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DOI: https://doi.org/10.24921/2018.94115924

Originally published at:
Mahlmann, Matthias (2018). Legal philosophy and legal theory. In: Thommen, Marc. Introduction to Swiss Law. Berlin: Carl Grossmann Verlag, 81-107.
DOI: https://doi.org/10.24921/2018.94115924

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I. The Problems of the Philosophy of Law and Legal Theory

A good starting point for reflecting on legal philosophy and legal theory and its purpose, content, and profound significance in any given legal culture is the following observation: law is a mandatory normative order. It is enforced, ultimately, by the threat and application of physical force. Coercive force may be executed by public authorities in a variety of ways – for example by police agents or, in extreme cases, even military operations to defend certain principles of international law. This characteristic of the law raises a crucial issue: how do we know that the law being enforced is, in fact, legitimate? What are the criteria for well-justified law?

These are vitally important questions because the mandatory character of law seems to necessarily imply that the law enforced has a real claim to legitimacy. To enforce and maintain a normative order with physical force without such a claim is an indefensible enterprise.

Thus, it is important that we endeavour to find answers to questions of legitimacy, although this is certainly no easy task. Examples of such questions can be found in various areas of the law. For instance, constitutional states based on fundamental rights are facing new threats posed by international terrorism. Is it legitimate to increasingly curtail fundamental rights because of security concerns? If so – what is the line that should not be crossed? Is there such a line at all?

It has recently been proposed that the international order should be based on the narrow self-interest of nations, pursued with their respective power.[1] Is that the proper guiding principle for the international community or, on the contrary, will this be the highroad to its destruction?

What about the refugee crisis? Are states' national laws well-justified in this area? Does this body of law properly reflect the moral obligations affluent

1 Donald Trump, Remarks to the 72nd Session of the United Nations General Assembly, 19 September 2017.

states and citizens of the Global North have towards the people seeking shelter and a better life? Or are these laws too generous? What about international refugee law: do its principles rest on solid grounds? An example to consider is the principle of non-refoulement, a ius cogens norm that prevents a country from returning asylum seekers to a country in which they would face the likely danger of persecution based on race, religion, nationality, membership of a particular social group or political opinion.[2] Is it justified?

Such questions can be supplemented by traditional problems of legal reflection like: what are the foundations of public authority, of states in particular? How do we sketch the contours of a justified order of relations between private parties? What are the bases of guilt, responsibility, and punishment? Are human rights universally justified?

These kinds of questions lead to important problems of justice, freedom, dignity and solidarity and, importantly, such concepts' often contentious concrete meaning. To attempt to answer such questions consistently and coherently with reasons understandable to all is the core task of legal theory and legal philosophy.

The following remarks will outline, first, some central topics of legal theory and legal philosophy to roughly map the contours of the field (II.). They will then explain why spending some time with the questions of legal theory and legal philosophy is not an exotic occupation. On the contrary, serious, committed work with the law is hard to imagine without a substantial reflection about its nature, structure and legitimate content (III.). The attention will turn then to two paradigmatic questions in more detail to illustrate the discourse and some findings of current reflections about justice (IV. and V.) and human rights (VI. and VII.).

A note on terminology: Sometimes legal theory is understood as a predominantly analytic enterprise whereas legal philosophy deals with normative questions. The international discourse on these topics, however, mostly uses these terms interchangeably. These remarks will follow this latter example.

2 See Article 33 of the Convention and Protocol relating to the Status of Refugees, 1951 (Geneva Convention).

II. A Map of Philosophy of Law and Legal Theory

The questions of legitimacy which legal philosophy and legal theory consider are part of, and are embedded in, a wider theoretical enterprise which contains at minimum the following elements:

1. Descriptive and Analytical Theory

Legal philosophy provides a descriptive and analytical theory of concepts and phenomena of the law. It asks questions like what is a norm? What is the difference between a norm and, say, a habitual pattern of behaviour or the expectation that a certain course of events is going to take place? What is the formal structure of a fundamental right? What is the difference between such a right and an agent's wish or interest, for example? The nature of an obligation – a concept that "*haunts much legal thought*"[3] – is another question that legal philosophy has examined in great detail. This issue is vital because obligations are a core element of any legal system. Another pertinent issue is the meaning of the validity of a norm. What does it mean to assert that a norm is valid? Is it a matter of efficiency, of the (unbound) will of an authority, of the consent of the addressees of norms, or perhaps of some material standards of justice or other ethical principles? Validity is sometimes equated with the existence of a law. Validity is an existence condition of norms. What does this mean? In what sense does a norm exist when it is valid?

These questions are of great importance because they outline the basic architecture of normative systems, including legal systems. We can have no real understanding of legal systems without a clear sense of what concepts such as norm, fundamental rights, obligations, or validity mean.[4]

3 H.L.A. Hart, The Concept of Law, Oxford 1961, p. 85.

4 See Matthias Mahlmann, Rechtsphilosophie und Rechtstheorie, 5th edition, Baden-Baden 2019, paragraph 26.

These concepts are also important in another respect. Today, one major political challenge is to develop a cross-cultural, perhaps even transcultural concept of normativity and the law. The world has become highly interdependent and, in various ways, its legal orders attempt to respond by establishing a legal framework that accommodates this need for international legal coordination. A very basic framework of this type is created through the Universal Declaration of Human Rights[5] and other human rights documents that define the minimal mandatory standards for the treatment of human beings by public authorities and by other agents (individuals and other legal subjects like companies). It should be noted, however, that whether it is possible to make a human rights claim against companies is particularly contentious in its detail. This system of human rights has gained a very differentiated reality through public international law and regional organisations including the Council of Europe, the European Union, the Organisation of American States, or the African Union and their respective human rights law, all of which more or less satisfactorily complement the constitutional protection of basic rights.

But is this a feasible enterprise? One sometimes encounters the claim that cultures are so different that reaching any form of cross-cultural consensus about particular norms is unimaginable. After all, is it not true that globally, people are deeply divided over questions like the rights of women, the scope of religious freedom or the legitimate claims of people with different sexual orientations? Some even claim that certain cultures do not have certain concepts which are key elements of what is sometimes considered a "Western" conception of the law, e.g. the concept of fundamental rights. These claims are frequently spurious and based on a selective reconstruction of the fundamental features of the legal system under consideration. Nonetheless, if attempting to assess the merits of such claims, it is vital to have a clear sense of what one is talking about when one is referring to a concept like "fundamental rights". Thus, conceptual clarity – descriptive and analytical precision – is a precondition for successfully meeting the many challenges that the divided modern world poses for ethics and law.

5 UN General Assembly, Universal Declaration of Human Rights of 10 December 1948, 217 A (III).

2. Explanatory Theories

Another subject matter of the philosophy of law is that of explanatory theories. Explanatory theories formulate a hypothesis about the causal connection between something requiring explanation and a factor that serves as the explanation for the phenomenon under scrutiny. For example, explanatory theories of law maintain that law in its concrete form is an expression of the economic structure of society, of culture, of the functional necessities of legal social systems or even of the climate. These theories have sometimes become forces of world history: for example, the aforementioned theory developed by Marx connecting law and economics. This theory was an important element of the motivation and content of social revolutions, like the Russian Revolution which transformed important parts of the world last century. The particular stance of pre-Stalinist Marxism with its critique of law, state, and human rights cannot be understood without reference to this highly influential background theory.[6] After all, the critique of the concepts like human or fundamental rights played a key role in the establishment of dictatorships that – a tragic irony – counted among their victims some prominent Marxist theoreticians of law,[7] and led some important Marxist authors to embrace the idea of human rights.[8]

Such theories need to be scrutinised for scientific reasons and because of such sometimes far-reaching practical consequences. There must be scrutiny of whether they are actually defensible and their claims must be backed by evidence. Further, it must be considered whether there are preferable alternatives: for example, with regard to Marxism, perhaps a more differentiated theory of the relationship between the law and the economy, as proposed by

6 See e.g. Karl Marx/Friedrich Engels, The German Ideology, in Marx/Engels Collected Works, Vol. V, New York 1976, pp. 46, 315 (German source: Karl Marx, Die deutsche Ideologie, Marx-Engels-Werke, Band 3, Berlin 1969, S. 63, 311); Karl Marx/Friedrich Engels, The Manifesto of the Communist Party, in Marx/Engels Collected Works, Vol. VI, New York 1976, pp. 477 (German source: Karl Marx/Friedrich Engels, Manifest der Kommunistischen Partei, Marx-Engels-Werke, Band 4, Berlin 1959, S. 464).

7 E.g. Evgeny Pashukanis, author of a classical treatise of Marxism and the law, General Theory of Law and Marxism, 1924, in Selected Writings on Marxism and Law, Piers Beirne/Robert Sharlet (eds.), translated by Peter B. Maggs, London/New York 1980.

8 The most interesting is Ernst Bloch, Natural Law and Human dignity, translated by Dennis J. Schmidt, Cambridge 1986 (German source: Ernst Bloch, Naturrecht und menschliche Würde, Berlin 1985).

Max Weber, including a variety of factors, not just the economy to explain the nature and development of the law.[9]

3. Normative Theory

A third element of legal philosophy is *normative* theories. Kant famously formulated three questions that philosophy essentially aims to answer in his work the "Critique of Pure Reason". These questions are: 1. what can we know? 2. what should we do? and 3. what can we hope for?[10] Normative theory answers the second question: what are we supposed to do? This is a very important consideration because itis not only relevant for the agent herself but for others as well. What we decide to do affects others in direct or indirect ways. For example, when we decide that we have reached the limits of solidarity in the framework of the refugee crisis, this is not only a decision about our own life but about the lives of those arriving on Italian shores, boarding a rubber boat in Libya or stranded in a Pacific camp on the way to Australia. Therefore, the kind of answer we formulate to this question is a matter of real consequence.

In order for normative theory to proceed on this course, it must address matters of principle: it considers, for instance, what the content of justice is. Is it related to equality as major authors of the theory of justice, from Aristotle to Rawls, have argued? If so, in which sense? What does equality actually mean? Who or what is equal and in which respect? What behaviour does the idea of equality mandate?

Normative theory also enquires also into what we owe to each one another. Are there such duties of solidarity? If so, towards whom; to personal relations, to the members of a group one belongs to or to the group itself, to people whom we have formal legal ties with like shared citizenship, or to any human being? What is the content of such duties? Are they differentiated depending on the level of proximity of the agent towards the addressee? What are their limits, what is their minimal content? How are they embodied in the law?

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9 Max Weber, Economy and Society, edited by Guenther Roth/Claus Wittich, Berkeley/Los Angeles/London 2013 (1972), pp. 311 (German Source: Max Weber, Wirtschaft und Gesellschaft, 5. Auflage, Tübingen 1972, S. 181 ff.).

10 Immanuel Kant, Critique of Pure Reason, in Immanuel Kant, Practical Philosophy, The Cambridge Edition of the Works of Immanuel Kant, translated and edited by Paul Guyer/Allen W. Wood, Cambridge 1999, pp. 677 (German source: Immanuel Kant, Kritik der reinen Vernunft, Akademie Ausgabe, Band III, 2. Auflage 1787, Berlin 1911, S. 833).

Legal Philosophy asks questions about concrete institutions of the law. Some questions have already been mentioned above: it enquires into the nature, content, and justification of human rights. What are these rights? In what form do they exist? What are their foundations? Are they relative to different cultures or religions or are they of universal validity? What is the content of true human rights? Are current conceptions of human rights too expansive or too limited; if either, in which area?

The legitimacy of public authority – national, super-national, and international – is another pertinent topic of research by legal philosophers. The normative structure of the international order is of great importance. Are there reasons for robust national egoism or is it preferable to pursue a cooperative approach to international relations based on some kind of notion of international solidarity, mutual help, and respect? If the latter, then what are the proper institutions to pursue such aims? A World-State? A federation of nations? Networks operating beyond the state? What are the prospects of such enterprises? Is the hope of "*perpetual peace*"[11] still alive or just the embarrassing dream of a bygone epoch?

An important part of the law is its regulation of relations between private parties. The theory of private law is consequently another leading topic of legal philosophy and legal theory. For example, one can ask questions about the foundations of the law of contract or tort in a legal system or about the content and limits of private autonomy as a guiding principle of liberal private law systems.

A theory of criminal law raises equally significant questions. Are there principled reasons behind the idea that sanctions should be based on concepts of guilt and responsibility? What purposes can criminal sanctions justifiably pursue: dissuading the criminal from reoffending, re-integration, retribution, general prevention or perhaps something else entirely? One may add additional concrete questions like whether the criminal law can justifiably aim for sanctions to have general preventive effects. Further, what are the limits of such sanctions: for example, does the concept of human dignity set any?

Normative theory can also address more concrete questions: e.g. is the ban of burqas in Europe legitimate, or is it a violation of the basic principles of a liberal order? What privacy rights are justified? Is it true that the modern

11 Immanuel Kant, Toward Perpetual Peace, in Immanuel Kant, Practical Philosophy, The Cambridge Edition of the Works of Immanuel Kant, translated and edited by Mary J. Gregor, Cambridge 2008, pp. 311 (German source: Immanuel Kant, Zum Ewigen Frieden, 1795, Akademie Ausgabe, Band VIII, Berlin 1923, S. 341 ff.).

digital society has fundamentally reshaped the concept of privacy or, to the contrary, should notions of human autonomy guide our approach to these far-reaching challenges created by digital technologies and their use that have been and still are constitutive of constitutional state?

4. The Relationship of Law and Morality

Another classical problem of philosophical reflections about the law concerns the relationship between law and morality. The question is whether there is a necessary connection between the law and morality, as many theorists of law have claimed, even arguing that ultimately the law is a part of political morality: "*lawyers and judges are working political philosophers of a democratic state*".[12] Or are positivists correct in their persistent claim that the two realms are entirely separate?[13]

As a starting point, one should remember that the separation of law and morality is a basic element of modern law. Law regulates external behaviour and is enforced by sanctions; morality is a normative order that is subjectively experienced as mandatory by individuals themselves, and is effective only because of the power and influence moral obligations have on agents' motivation.[14] There is no good reason to abandon this basic distinction in current reflection.[15]

However, to underline the distinction between law and morality in this sense does not answer the question of whether material ethical principles are

12 For a recent example see Ronald Dworkin, Justice for Hedgehogs, Cambridge/London 2011, p. 414.

13 See e.g. Hans Kelsen, Pure Theory of Law, translated by Max Knight, Berkeley/Los Angeles 1967 (German Source: Hans Kelsen, Reine Rechtslehre, 2. Auflage, Wien 1960); Hart; Joseph Raz, The Authority of Law, 2nd edition, Oxford 2009.

14 The most influential statement of the relation stems from Immanuel Kant, The Metaphysics of Morals, in in Immanuel Kant, Practical Philosophy, The Cambridge Edition of the Works of Immanuel Kant, translated and edited by Mary J. Gregor, Cambridge 2008 (cit. Kant, Metaphysics of Morals), pp. 353 (German source: Immanuel Kant, Die Metaphysik der Sitten, 1797, Akademie Ausgabe, Band VI, Berlin 1914, S. 230 ff.). For a recent restatement of these thoughts see Jürgen Habermas, Between Facts and Norms, translated by William Rehg, Cambridge 1996 (German source: Jürgen Habermas, Faktizität und Geltung, Berlin 1992, S. 143 ff.).

15 See Matthias Mahlmann, Elemente einer ethischen Grundrechtstheorie, Baden-Baden 2008, pp. 27.

somehow relevant in determining the conditions of validity of law and the concrete content of legal norms, in circumstances where the opacity of legal texts necessitates interpretative choices. Even if such principles are relevant in this regard, this does not change the fact that the law thus identified and interpreted regulates external behaviour and does not necessarily demand to make a determination of an individual's conscience. Further, it does not affect the fact that law is backed by external sanctions rather than by the subjective experience of the mandatory character of norms.

There is a very rich discussion about this matter: starting in antiquity, pursued in the natural law tradition and continued today. At least the two major areas just mentioned demand further reflection: the conditions of the validity of norms and the hermeneutics of law.

The problem of defining the conditions for the legitimacy of law raises the following question: is it possible to dissociate legal systems from extra-legal grounds of legitimacy? Can one make an argument for democracy, constitutionalism or human rights without referencing principles of justice or human respect? If this seems difficult to imagine, a first connection between law and morality is established.

Another area where questions about the connection between law and morality become pertinent is in the application of the law. Is it possible to apply the law without the influence of certain background theories, including ethical principles that guide the interpretation of law in concrete cases which require the making of interpretative choices? Can one concretise an abstract fundamental right, for instance freedom of religion in the case of the prohibition of burqas, without the influence of a background theory about the meaning of freedom, the kind of restrictions we can impose on others engaged in prima facie not harmful behaviour and the conditions under which this may be allowed? Such background theories cannot be fully determined by the text of the concrete norm to be interpreted, because these theories are the instrument used to concretise the open-textured wording of the norms; the wording that made it necessary to take recourse to them in the first place.

The identification of norms as valid law is another, related issue. Positivists maintain that law can be identified simply by reference to a certain social fact, some kind of rule of recognition, in a famous formulation;[16] but is this really the case? Is it not true that for positivists the identification of positive law also depends on some kind of extra-legal background assumption; namely

16 Hart, pp. 97.

that those norms that have been enacted following a certain procedure for example acts of parliament (according to the rule of recognition) *ought* to be regarded as law? The alternative is to deprive any rule of recognition of its normative dimension and make it simply a description of the practice of judges, officials etc. that changes "*as we go along*", in Wittgenstein's words.[17]

However, such an understanding clearly fails to capture the actual practice of law: judges in a democracy, for instance, regard it as a normative rule that one ought to take as law that which has been enacted in the proper way according to prescribed procedures and that which does not violate certain material standards like fundamental rights. The same is true for the constitution of a legal order itself: respecting the constitution is a mandatory rule, not a mere habitual disposition of judges and other officials. These are not banal findings; on the contrary, they are substantial assumptions about the reasons for regarding a norm as valid law. In the case of the constitution, it is clear that the obligation to treat it as law cannot be derived from the constitution itself; it must stem from other sources. In democratic states it is the idea of popular sovereignty that is the ultimate source of legitimacy and thus also of the obligation of judges and officials to treat the constitution as the highest law of the land. The question of the authority of the ultimate law giver is therefore the precise point where any merely positivist reconstruction of the identification of norms as valid law ceases to convince.[18]

Thus, there are very good reasons to think that the realms of law and morality are not entirely separate but instead interwoven in intricate ways. Such a finding does not mean that law is moralised in any objectionable way. The starting point for any interpretation is the positive law: this guides the legal understanding in the first place. Respecting positive law means respecting democracy, where the positive law is the outcome of democratic processes.

As indicated above, making the relationship between law and morality explicit does not turn law into morality, because the social institution of law is not transformed into individuals' rules of conscience. The problem is rather how we are to determine why the positive law is valid, what the positive law actually says, and how we can decide what it means in difficult (or even sometimes in easy) cases without reference to such background assumptions

17 Ludwig Wittgenstein, Philosophische Untersuchungen, n. 83, in Ludwig Wittgenstein, Tractatus logico-philosophicus, 1984, translation Wittgenstein, Philosophical Investigations, 4th edition, P. M. S. Hacker/Joachim Schulte (eds.), Oxford 2009, n. 83.

18 This is not a new observation, see e.g. Kant, Metaphysics of Morals, pp. 353.

regarding morality, for example in the case of current conundrums of religious freedom. To insist on the connection between law and morality thus does not lead to a suspect moralisation of law but to an area of crucial, critical transparency where influence that normative theory has on the law and its practice is not hidden but rather exposed.

5. Epistemology

A further important area of legal philosophy concerns the limits of legal insight and knowledge. The questions to be answered in this area are questions about the epistemology of ethics and law. Are we simply exchanging opinions when we argue about matters of justice? Is such argument just mutually shared information about preferences we are entertaining? What is the epistemic status of those propositions we make? Are they in one way or another comparable to insights in other domains of knowledge, for example, the natural sciences or logic? Or are they entirely different, perhaps due to their relativity to the tastes of a particular individual?

These questions are as difficult as they are important because, as indicated above, the law has far-reaching consequences for agents and other human beings who are affected by their actions. Therefore, the degree of certainty we can gain in this area of human thought is of great significance. We sometimes inflict great harm on individuals in the name of normative principles and the law, e.g. when we impose sanctions or, even more dramatically, when we engage in war. Surely such action can only be legitimate if we have firm epistemological reasons to assume that our judgment is not leading us entirely astray.

Whether there are reasons to have some kind of epistemological self-assurance must be examined in the context of some more concrete reflections below.

6. Ontology

Another important question of legal philosophy is that of what exactly normative propositions refer to. Specifically, are normative propositions, e.g. those of the law, comparable to propositions like "in front of my window stands a tree"? Are normative propositions referring to entities that exist in the world

in the same way that a tree does, or to something else entirely? Are they perhaps referring to nothing at all, instead simply being chimerical empty concepts without any real meaning, as important voices in the history of ideas have argued?[19]

These are very contentious questions concerning the stuff the world is made of. It is far from clear whether normative entities belong to the fabric of the world as many, since Plato, have argued. The question remains unsettled today due to the arguments of a forceful stream of so-called moral realists who think that, in fact, moral entities are as real as any other entity of human experience.[20] Others, in contrast, object to this kind of theory without necessarily denying the rationality of moral and other forms of normative argument.[21]

7. Grotius and Methodological Secularism

Hugo Grotius, elaborating on a thought formulated in medieval philosophy before his time, famously argued that it is a useful exercise to think about the foundations of law as if God did not exist.[22] This did not imply that Grotius did not believe in God. On the contrary, it simply meant that he wanted to explore whether religious premises are necessary in order to establish a convincing system of law. He came to the conclusion that this was not the case. In his opinion, a natural law theory could be developed on the basis of rational insight gained by the exercise of reason that would necessarily lead human beings to certain conclusions about the law. He tried to spell out in some detail what this could mean concretely in his account of the content of natural law, the same account that became a mile stone not only for public international

19 See e.g. Rudolf Carnap, The Elimination of Metaphysics through the Logical Analysis of Language, translated by Arthur Pap, in Alfred Jules Ayer (ed.), Logical Positivism, Glencoe 1959, pp. 60 (German Source: Rudolf Carnap, Die Überwindung der Metaphysik durch logische Analyse der Sprache, 1932, S. 219 ff.).

20 See e.g. David Enoch, Taking Morality Seriously, A Defense of Robust Realism, Oxford 2011.

21 See e.g. Thomas Scanlon, Being realistic about reasons, Oxford 2014. On this matter, Matthias Mahlmann, Mind and Rights, in Mortimer Sellers (ed.), Law, Reason, and Emotion, Cambridge 2017 (cit. Mahlmann, Mind and Rights), pp. 80, available at www.ssrn.com (https://perma.cc/ZZD3-FKYT).

22 Hugo Grotius, De Iure Belli ac Pacis Libri Tres, Vol. I, reproduction of the edition of 1646 by James Brown Scott, Washington 1913, paragraph 11.

law of the modern age but for other areas of the law as well – from the concept of rights to criminal law.

The project of an inner-worldly ethics and law as a hallmark of Enlightenment has been famously summarised by Immanuel Kant in the course of his philosophy of ethics and law: he stated that human reason needs no higher authority above it to determine the content of justified norms, and no other motivation than that derived from the command of ethical principles.[23] This methodological secularism is very important for two reasons. The first reason is a pragmatic one: the methodological secularism perspective builds bridges across religious and other ideological divides. If it is possible to argue for certain normative principles without taking recourse to such contentious background theories, the prospects of reaching consensus across such divides are better. The second reason is a matter of theory. There are simply very good reasons to believe that in fact a justificatory theory of ethics and law can be outlined satisfactorily without recourse to religious foundations. The examples below will give some indications of how this aim may be reached.

8. The Question of Universalism

One important question is whether some normative propositions are universal.[24] This is not to be misunderstood as a denial of the factual variety of ethical and legal principles. There is no question about it; ethical and legal systems vary in many respects. Rather, the question is whether there are reasons to believe that there are reflective principles that could command universal assent and that are in that sense universally valid, even though they may not be fully accepted everywhere today. Universalism should not be mistaken for the idea of normative convictions being factually uniform.

That there are no such universally justified normative propositions is, however, far from clear. A bedrock principle of modern legal orders is the equal worth of human beings. Certainly, there have been many systems of

23 Immanuel Kant, Religion within the Bounds of Bare Reason, in: Religion and Rational Theolorgy, edited by Allen Wood/George di Giovanni, Cambridge 1998, p. 57 (German source: Immanuel Kant, Die Religion innerhalb der Grenzen der blossen Vernunft, 1793, Akademie Ausgabe, Band VI, Berlin 1914, S. 3).

24 On this matter see Matthias Mahlmann, Universalism, in Max Planck Encyclopaedia of Comparative Constitutional Law, Oxford 2017, available at www.oxcon.ouplaw.com (https://perma.cc/8VT3–8V86).

law – past and present – that have violated this principle. But are there any good reasons to justify such violations? Is there really an argument for the idea that humans in Cape Town are worth less than in Zurich? Is there an argument that the worth of women is justifiably less in Islamabad than in Paris? What reasons could justify the idea that skin colour is a relevant factor for the enjoyment of rights? It seems pretty difficult to formulate any kind of argument for such views denying human equality (widespread as they may be) that would stand even minimal scrutiny. The same holds true for many other such foundational normative principles - a state of affairs which widely opens the door for the idea of normative universalism.

Normative universalism is an epistemological point of view, not a political doctrine. It defends epistemic egalitarianism by underlining the fact that everyone has the potential for insight, whether this person is graduate of the University of Zurich or struggling to survive in a slum in Mumbai; of whatever skin colour, religious creed or gender. It takes a stance on the justification of basic normative principles and rights, not on the political means for developing a social order where such principles count. There is no individual or group that enjoys any prerogative in determining the content of universally justified norms. On the contrary, the elaboration of a universally justified set of norms is an open-ended process of committed critical thought in which nothing but arguments count, as is the case in any other serious intellectual enterprise of humanity. Consequently, to associate universalism with euro- or ethnocentrism or even cultural imperialism is way off the mark. To defend universalism is not to attempt to impose parochial norms on others: it is to defend the possibility of there being an understanding of basic norms of human civilisation open to all.

III. The Point of Philosophy of Law and Legal Theory

Legal theory and legal philosophy are important in any given legal culture. Theoretical insight is important in two key regards. Firstly, it is important for successful legal practice. It is impossible to solve difficult (or even simple) problems of law without a deeper understanding of what the particular issue is about. A short look at the challenges formulated above (see I.) – from answers to the problem of international terrorism to the structure of the international legal order – illustrates that.

This is not least the case given the internationalisation of law. An understanding of the general structure of laws is essential in enabling us to rise to the challenges of this new embeddedness of norms in international legal contexts. The discussions about hierarchies of law – municipal, supranational or international – illustrates this very clearly

Secondly, theoretical insight is of intrinsic value. Many people in the legal profession spend their whole life working with the law, and it seems hard to imagine that one devotes one's life to this particular activity without asking some, even passionate, questions about the nature and sense of this kind of occupation. Furthermore, the law is a central and constitutive characteristic of human culture. There can be no understanding of the human condition without sufficiently deep reflection about the law.

Legal philosophy and legal theory provide critical normative yardsticks for the many existential questions we face today. Without such standards, people lack reasons to change, and just as importantly, to support and defend significant, valuable aspects of a given legal order. Consciousness of the sense and meaning of a legal system is a precondition for the survival of some kind of decent civilisation of law.

IV. Theory of Justice

The theory of justice is one of the core elements of the theory and philosophy of law. The foundations of this theory can be found in the thought of antiquity in the work of authors like Socrates, Aristotle, and Plato; philosophers whose ideas are still relevant today. Some important elements of this theory stand out: justice, in the view of these thinkers, is a matter of insight. It is not a matter of subjective, individual preferences, nor is it related to the fulfilment of particular pleasures. Actions are to be regarded as just or unjust, good or evil, independently of whether agents actually think this is so. Their deontic status is not dependent on the whim of human agents. They are simply just or unjust, good or evil, in themselves.

The content of justice is connected to certain principles, including the principle that everybody must be given his or her due, which later found its expression in Roman law.[25] The principle of proportional equality is key in understanding why inequality of result may be regarded as just. This is because when proportional equality is maintained between the criterion of distribution and the good distributed, e.g. the grade that a student receives for her work and the quality of this work, this distribution is just even though the results are unequal.[26]

A controversial issue in this respect is the criterion of distribution. This criterion of distribution varies according to the spheres of distribution.[27] For instance, if we consider the example of grading, performance is crucial in the distribution of grades. In other areas, different criteria play a role. Article 12 of the Constitution[28] stipulates that need is an important prerequisite for the distribution of at least a basic income that ensures a dignified human life. In other areas, "humanity" is central. This is the case, for example, for the distribution of basic rights in a society; this is usually linked to no other precondition than the humanity of the bearers of such rights.

25 Corpus Iuris Civilis, Dig. 1.1.10.

26 Aristotle, The Nicomachean Ethics, translated by David Ross, edited by Lesley Brown, Oxford New York 2009, n. 1129a et seqq.

27 Michael Walzer, The Spheres of Justice, New York 1983.

28 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution www.admin.ch (https://perma.cc/M8UJ-S369).

Since antiquity, justice has been a concept used to evaluate the actions of agents. It has also been the foundation for the construction of societies. In antique thought, questions about democracy, oligarchy, aristocracy, and tyranny were wedded to the question of what constitutes a just order. Plato's particular hierarchical vision of a society is certainly not able to command much assent today, but one key question he posed in its canonical form still persists: what are the consequences for the structure of a decent society if it is based on principles of justice?[29]

Antique thinkers made another important point: they believed that justice and goodness are intrinsically linked to a fulfilled, even happy life. Socrates maintained that it is better to suffer injustice than to do injustice, implying that an ethical life is an intrinsic good, more important even than what one may have to endure if one prefers not to inflict injustice.[30] This leads to the idea that there is intrinsic value in a legitimate legal order that mirrors an ethical life on the social and institutional level. It seemed to these thinkers, and with good reason, that this too is a vital element of a decent human life.

These questions have been alive through the centuries, circling around various issues formulated in the past. A recent example for such reflection is the theory of John Rawls: the single most influential theory of justice of the second half of the 20th century. He developed behind the so-called "veil of ignorance" two principles of justice that he thought rational, risk-averse individuals would agree upon, if they were unaware of their particular privileges, talents, and propensities. The first principle is universal freedom. The second principle is that an unequal distribution of material goods can only be justified if: a) the worst-off still profit absolutely, and b) such a system is based on the principle of equal access of everybody to public office. In Rawls' theory too, equality is the guiding star of reflections about justice, importantly on two levels: on the level of concrete principles and on the level of the construction of the original position where the imagined agents decide upon the principles. The veil of ignorance is nothing other than an expository device for the basic intuition of human equality, an intuition that is at the core of what justice is about.[31]

29 See Plato, Politeia, in Plato in Twelve Volumes, Vol. V and VI, translated by Chris Emlyn-Jones, Cambridge/London 2013.

30 Plato, Gorgias, in Plato in Twelve Volumes, Vol. III, translated by W.R.M. Lamb, Cambridge 1967, n. 469b et seq.

31 John Rawls, A Theory of Justice, Cambridge/London 1971. For an alternative, derived from a discussion of Rawls, see e.g. Amartya Sen, The Idea of Justice, Cambridge 2009.

V. A Concept of Justice

From this discussion, at least six principles may be derived that are helpful in understanding the content of justice. The first one is the necessity of having equal standards to be applied to different agents. Second, these standards have to be practically applied in an equal way to different agents in concrete circumstances. Third, equality forms a default principle of distribution. If there is no criterion for an unequal distribution, only an equal distribution is just. Fourth, just treatment presupposes the reasonable determination of the content of criteria of distribution in the respective sphere of distribution. For example, to distribute rights on the basis of skin-colour evidently does not meet these sometimes quite demanding standards. Justice demands to maintain proportional equality between the criterion of distribution and the good distributed. Fifth, restitutive justice serves the purpose of maintaining a just distribution of goods (material and immaterial, like rights) within society. Finally, and importantly, there is a baseline of equality that has to be protected in a just order. This baseline is set by the equal dignity of human beings. Certainly there are cases where inequality of results is just, e.g. in the obvious, aforementioned case of the distribution of grades. But any inequality has to be reconcilable with this basic equality of human beings, a principle rom the based on the dignity of autonomous persons.[32]

32 See on the debate about dignity Matthias Mahlmann, Human Dignity and Autonomy in Modern Constitutional Orders, in Michel Rosenfeld/András Sájó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford 2012 (cit. Mahlmann, Human Dignity), pp. 370; Matthias Mahlmann, The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law, in Christopher McCrudden (ed.), Understanding Human Dignity, Oxford 2013, pp. 594; Christopher McCrudden, In Pursuit of Human Dignity: An Introduction to Current Debates, in Christopher McCrudden (ed.), Understanding Human Dignity, 2013, pp. 1.

VI. The Birth of the Human Rights Idea

Today, human rights are something like a secular Decalogue of our modern era. They are not, however, a modern invention: rights and the reflection about rights have a very long history, in Natural Law and in social contract theory, for example. An important more recent example is the thought concerning rights in the Enlightenment, based on practical reason and the particular concept of human dignity.

KANT's categorical imperative is a crucial expression of this kind of thinking. The categorical imperative is at the core of KANT's ethics and is wedded to the idea of universalisation. It holds:

> *"Act only in accordance with that maxim through which you can at the same time will that it become a universal law."*[33]

This means that any ethical principle followed by an individual has to be able to survive the test of universalisation. Only if it is thinkable that such a rule could be applied to everybody can it be a legitimate rule.

The second version of KANT's categorical imperative is the so-called principle of humanity:

> "*So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means*."[34]

33 IMMANUEL KANT, Groundwork of the Metaphysics of Morals, in Immanuel Kant, Practical Philosophy, The Cambridge Edition of the Works of Immanuel Kant, translated and edited by Mary J. Gregor, Cambridge 2008 (cit. KANT, Groundwork), pp. 37 (German source: IMMANUEL KANT, Grundlegung zur Metaphysik der Sitten, 1785, Akademie Ausgabe, Band IV, Berlin 1911, S. 421: *"Handle nur nach der Maxime, durch die du zugleich wollen kannst, dass sie ein allgemeines Gesetz werde."*).

34 KANT, Groundwork, pp. 37 (German source: "*Handle so, dass du die Menschheit, sowohl in deiner Person als in der Person eines jeden anderen, jederzeit zugleich als Zweck, niemals bloß als Mittel brauchst.*").

This is an exacting statement; it means that every individual is the ultimate limiting condition of actions by individuals and social order. It is thus the principle of radical humanism.[35]

The idea of universalisation is mirrored in the concept of right:

> "*Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with the universal law of freedom.*"[36]

There is one natural subjective right under this principle of law that incorporates the categorical imperative in legal thinking. This natural subjective right is

> "*freedom* (*independence from being constrained by another's choice*), *insofar as it can coexist with the freedom of any other in accordance with the universal law, is the only original right belonging to every human being by virtue of his humanity.*"[37]

This is not just a right to freedom; it is the subjective right to universally equal freedom, based on the equal dignity of human beings. KANT's formulation thus weaves together normative elements that continue to be foundational for the human rights project today.

35 This principle had a major impact on the case law of different legal systems of the world. See for an overview MAHLMANN, Human Dignity, pp. 370.

36 KANT, Metaphysics of Morals, pp. 353 (German source: *„Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des anderen nach einem allgemeinen Gesetz der Freiheit zusammen vereinigt werden kann."*).

37 KANT, Metaphysics of Morals pp. 353. Please note that the German original is gender neutral (Mensch): *„Freiheit* (*Unabhängigkeit von eines anderen nöthigender Willkür*), *sofern sie mit jedes Anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist dieses einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit zustehende Recht."* Therefore, the translation has been adapted.

VII. Contemporary Human Rights Theory

Questions about the foundations of human rights have not stopped to profoundly engage people. The contemporary human rights theory is a place of vivid debate. It draws from the many thoughts in the history of ideas that have been formulated beyond those examples mentioned above. One important consideration is that of why we actually protect human rights. It is often said that human rights are protected by virtue of humanity alone. What does this mean? Is it the agency and personhood of human beings that is foundational in this regard? Are interests and needs central? Is the protection of capabilities, i.e. the factual ability to lead a complete and flourishing life, the source of our rights? Are rights best understood as a political project of the international community? Or, in fact, is human dignity the foundation of human rights? These are important questions and there is currently a lively and demanding discussion around such matters, engaging a huge variety of people across the globe.[38]

A starting point for solving some of these implied problems may be to formulate three elements that need to be incorporated into any convincing theory of human rights. First, a theory of human rights has to contain a theory of the basic universal human goods which are to be justifiably protected. Human rights do not protect everything, only certain qualified goods, e.g. life, respect for the person, bodily integrity, freedom, and the legitimate equality. Any theory of human rights must account for the importance of these particular goods and, in particular, for the *equal* importance of these goods for any human being.

Second, a theory of human rights must include a political theory of the social conditions necessary for the enjoyment of these basic universal human goods. It is not always obvious that rights are the best means through which to obtain even unquestionably crucial human goods. There are certainly such goods that cannot be attained through the protection of rights. For example,

38 For an overview see Mahlmann, Mind and Rights, pp. 80.

love is evidently a very important element of human existence, but clearly, a right to love could not ensure that everyone would enjoy this particular element of a fulfilled human life.

Third, normative principles are central. There is no theory of human rights that does not contain such normative principles. Principles of justice are important because they clarify why only a system of equal rights is a legitimate system of rights. In addition, of key relevance are principles of obligatory human solidarity and respect for human beings that, in particular, justify our concern for others; something which is embodied in human rights themselves and in the obligations they entail for our institutions and – ultimately – for all of us.

Justice, solidarity and respect for human persons, equality, and our concern for others are the springs of rights. They are the normative sources at the very foundation of the project of creating a national, regional, and international legal order where human rights in fact matter and are expressed in institutions of democracy, the constitutional state under the rule of law and public international law – one of the more noble aspirations in humanity's often surprisingly tragic history.

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