vincent Ostrom**, p. 294
- ^x *Ibid.*, **Vincent Ostrom**, p. 296
- ^{xi} *Ibid.*, **Vincent Ostrom**, p. 296