Law and Philosophy Library 94

C.W. Maris • F.C.L.M. Jacobs *Editors*

Law, Order and Freedom

A Historical Introduction to Legal Philosophy

Translated by J.R. de Ville

Springer

LAW, ORDER AND FREEDOM

Law and Philosophy Library

VOLUME 94

For further volumes:
http://www.springer.com/series/6210

LAW, ORDER AND FREEDOM

A Historical Introduction to Legal Philosophy

Editors

Cees Maris

Faculty of Law, University of Amsterdam, Netherlands

Frans Jacobs

Faculty of the Humanities, University of Amsterdam, Netherlands

Translated by

Jacques de Ville

Faculty of Law, University of the Western Cape, South Africa

Springer

Editors
Cees Maris
University of Amsterdam
Faculty of Law
Oudemanhuispoort 4-6
1012 CN Amsterdam
Netherlands
c.w.maris@uva.nl

Frans Jacobs
University of Amsterdam
Faculty of the Humanities
Department of Philosophy
Nieuwe Doelenstraat 15
1012 CP Amsterdam
Netherlands
f.c.l.m.jacobs@uva.nl

Translator
Jacques de Ville
University of the Western Cape
Faculty of Law
Private Bag X17
7535 Bellville, Cape Town
South Africa
jdeville@uwc.ac.za

Translated by J.R. de Ville from the original version in Dutch

Recht, Orde en Vrijheid
Prof.mr. C.W. Maris and Prof.dr. F.C.L.M. Jacobs
01 August 1997
Kluwer B.V

ISSN 1572-4395
ISBN 978-94-007-1456-4 e-ISBN 978-94-007-1457-1
DOI 10.1007/978-94-007-1457-1
Springer Dordrecht Heidelberg London New York

Library of Congress Control Number: 2011928954

Preface

Law, Order and Freedom gives an account of the history of Western legal and political philosophy. It focuses on *law* as a system of norms which aspires to provide a fair balance between *order* and *freedom*. This liberal ideal of law and justice is a distinctive feature of many present-day constitutions, specifically in Western culture. Western legal orders are permeated with the principles of Enlightenment philosophy, that is, liberty, equality, and (to a lesser degree) fraternity, which have been translated into the institutions of the democratic constitutional state with its characteristic rule of law, separation of powers and human rights. Judicial interpretation too takes place within this spirit.

The core value of Enlightenment ethics is individual autonomy. In constitutional terms autonomy is guaranteed by the classical freedom rights, while social rights must ensure that every individual can adequately make use of his liberties. In public deliberation everyone has an equal voice. As a consequence of the emphasis on individual autonomy, the state is accorded a much narrower moral role than during the time when Enlightenment values were not yet incorporated into law. In earlier periods it appeared self-evident that the government should mould citizens into virtuous members of society. In the liberal view, in contrast, it is the individual's responsibility to give shape to his life in conformity with his own ideals. The state should be neutral in ideological respect, refraining from interference on moral grounds. Moreover, in present-day plural societies consensus about ideals of life is lacking, calling for restraint rather than legal moralism, as the latter can easily degenerate into forms of oppression that endanger social peace. Individual liberty should find its limits only in the equal liberty of others. Liberal legal systems, then, aim at safeguarding the equal freedom of all citizens in an orderly way. In the second half of the 20th century, the Enlightenment values have been declared universally valid by the Universal Declaration of Human Rights of the United Nations, and have subsequently been laid down in several international treaties on human rights. Nowadays they have acquired the status of apparent self-evidence, at least in the Western world.

Viewed historically, however, liberal freedom is a recent phenomenon that emerged only with the scientific revolution and Enlightenment philosophy in the early modern period from the 16th century onwards. In antiquity and medieval times, man was viewed as part of a comprehensive cosmic hierarchy that should be reflected in the legal order. Individual freedom to think and act as one wishes is then

out of the question, as is equality. In modern times, too, equal freedom on closer inspection is not at all that self-evident. Liberal individualism has been met with strong criticism. According to moralists, liberalism wrongfully claims that its narrow state ideal is neutral. Adherents of conflict theory assert that law merely reflects political power struggles. Advocates of order theory warn that it is better for law to concentrate on the maintenance of order, because freedom undermines social peace. Anarchists see the state as an illegitimate violation of freedom. Communitarians stress the value of communal life and solidarity. Cultural relativists accuse liberals of an ethnocentric bias and deny that so-called human rights are really universal. Asian critics advocate 'Asian values' as a perfect alternative. Orthodox believers of various creeds reject liberal freedom as immoral heresy. Sceptics doubt the rationality of any theory of justice. All things considered, therefore, the prevailing legal values call for a critical historical analysis.

Law, Order and Freedom chronicles liberal legal morality and its critics. Focusing on the developments in Western thinking from ancient Greek philosophy to the present day, this historiography has admittedly been written from an ethnocentric perspective. *Law, Order and Freedom* may also entail some moral bias. It can be read as a defence of political liberalism, viewed as the outcome of a historical learning process that enables us to deal fairly with deep conflicts of interests and ideals.

Chapter 1 opens with a sketch of the present state of the art in the philosophy of law. It lists the central problems of legal philosophy (What is law, and why should one follow its rules? What is the connection between law and morals, particularly justice, on the one hand, and between law and power, on the other? What does justice entail?), as well as the various philosophical accounts of them (natural law, legal positivism, and their critics). In the successive historical Chapters 2, 3, 4, 5, 6, 7, 8, and 9, the central topics of legal and political philosophy are embedded in discussions of the relevant philosophical systems as a whole. Plato's theory of justice, for example, can be understood only from within the larger framework of his metaphysics and epistemology (Chapter 2). Derrida's 'hyper-ethics' results from his effort to go beyond metaphysics (Chapter 9). Likewise, Rawls's liberal theory of justice stems from his epistemological insight that in modern plural and open societies people may reasonably disagree about worldviews and ideals of the good life (but still have to cooperate in a peaceful way) (Chapter 10).

Each historical chapter starts with an introductory section that sketches the period concerned, continuing with an overview of the philosophical theories which are discussed more extensively in the sections that follow (so that the impatient reader may jump over the latter to continue with the next chapter). Sequentially, the chapters present the philosophies of Antiquity and the Middle Ages: the Pre-Socratics, the Sophists, Plato, Aristotle, the Stoa, Thomas Aquinas, William of Ockham, Marsilius of Padua (Chapter 2); the early Modern Age: Calvinism, Machiavelli, Descartes, Grotius (Chapter 3); Hobbes, Locke and Spinoza (Chapter 4); the 18th-century French Enlightenment: Montesquieu, Rousseau, Beccaria (Chapter 5); Kant (Chapter 6); the 19th century: utilitarianism, Hegel, Marx, Nietzsche (Chapter 7); the 20th century, 1900–1945: Freud's psycho-analysis, logical positivism, Popper's

critical rationalism, hermeneutics (Chapter 8); the 20th century, 1945–2000: communitarianism, linguistic philosophy, postmodernism, Critical Theory, Nussbaum's neo-Aristotelianism, and Derrida's deconstruction (Chapter 9). The concluding Chapter 10 summarises the historical developments of the preceding chapters in light of the central problems of legal philosophy as elaborated on in Chapter 1. It proceeds to discuss whether political liberalism, which has found its most impressive articulation in the theory of justice of John Rawls, gives an adequate answer to these problems. It concludes that, although there certainly is no such thing as a liberal End of History, for the time being political liberalism emerges from historical experience as providing law with the most reasonable balance between order and freedom available.

Law, Order and Freedom is partly the translation of a book that was originally published in the Netherlands in 1991 (second edition 1997), which has since been used at several Dutch universities. Most of it was written by a group of legal philosophers who at the time collaborated at the University of Amsterdam. The present English text was substantially revised and updated in 2010. It was edited by Cees Maris (professor of legal philosophy, University of Amsterdam) and Frans Jacobs (professor of practical philosophy, University of Amsterdam). Both also contributed as authors. Other authors who contributed include Herman van Erp (associate professor of social philosophy, University of Tilburg), Govert den Hartogh (professor of practical philosophy, University of Amsterdam), Hendrik Kaptein (associate professor of legal philosophy, University of Leiden), Jacques de Ville (professor of law, University of the Western Cape), and Joep van der Vliet (associate professor of legal philosophy, University of Amsterdam). The English translation was undertaken by Jacques de Ville.[1]

References to events that have a particular Dutch connotation have been preserved in the English translation in as far as they are illustrative of more general themes. The book begins, for instance, with a discussion of the legitimacy of the former Dutch colonial legal system in Indonesia, as an illustration of the problematic relationship between law and morals. Yet, although *Law, Order and Freedom* is admittedly ethnocentric, it is not chauvinistic. The Dutch Republic during its Golden Age was, in the tradition of Erasmus, certainly a unique social laboratory of experiments with tolerance. Foreign philosophers such as Descartes and Locke, who were about to turn the world upside-down, could take refuge there; other philosophers of the Enlightenment could have their books printed there while they were censured back home. On the other hand, the pragmatic Dutch did not particularly excel in philosophy.[2] Well-known Dutch philosophers, notably Grotius and Spinoza, are

[1] We are thankful to Solly Leeman for his proofreading of the present text.

[2] See, however, Jonathan Israel's *Radical Enlightenment Philosophy and the Making of Modernity 1650–1750* (2001), which places the spotlight on Spinoza and his Dutch followers who, as the philosophical vanguard, brought the Enlightenment project to its radical conclusion.

accorded space in proportion to their international reputation. In this sense, *Law, Order and Freedom* has a cosmopolitan spirit.

The various chapters were (co-)written by the various authors as follows:

Chapter 1, *Legal Philosophy: The Most Important Controversies*: Maris.
Chapter 2, *Antiquity and the Middle Ages*: Van der Vliet (Sections 2.1–2.4, with contributions by Maris), Jacobs (Sections 2.5–2.8, with contributions by Van der Vliet).
Chapter 3, *The Commencement of the Modern Age*: Den Hartogh, with an introduction by Maris.
Chapter 4, *Hobbes, Locke and Spinoza*: Den Hartogh (Sections 4.1, 4.2, 4.4), Jacobs (Section 4.3).
Chapter 5, *Eighteenth-Century French Enlightenment*: Kaptein (Sections 5.1–5.7; Section 5.6 partly by Maris).
Chapter 6, *The Synthesis of Kant*: Maris (Sections 6.1, 6.2, 6.5), Jacobs (Sections 6.3, 6.4.3, 6.6), Van der Vliet (Sections 6.4.1, 6.4.2).
Chapter 7, *Nineteenth Century*: Maris (Sections 7.1, 7.4.1–7.4.5, 7.4.7, 7.5), Jacobs (Sections 7.2, 7.4.6), Van Erp (Section 7.3).
Chapter 8, *Twentieth Century: 1900–1945*: Maris (Sections 8.1, 8.3–8.5), De Ville (Section 8.2).
Chapter 9, *Twentieth Century: 1945–2000*: Maris (Sections 9.1–9.4), De Ville (Section 9.5).
Chapter 10, *Conclusion: Law, Order and Freedom*: Jacobs (Sections 10.1–10.5, 10.9–10.10, with contributions by Maris), Maris (Sections 10.6–10.8).

Amsterdam, The Netherlands — Cees Maris
May 2011 — Frans Jacobs

Contents

1 Legal Philosophy: The Most Important Controversies 1
1.1 Introduction 1
1.2 Legal Philosophy 4
1.2.1 What is Law? 4
1.2.2 The Natural-Law Doctrine 9
1.2.3 Descriptive Legal Positivism and Its Critics 15
1.3 Law Between Power and Morality 30
1.4 Conceptual Framework and Brief Overview of the Subsequent Chapters 34

2 Antiquity and the Middle Ages 43
2.1 Introduction to Greek Philosophy 43
2.2 Pre-Socratics 48
2.3 The Sophists 50
2.3.1 Scepticism and Relativism 50
2.3.2 Law as Convention 52
2.4 Plato 54
2.4.1 Introduction 54
2.4.2 State Doctrine 55
2.4.3 Rationalistic Theory of Knowledge and Ontology . . 56
2.4.4 Moral Perfectionism 59
2.4.5 Commentary 63
2.5 Aristotle 65
2.5.1 Ontology 66
2.5.2 Ethics 68
2.5.3 Political Philosophy and Legal Philosophy 71
2.5.4 Commentary 73
2.6 The Stoics 74
2.7 The Middle Ages 78
2.7.1 Introduction 78
2.7.2 Thomas Aquinas 82
2.7.3 End of the Middle Ages 87
2.8 Conclusion 89

3 The Commencement of the Modern Age 91
3.1 Introduction 91
3.2 From God's Sovereignty to the People's Sovereignty: Calvinism 96
3.3 Realism and Relativism: The Renaissance 100
3.4 The Break with Tradition: The Scientific Revolution 103
3.5 Modern Natural Law: Hugo Grotius 107

4 Hobbes, Locke, and Spinoza 111
4.1 Hobbes 111
4.1.1 Life 111
4.1.2 Man and World 112
4.1.3 The State of Nature 114
4.1.4 Social Morality 116
4.1.5 The State 118
4.1.6 The Social Contract 120
4.1.7 Law and Morality 121
4.1.8 Commentary 123
4.2 Locke 124
4.2.1 Life 124
4.2.2 Law in the State of Nature 125
4.2.3 The Formation of the Political Community 127
4.2.4 Limits of Power 128
4.2.5 Grounds and Limits of Reliable Knowledge 131
4.3 Spinoza 134
4.3.1 Life 134
4.3.2 Pluralism and Tolerance 134
4.3.3 Commentary 135
4.4 Conclusion: Hobbes and Locke 136

5 Eighteenth-Century French Enlightenment 139
5.1 Enlightenment, Freedom, Equality and Fraternity 139
5.1.1 Enlightenment Through Science 139
5.1.2 Legal Philosophy of the Enlightenment 140
5.2 The Liberal Enlightenment: Montesquieu's Separation of Powers 142
5.2.1 Montesquieu 142
5.2.2 The Spirit of Laws 143
5.2.3 Separation of Powers 144
5.2.4 Montesquieu as Moderate Liberal 146
5.2.5 Commentary 147
5.3 Enlightenment of Criminal Law 148
5.3.1 Monopoly of Power and Criminal Law 148
5.3.2 Cesare Beccaria 149
5.3.3 Criminal Law According to Beccaria 150
5.3.4 Instrumental Criminal Law and Individual Justice . . 152
5.3.5 Separation of Powers and Codification 154

5.4 Natural Law, Enlightened Science and Cruel Arbitrariness . . 155
5.5 Rousseau: Nostalgia for Natural Security 157
5.5.1 Rousseau's Life and Work 157
5.5.2 Feeling Versus Reason: The 'Natural' and the 'Civilized' Person 158
5.5.3 Politics, Law and State 159
5.5.4 Commentary 162
5.6 French Revolution: The Declaration of the Rights of Man and of the Citizen 163
5.7 Continuation of the Enlightenment 166

6 The Synthesis of Kant 169
6.1 Introduction 169
6.2 Theory of Knowledge: Synthesis of Empiricism and Rationalism 174
6.2.1 The Influence of the Empiricism of Hume 174
6.2.2 Kant's Epistemology 176
6.3 Ethics 179
6.3.1 The Categorical Imperative 179
6.3.2 Kant's Deontological Ethics Versus Utilitarianism . . 184
6.4 Legal Philosophy 185
6.4.1 Law and Ethics 185
6.4.2 Social Contract 187
6.4.3 International Law 188
6.5 The Separation of 'Is' and 'Ought' and a Narrow Social Morality 189
6.6 Commentary 191

7 Nineteenth Century 195
7.1 Introduction 195
7.1.1 General Developments 195
7.1.2 Liberalism and Utilitarianism 200
7.1.3 German Historical School 202
7.1.4 Hegel 204
7.1.5 Marx 207
7.1.6 Nietzsche 208
7.2 Utilitarianism 209
7.2.1 Introduction 209
7.2.2 Jeremy Bentham 210
7.2.3 John Stuart Mill 211
7.2.4 Mill's Utilitarianism 212
7.2.5 Mill's Liberalism 215
7.2.6 Commentary 216
7.3 Hegel 218
7.3.1 Introduction 218
7.3.2 Hegel and Liberalism 218
7.3.3 Legal Philosophy as Philosophy of the Spirit 220

7.3.4 Law, Morality and Ethics . . . 222
7.3.5 State and Society . . . 223
7.3.6 Constitutional Law . . . 224
7.3.7 Commentary . . . 227
7.4 Marx . . . 230
7.4.1 Introduction . . . 230
7.4.2 Historical Materialism . . . 231
7.4.3 Class Struggle . . . 235
7.4.4 Marx, Liberal Human Rights and the State . . . 238
7.4.5 Marx and Freedom . . . 240
7.4.6 Marx's Normative Views . . . 241
7.4.7 Commentary . . . 249
7.5 Nietzsche . . . 252
7.5.1 Introduction . . . 252
7.5.2 Beyond Good and Evil . . . 254
7.5.3 The Nietzschean State: Artist-Tyrants . . . 256
7.5.4 Commentary . . . 258

8 Twentieth Century: 1900–1945 . . . 261
8.1 Introduction . . . 261
8.1.1 General Developments . . . 261
8.1.2 Developments in Philosophy and Related Fields . . . 264
8.2 Psychoanalysis . . . 273
8.2.1 Introduction . . . 273
8.2.2 The Mental Apparatus . . . 275
8.2.3 The Functioning of the Mind . . . 277
8.2.4 The Origin of Law, Morality and Religion . . . 280
8.2.5 Commentary . . . 284
8.3 Logical Positivism . . . 286
8.3.1 Scientific Progress . . . 286
8.3.2 Ethics . . . 289
8.3.3 Law . . . 294
8.4 Critical Rationalism . . . 297
8.4.1 Popper . . . 297
8.4.2 The Open Society and Its Enemies . . . 299
8.4.3 Commentary . . . 300
8.5 Hermeneutics . . . 301
8.5.1 The Practical Meaning of Understanding . . . 301
8.5.2 Hermeneutics and Legal Science . . . 305
8.5.3 Commentary . . . 308

9 Twentieth Century: 1945–2000 . . . 311
9.1 Introduction . . . 311
9.1.1 Political and Philosophical Developments . . . 311
9.1.2 Communitarianism . . . 313
9.1.3 Philosophy of Language and Cultural Relativism . . . 315

9.1.4 Postmodernism . . . 316
9.1.5 Critical Theory . . . 318
9.1.6 Neo-Aristotelian Natural Law . . . 319
9.1.7 Deconstruction . . . 322
9.1.8 Intersubjectivity and Politics . . . 324
9.2 The Philosophy of Ordinary Language . . . 325
9.2.1 Linguistic Philosophy . . . 325
9.2.2 Linguistic Philosophy and Ethical Relativism . . . 327
9.3 Critical Theory . . . 331
9.3.1 Neo-Marxism . . . 331
9.3.2 The Interest in Emancipation . . . 332
9.3.3 The Ideal Communication Society . . . 334
9.3.4 Legal Philosophy . . . 337
9.4 Commentary: Intersubjectivity and Universal Ethics . . . 340
9.5 Deconstruction . . . 342
9.5.1 Psychoanalysis Radicalised . . . 342
9.5.2 Legal Philosophy . . . 346
9.5.3 Commentary . . . 349

10 Conclusion: Law, Order and Freedom . . . 353
10.1 Introduction . . . 353
10.2 Cognitivist and Non-cognitivist Views on Law, Order and Freedom . . . 355
10.3 Complications . . . 358
10.4 A Liberal View of the Relation Between Law, Order and Freedom . . . 360
10.5 An Example: Rawls's Theory of Justice . . . 364
10.6 A Liberal Law of Peoples . . . 367
10.7 Criticism of Political Liberalism . . . 368
10.8 Liberalism: A Universal Morality? . . . 371
10.9 Answers to the Questions of Section 1.1 . . . 374
10.10 Conclusion . . . 377

Bibliography . . . 379

Name Index . . . 385

Chapter 1
Legal Philosophy: The Most Important Controversies

1.1 Introduction

> According to the idea generally held over almost all Asia the subject, with all he possesses, belongs to the Prince. . . . Accordingly, nothing is more normal than that hundreds of families should be summoned from a great distance to work, *without payment*, on fields that belong to the Regent. Nothing is more normal than the supply, unpaid for, of food for the Regent's court. And should the horse, the buffalo, the daughter, the wife of the common man find favour in the Regent's sight, it would be unheard-of for the possessor to refuse to give up the desired object unconditionally. . . . This is known to the [Dutch colonial] Government; and when you read the official gazette containing the laws and instructions and advice for the functionaries, you applaud the humanity that appears to have presided at their framing. Everywhere the European who is clothed with authority in the interior is enjoined, as one of his most sacred duties, to protect the population against their own docility and the rapacity of their chiefs (Multatuli 1987, pp. 74–76).

This passage in the novel *Max Havelaar* was written in 1856 by the Dutch author Douwes Dekker under the pen name Multatuli. Max Havelaar, the novel's main character, attempts to protect the Asian population in the former Dutch India (now Indonesia) against the abuse of power by the indigenous elite by appealing to the 'humane' European laws mentioned above, but in vain. *Max Havelaar* is in part autobiographical. Douwes Dekker was himself an official in Sunda (in the western part of the Indonesian island Java). He did not reject colonialism as such, because in his view it could be to the benefit of the local population: an enlightened colonial regime could break down the indigenous suppressive hierarchies based on superstition, and bring about a society based on justice instead. As assistant-commissioner he took seriously his official oath 'to protect the population against exploitation and extortion', and accused the indigenous ruler of abuses of power vis-à-vis his own subjects. The colonial superiors of Douwes Dekker were not pleased with this, for the interests of the Netherlands were not always furthered through compliance with fair laws. The colonial government regarded it as more efficient for pre-colonial indigenous feudal relations to remain in place, and then to enforce its will on the population via the old dynasties. The actions of Douwes Dekker, therefore, ended in

C.W. Maris, F.C.L.M. Jacobs (eds.), *Law, Order and Freedom*, Law and Philosophy Library 94, DOI 10.1007/978-94-007-1457-1_1, © Springer Science+Business Media B.V. 2011

his dismissal and not in measures against the Sundanese ruler. The *J'accuse* of *Max Havelaar* constitutes Multatuli's literary revenge.[1]

Nowadays the actions of Douwes Dekker are challenged for other reasons too:[2] he would have made himself guilty of spiritual colonialism by forcing Western values upon another culture, and thus have undermined the inherent value and identity of the Sundanese culture on the basis of a misplaced feeling of superiority. According to the local customary law the ruling authority was regarded as sacred, so that the absolute rights of the ruler were not deemed unjust.

The conflict between two legal orders based upon incompatible principles, both of which claim obedience, raises a number of philosophical questions: Which of the two legal systems deserves to be followed? Why should one comply with the law at all when it can apparently be given content in such incompatible ways? Is the law primarily an instrument of power aimed at maintaining *order* (the view of the Dutch colonial administration)? However, if I were an Indonesian without any interest in colonial order, why should I then have to obey it? Or should the law satisfy a number of substantial moral requirements? In other words, is a legal order only legitimate if it guarantees a *just* order? And if so, which justice precisely? The European ideal of justice that Douwes Dekker advocated? In that case, must one ignore local customary law if it conflicts with this view of justice – for the benefit of the local population, even though they do not themselves realise this? Or does the traditional Asian, hierarchical view of justice have as much, or even more, value than the European rule of law? And in this case, does Douwes Dekker's reliance on Dutch colonial law not simply amount to an expression of power without any legitimacy?

Presently in Western culture the moral values of freedom and equality, as well as the complementary constitutional ideal of democracy and the rule of law are self-evident to a great degree. These principles were formulated during the 18th-century Enlightenment, a movement which propagated a modern, 'enlightened' conception of man and society. As its central value it emphasizes the autonomy of the individual to define his own life. This leads to the constitutional ideal of *democracy*: everyone should have an equal vote in the design of society. Furthermore, the individual is protected against the power of the government through the *rule of law* which, defined broadly, consists of three complementary elements: (1) the government is itself bound by its own laws; (2) this is controlled by an independent judiciary, in accordance with the principle of separation of powers which likewise aims at limiting state power; and (3) in addition, the law must guarantee the equal individual freedom of all citizens, as determined in the classical fundamental rights. Government and law may only interfere with this freedom in order to safeguard that very freedom right for everyone – by means of the protection of the classical fundamental rights and the realization of social fundamental rights. The Enlightenment values,

[1] Douwes Dekker himself, incidentally, advocated an authoritarian anti-parliamentarianism.

[2] For example by Nieuwenhuys (1987).

therefore, imply a liberal view of law, not a moralistic one: the government does not have the function of ensuring that legal subjects lead a morally perfect way of life.

As a result of this liberal tendency, the modern Western ideal of law deviates significantly from the concepts of law in most non-Western and pre-modern European societies. These views of law assign a much broader moral task to the state. In Europe, during the Middle Ages, for example, the law was expected to impose Christian virtues. The freedom to live in accordance with non-Christian ideals was regarded as immoral and, therefore, had to be combated by the law with all its might.

Freedom and equality thus were not always the same self-evident values as they now appear to be in Western culture. The philosophers of the Enlightenment formulated these ideas in the 18th century as criticism of the law of that time, which was still based on the feudal traditions of the Middle Ages and on the monarchical absolutism of the 17th century (with its characteristic features of inequality and lack of individual freedom). These new liberal ideas coincided with an emerging belief in human progress. People expected that the growth of scientific knowledge would promote social and moral progress: to emancipation from the superstitious fears and suppressive traditions of the 'dark' Middle Ages. This would lead to an autonomous, consciously chosen way of life for both the individual and society. Later, the Enlightenment ideals were incorporated in most national legal systems of the West and in a great number of international treaties. As a result they now increasingly serve as the standard against which the legislation and judicial decisions of Western countries are measured. Moreover, since the Enlightenment the principles of freedom and equality have been accorded a supra-cultural, universal significance: they should form the basis of every modern society. In this view, societies which are based on illiberal values are regarded as 'primitive' and must, for their own sake, be modernised and 'enlightened'.

It is, however, controversial whether the liberal principles of the Enlightenment can indeed serve as the universal basis for society and law. Critics argue that they are just an accidental and fleeting product of Western culture and can, therefore, make no claim to universal validity. If this criticism is applied to the Max Havelaar dispute mentioned above, the indigenous customary law would deserve to be preferred to the colonial legal order (supposing that the latter was an expression of the liberal idea of justice, as Douwes Dekker, not very convincingly, argued). Another criticism is that the liberal emphasis on individual freedom leads to social disintegration, because individualism would undermine the solidarity that is required for social life. Liberal values would, therefore, fail to provide a sufficient basis for society and law.

This discussion about freedom and equality constitutes a central theme of this book. In *Law, Order and Freedom* the fundamental question of legal philosophy, what is the relation between law and morals?, focuses on the liberal values of the Western Enlightenment. To what extent can the principle of equal freedom serve as the universal standard for law: should *law* guarantee a social *order* that serves as a framework for the equal exercise by all citizens of their *freedom*? This problem is placed within the context of the history of Western legal and political philosophy, or

the development from the moralistic view of law in classical Greek philosophy to the liberal view of modern times.

Thus, this book approaches history from a modern viewpoint with its associated conceptual tools, as sketched in the introductory methodological Section 1.4. This may involve anachronistic comparisons, such as: for which reasons does the ideal state of Plato differ so radically from the modern democratic constitution with its liberal fundamental rights? – obviously Plato himself was not acquainted with modern liberalism. The central question examined in this book also implies specific criteria for the selection of material: it focuses on those parts of the history of Western legal philosophy which either have led to present-day liberalism, or serve as its counter-model. This in the hope that we can learn from history, and that in this way historiography may clarify fundamental problems of actual legal orders.

1.2 Legal Philosophy

1.2.1 What is Law?

1.2.1.1 Introduction

Legal philosophy concerns the previously mentioned fundamental questions of law: What is law? To what extent does law relate to morality, more specifically to justice? To what extent is law simply an instrument of power? How can the enforcement of law be justified, for example, by means of punishment? When should one obey law? What is the extent to which the state may interfere in the lives of citizens? In asking these questions, legal philosophy offers a critical view of everyday legal practice.

The most central question of traditional legal philosophy pertains to the nature of law. The answer to this question may also determine how one answers the other questions, such as the extent to which positive law deserves to be obeyed, and when legal force is legitimate.

In colloquial speech the meaning of the concept ‘law’ is ambiguous. On the one hand, it is used to point to the existing positive legal order, while, on the other hand, it refers to the moral concept of justice. These two meanings may overlap in so far as positive law has a just content. This is not, however, necessarily the case. The ambiguity of the concept ‘law’ comes to light most clearly in the event of unjust positive law. This can lead to paradoxical statements, such as: ‘The law of Nazi Germany was not real *law*.’ The question ‘what is law?’ can thus focus on whether the concept ‘law’ refers to every legal order which is in fact effective within a specific territory, irrespective of its content (and which is thus in important respects determined by power), *or* whether a necessary relation exists between law and morality. Nowadays it is, however, contended that such problems of definition are of secondary importance. However one defines the concept ‘law’, the central question is a moral one: under what conditions is the claim of law to obedience legitimate?

1.2.1.2 Law, Order and Morality

Viewed historically, undoubtedly a close factual relation obtains between law and morality. At the origin of human history man lived in simple small groups, mostly an extended family under the leadership of the older men (in the 21st century this mode of life is still maintained in certain parts of the world, such as Australia and Canada). These groups survive by means of gathering and hunting. In such a society law forms an undifferentiated whole with traditional morality and religion. One can actually ask whether such societies know of 'law' in our sense, as specific legal institutions, such as a legislature, judicial power and police are lacking. General norms do exist, but taboos and traditions are sufficient to ensure compliance. The groups are so small that everyone knows each other. The breach of the norms thus has immediate negative social consequences, so that social control suffices (in addition to the belief in supernatural sanctions).

Only when larger and more complicated societal structures come into being, because of conquest or extending family relations, does social control through kinship ties become insufficient. People no longer know each other personally; in subgroups different traditions come into being, and as a result of accelerated social changes, traditional norms do not keep up with social needs. To ensure a peaceful and orderly society in such circumstances, institutions of a specific legal character evolve. Thus, it was impossible for the agricultural societies that came into being from 6500 BC to function without purposive legal regulation. Sowing, irrigation, and harvesting require rules for an extensive co-ordination of activities. Commerce requires safe trade routes, reliable contracts, and money as a means of exchange. A central authority then comes into being which co-ordinates social life, for instance, by enacting general rules. As a result of the new agricultural techniques, surpluses arise which provide the opportunity to exempt from the daily work a class of priests who specialise in legal knowledge and legislation (and who are the only ones able to write). The central enactment of a number of fundamental norms for social exchange now compensates for the lack of generally shared traditions, and enables quick adaptations to new social conditions. A specific judicial institution concerns itself with the final settlement of legal disputes. Because compliance with such non-traditional norms is not customary, a specialised group is formed which concerns itself with the maintenance of legal rules, through violence, if necessary. In short, as time goes by, specific legal institutions develop, which specialise in legislation, judicial decisions, and policing functions. These institutions ensure social order by establishing central rules that are clear to everyone, and maintain them through a monopoly on violence.

Critics of Enlightenment philosophy point out that this kind of development should not be taken as social progress from an inferior 'primitive' form of society to a superior modern civilization. According to them, all that happens is an evolution from simpler to more complex forms of society, in which, as a result of the process of division of labour, still more specialised social institutions develop. This does not per se mean progress in a moral or rational sense. It is, for example, equally possible to perceive in less complex societies a purity that has been lost in modern society. Furthermore, what is rational for a society of hunters is not per se rational in an industrialised society.

This development, moreover, does not take place in a straight line and differs in each cultural sphere. In Western Europe, the invasions of the Germanic tribes in the 4th century AD led to the demise of the Western Roman Empire. Because of this, the Roman legal order, and with that also the unity of Roman law, was lost (although it did continue to develop in the Eastern Roman Empire where it was codified by the emperor Justinian in approximately 530 AD). The professional practice of law then provisionally came to an end. In its place came the unwritten customary law of the different Germanic tribes which was maintained by the group itself. Only in the 13th century, in Italian universities, was the scientific study of Roman legal texts revived. At the end of the Middle Ages, lawyers, having completed their studies, started playing an increasingly important role in state administration, which from the 15th century slowly developed in the direction of centrally organised monarchical states (with the federal Netherlands as the exception). Central legislation and jurisprudence came into being to direct the booming trade and colonial expansion, and to increase the power of the king. The success of natural science, moreover, led to the idea that man can control his own environment and life, adapting them to his will. Consistent with the belief in progress of 18th-century Enlightenment philosophy, man, by means of legislation, could fashion society in accordance with his ideals. The Enlightenment ideals of freedom, equality and democratic deliberation, therefore, had to be anchored in a constitution, and be elaborated in more detail in codes that were comprehensible to all citizens. After the French revolution in 1789, French law was indeed codified in the *Code Civil* and other codes, which served as examples for similar codifications in the rest of Europe. Later 19th-century legislation stressed the principle of freedom, so that the modest task remained for law to regulate the freedom rights of everyone in an orderly fashion. Gradually, however, it became apparent that this leads to an extremely unfair distribution of the opportunities to use one's liberties. In this revised liberal view, state and law were allocated a much broader task, particularly in the field of social legislation, which in the second half of the 20th century led to the welfare state. This process went hand in hand with the development of an expansive bureaucracy, the 'fourth branch', in addition to the legislature, executive and judiciary. The law now extended significantly into important parts of social life. Nonetheless, it remains central to the liberal view that law does not have the function of enforcing a morally good way of life, since every individual should be free to establish how he arranges his own life.

With the increasing complexity of society, law and morality thus gradually grow apart. The law breaks away from the old moral traditions, as it is centrally established, and changes in accordance with practical circumstances and political priorities. Morality, for its part, can develop into a critical ethics, which distances itself from inherited moral values and can even call for radical social change. Moreover, law and morality grow apart in substance as law primarily focuses on the *orderly* course of social life.

Since law is distinguished from morality by its ordering function, one can now specify the following ideal-typical differences between them. Law is tied to impersonal social institutions that centrally regulate its establishment and maintenance.

Legal norms can be identified with reference to clear formal characteristics (procedures for creation, proclamation, etc), and consequently can become known by everyone, as is required by legal certainty. Legal norms apply to all participants in the legal order, and in the case of deviating behaviour may be maintained by force. Moral rules, on the other hand, are less clearly determined, as they are not decreed by a central institution. They can, therefore, differ per group, or even per person. They are dependent for their compliance upon individual goodwill, instead of external force. To be sure, the moral views of most people are determined by generally shared cultural traditions, and transgressions of traditional morality are punished with social sanctions. It is, nonetheless, possible that an individual with a critical attitude propagates deviating moral views that conflict with dominant values. Jesus and Muhammad are good examples: they gave a radical reinterpretation of the traditions of their times (whilst claiming that they were bringing to the fore what was most fundamental to those traditions). The law, furthermore, primarily requires conduct which externally conforms to norms, whereas morality addresses someone's motives, too. (From a moral perspective, it is insufficient that one refrains from stealing out of egoistic motives, such as fear of punishment.) Moreover, in contrast to law, morality often requires more than is necessary for orderly social relations. Hence, dishonesty is regarded as morally prohibited as such, but its legal sanction is limited to the non-fulfilment of contracts, committing forgery, etc. On the other hand, law sometimes requires more than morality: it aims at conduct which is indifferent from a moral point of view, but that is required by the social order, such as the right of way in traffic rules.

The consequence of this segregation of law and morality into different normative areas is that legal authorities can give law a content which, from a critical-ethical perspective, is utterly immoral. Since those in power dispose over specialised legal institutions to transform their interests and values into legal rules, law is indeed an efficient instrument to impose injustice. Certain legal philosophers argue that one should still obey unjust laws because the maintenance of social order is the primary requirement for human survival. They reject the counter-argument that a duty of obedience exists only when law is substantially just: if everyone could disobey the law whenever he considers it unjust, there would be social chaos. The function of ensuring order relies precisely on the *central*, generally binding establishment and maintenance of law. In other words, a bad order is better than no order at all. These legal philosophers thus primarily accord to law the function of ensuring order, which is not tied to additional moral requirements. However, this equation of law and order gives a somewhat extreme view of the differences between law and morality. Despite the differentiation of the legal and moral spheres, a number of similarities remain. In substance, law and morality will almost always share certain central norms. The general norm 'You may not kill', for example, is not only central to most moral systems, but also to every legal order (with the reservation: unless the prohibition to kill is overruled by another norm, for example, that killing is allowed in the case of self-defence). Here the requirements of morality and order coincide because society would not be possible if everyone was about to kill each other. Moreover, like morality, law sometimes takes account of motives, as in the case of the criminal

fault or intention requirement. Certain legal fields, such as customary law and international law, are institutionalised to a lesser extent than others. The differences with traditional morality are, therefore, smaller here. In addition, written law frequently mirrors existing moral views. Consequently, law is constantly subject to the ongoing social debate concerning the moral question of how society and law should be structured. Furthermore, often the meaning of written law is much less clear than was suggested above, so that its application requires detailed interpretation. In many instances judges let their reading be guided by their sense of justice.

In brief, in many societies a great number of legal subjects, specifically the political elite, at least have the subjective sense that they *should* obey the law, irrespective of any threat of sanction. Furthermore, the authorities will never publicly present their norms as purely based on power. For strategic reasons they will at least attempt to create the façade of justice. They do not only say 'do this or else. . .', but also attempt to give (moral or other) reasons why it is good to act in the required manner. In doing this, they open themselves to moral criticism, which tests their legislation against its own pretences of legitimacy. Due to this, legal and moral discussions overlap. Nonetheless, as a consequence of the differences between law and morality, positive law may primarily serve the interests of the powerful, and fundamentally conflict with the requirements of a critical ethics.

1.2.1.3 Natural Law and Legal Positivism

Because of this demarcation between law and morality, the question 'What is law?' is answered in diverse ways. Certain legal philosophers regard the ordering function of law as characteristic, seeing that a number of unjust positive legal orders exist as well. Others retain the view that the law by its nature is aimed at the realisation of a just order. This controversy about the nature of law is central to the debate between the two most important movements in legal philosophy: the natural-law doctrine and legal positivism.

According to the *natural-law doctrine*, 'law' conceptually implies a necessary relation with morality, specifically justice. This relation exists 'by nature', thus independently of, and preceding, human legislation. For this reason the concept of law provides a critical standard by which to test positive law. According to the classical natural-law doctrine, manifestly immoral positive law can make no claim to the status of 'law' in the full sense of the term, and can, therefore, also not require obedience.

Legal positivism on the other hand denies any relation between law and morality which is more than accidental. Law is simply what is posited and maintained as such by competent state organs, even if it is substantially unjust. According to this view, law reflects power rather than morality. According to many legal positivists this does not, however, mean that one ought to obey positive law unconditionally. *Normative* legal positivism does indeed associate a duty of obedience with law's function of ensuring order. In accordance with this view, legal certainty is so important that one should obey unjust law, too. These positivists thus actually do connect legal

positivism with a moral argument: a chaotic society is worse than an unjust society, *ergo* an absolute duty of obedience to positive law.

Descriptive legal positivism, on the other hand, advocates a complete separation of law and morals. It only intends to give a neutral description of law as a factual societal phenomenon, for example: law is what the legal authorities command and maintain effectively in a certain territory, irrespective of the content of their prescriptions. This neutral analysis of what a positive legal order entails does not imply any moral duty to obey it. The latter question is viewed as a separate moral problem. In this variant of legal positivism, positive law can indeed be criticised and disobeyed on moral grounds. In this regard descriptive legal positivists agree with the adherents of natural law. Their basic disagreement with the natural-law doctrine is that this critique is not a *legal*, but an extra-legal *moral* issue.

1.2.2 The Natural-Law Doctrine

1.2.2.1 Classical Natural Law

The classical doctrine of *natural law* is grounded in a presupposed fundamental 'nature' or essence of man: man displays a number of essential characteristics from which societal rules follow, which always and everywhere should constitute the nucleus of positive law. The content of these natural-law norms can be determined prior to the study of any positive legal order, because natural law can be derived directly from insights into human nature. This means that one can, independently of positive law, determine what the concept of law entails at its core. From this, natural-law theory concludes that a positive legal order only has the status of genuine 'law' when it does not substantially deviate from natural law.

A modern version of classical natural law reflecting the values of the Enlightenment was proclaimed in the American Declaration of Independence of 1776:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it.

The truth claims of natural-law theories are, however, subject to a number of objections. The most important problem is how to establish what the essential nature of man entails. The American Declaration of Independence posits a number of 'evident truths', such as the truth that all people are (created) equal, and that as such they have a right to freedom. However, when one examines the world as it is, one sees that in fact people are indeed the same (equal) in many respects; but then again, they are very different (unequal) in other respects. For example, on average human beings are much more intelligent than animals, but among themselves they show

great varieties in intelligence. On what basis can one claim that the similarities are more decisive, or more 'essential', than the differences?

Moreover, how can one actually speak of inalienable 'rights' which people would possess 'by nature', thus preceding legislation? Do such rights exist in an objective way? If so, where and how? How can this be proved to someone who doubts it?

Generally, advocates of classical natural law state that such rights belong to that which makes human life 'dignified'. But what can be the basis of such a normative claim? Do animals then have no 'right' to freedom and happiness? Often the natural-law doctrine's response to this is that man *as* man is to be distinguished from animals owing to a number of characteristics: specifically, because of his intellectual abilities that enable him to distance himself from his immediate environment, in order to establish the course of his life himself. Man, in brief, differs from animals because of his reason and freedom. To this is added that human beings develop these characteristics in cooperation with others; thus, in a society. According to this view, state and law are social institutions which should guarantee the development of these essential human traits. Therefore, in the liberal version of natural law, the state should exercise coercion when people infringe each other's freedom rights.

The question, however, is whether this concept of man is not based on an arbitrary selection from the set of characteristics which human beings actually possess. After all, in some respects they are equal; but in other respects they are unequal. They may appear to be free at first sight, but on reflection their actions may turn out to be closer to the instinctively determined animal way of life. Moreover, is the idea of a 'natural' supra-positive law not a projection of human thinking onto nature? Nature after all primarily seems to be the arena where the 'right' of the strongest prevails.

Opponents of classical natural-law thinking, therefore, frequently state that nature as such is without norms and thus amoral. It consists of all the phenomena that manifest themselves in nature – thus, of life and death, cooperation and aggression, equality and inequality, and freedom and lack of freedom. It entails no rights, but only the amoral 'law of the jungle', that is to say, the struggle for survival. This of course does not mean that all individuals are by nature involved in some mutual physical struggle. Survival of the species can be equally promoted by means of close cooperation. Yet in mammals that live together in groups, and in most human societies as well, cooperation takes place in a strict hierarchy; thus, in relations of fundamental inequality and lack of freedom. Moreover, in most human societies, not only cooperation, but also competition and aggression, stimulate progress. According to this criticism, an advocate of classical natural law who selects specific natural phenomena from the whole of nature as 'essential', simply projects his own normative preferences onto amoral nature

The American Declaration of Independence, quoted above, claims to provide a response to this criticism. It appeals to the order which God conceived in his creation of nature. Indeed, in the Christian view a normative order can be discovered in nature (see Section 2.7). This divine creation plan cannot be observed directly in the natural phenomena as such, because through the acts of Evil, immoral phenomena are part of reality as well. Therefore, the actual actions of mankind may diverge from God's plan. However, by taking note of God's revelation, specifically

via the Bible, we can still know which of our characteristics should be promoted and which we should fight against. According to the traditional Christian worldview, God's creation implies a normative hierarchy: lifeless nature and animals take the lower positions, God himself is placed at the top, while mankind occupies a position in-between. Man, then, partly has an animal nature that links him to the material world; but because of his immortal, immaterial soul, he at the same time resembles God. This latter aspect constitutes the origin of human reason and freedom. This hierarchical order makes it easy to decide what we should do: suppress our bestial (instinctive, materialistic) side and live in accordance with our reasonable free will, aimed at God's Commandments.

Critics object to this argument because it is based on indemonstrable metaphysical speculation, and ultimately on faith. Christian metaphysics claims a hierarchy which is hidden behind, and in, natural phenomena, but which is not directly observable. How could a Christian prove to an unbeliever that God exists, and that, if he exists, the Bible is his word? This objection may be strengthened by pointing at competing metaphysical theories that are incompatible with Christian natural law. The Greek philosopher Plato (428–347 BC), for example, likewise contends that nature consists of more than the world of observable phenomena (see Section 2.4). Plato states that man can, via his intelligence, take part in a rational world of eternal truths. This 'world of Ideas' functions as an ideal model for our imperfect everyday world. On the other hand, man, owing to his body, equally belongs to the material world of things and animals. Like Christianity, Plato derives from this hierarchical division of nature as a whole, and of human nature specifically, the following norms: live reasonably, and allow intelligence to control physical inclinations. Plato, however, then arrives at a version of natural law with values that are the complete inverse of those of the American Declaration of Independence. According to him, only an intellectual elite is capable of the rational insight that is required for emancipation from our animal instincts. The masses, on the other hand, are by nature irrational. The best form of government is, therefore, a benevolent, but absolutist and paternalistic one of a wise elite ruling over the dumb majority, in their own best interests. On the basis of his hierarchical metaphysics Plato thus denies that all human beings are by nature equal and possess inalienable freedom rights. According to his theory, a democratic constitution, such as that of the United States, would fundamentally conflict with human nature. Because of its immorality and irrationality, it could make no claim to obedience at all.

The central problem of the classical natural-law doctrine, then, is that, on the one hand, empirical nature as such, as a consequence of its value-free character, does not appear to involve any (legal) norms; but that, on the other hand, each appeal to an underlying 'essence' that is not directly observable relies on indemonstrable metaphysics.

1.2.2.2 Naturalistic Natural Law: The Biological Model

Nonetheless, some natural-law theories are more acceptable to contemporary readers because they have a less metaphysical character. They advocate a conception of

nature that is inspired by a biological model that takes a middle position between conceptions that are completely value-free, on the one hand, and conceptions of a comprehensive normative-metaphysical character, on the other hand. According to this view – which is, for instance, to be found in the philosophy of Plato's pupil Aristotle (Section 2.5) – the diverse forms of life in (living) nature each show their own developmental design. A wholly mature human being has a different way of life than a mature ant. It is, therefore, possible to determine for each natural species which mode of life best serves its development. It is, however, questionable whether this view of nature can succeed in providing uncontroversial critical standards for the law.

Minimal forms of this model of natural law base their arguments on a simple biological fact: the human instinct for survival (Hobbes, Section 4.1; Hart, Section 1.2.3.2): in order to survive, man requires social organisation; because people, in addition to their social dispositions, equally display egotistical and aggressive characteristics, social life requires enforceable rules that prohibit violence, theft and the breach of contracts. This minimal natural law must, in other words, guarantee everyone's physical integrity, the right to property and contractual rights, if necessary through sanctions. However, this version of natural law is very minimal indeed. It is too meagre to provide a basis for the Enlightenment values of freedom and equality. Human beings can after all also survive in inequality and without liberties. In fact, in most cultures people live like this.

A less minimal version of natural law which does implicate the Enlightenment values must, therefore, contend that man prospers best in a society which is based on freedom and equality.[3] In this line of reasoning, the tendency to survive in groups is characteristic of many kinds of animals, and thus not specifically of man. People and ants both require social organisation. As a consequence of his greater intelligence, the *human* species is distinguished by a unique mode of organisation. Ants live in accordance with firmly established instinctive patterns, in a rigid, hierarchical organisation, organised in fixed classes (workers, soldiers and queen). In comparison, people are lacking in instinct, but compensate for this by means of their intelligence: they can learn from their mistakes; owing to their use of language they have access to information based on the experience of previous generations, and which helps them to determine which mode of action would best serve their goals in the long run. The social organisation of human beings, therefore, functions best when it is flexible and provides sufficient space for intelligent adaptation to new information. A problem for man is, however, that he can likewise use this free space in irrational ways, as his immediate instinctive reactions and spontaneous emotions are often not in harmony with his intellectual insights. (According to the theory of evolution, the layers of the brain where intelligence is situated have only recently been added to the older, 'animal' layers which constitute the source of emotions and instincts. Because of this, the intellect is in many instances too weak to control

[3] See, for example, Locke, Chapter 4, although one also finds that some of his arguments tend to remind one of classical natural law, specifically his appeal to God's will.

the emotions.) Acting instinctively one may become a chain smoker, even though anyone who takes his rational self-interest into account knows that in the long run he had better stop smoking. Nonetheless, many smokers are not able to follow their intellectual insight. Likewise, many people act in an asocial manner, although in the long run they cannot do without society. Therefore, it is necessary that people be compelled to discipline themselves by social rules and by sanctions, so that they fulfil the social roles that a well-ordered society requires. This serves their own well-being in the long run as well. Human societies must, therefore, on the one hand, limit individual freedom, but, on the other hand, grant enough space for free acquisition of information and for social dynamics.

Extending this reasoning, liberals contend that it is essential for the welfare of both individual and society that each person has equal freedom to think as he wishes, to express his thoughts, and to act accordingly. These liberties should be limited only if they infringe the like rights of others. Individuals can then develop their personality in accordance with their own insights, while society benefits as freedom furthers the growth of knowledge and new social initiatives.

However, conservatives argue against this that the Enlightenment philosophy allows for too much free space because it greatly overestimates human rationality and autonomy. In the conservative view, in reality man's intellectual abilities are extremely limited, so that he can hardly overcome his irrational emotions. Consequently, 'rational' attempts to transform society have ill effects. To orientate himself in the world man should rely on the traditional modes of life which are shaped by the experience of previous generations. Freedom to deviate from the traditions endangers the survival of the human species, the conservative critics conclude.

Even when this overestimation of human intelligence does not apply to everyone, critics of liberalism maintain that freedom is typically an ideal for intellectuals. The majority, by contrast, apparently feels more at ease in conforming with the prevailing traditions. Free criticism of traditions could under certain circumstances even lead to the loss of a communal sense of values and of solidarity, and hence to social disintegration. This at least would count against *equal* freedom for all: freedom is suitable only for an intellectual elite, not for the whole of the human species.

The advocate of freedom can still attempt to save his position with the contention that the intellectual mode of life constitutes the most complete stage of human development. However, the counter-argument may run as follows: are intellectuals not the very same persons who, while proclaiming unworldly ideas, make chairs fall over, get the food burnt and mess coffee on their clothes? Moreover, nothing guarantees that intellectuals will indeed use their freedom for increasing knowledge and developing new initiatives, and not for asocial conduct. Freedom, then, should be granted only to wise people who will definitely realise their liberties in a positive way (and who are thus in this sense not free). Thus runs the reasoning of Plato, whose elitist state ideal moreover includes inequality and a lack of freedom. The ideal of equal individual freedom is, in other words, deeply controversial.

1.2.2.3 Natural Law According to the Communication Model

Another contemporary version of natural law bases the universal validity of Enlightenment values on the non-metaphysical fact that man typically orients himself in the world through communication via language (among others, Habermas, Section 9.3). People determine their lives, consciously or subconsciously, on the basis of information based on the still growing life experience of successive generations, and which is passed on by means of language. Language enables people to convey new information, to argue about it, and, consequently, to strive toward a better way of life. This means that man, as a result of communication with others, can in the long run free himself from domination by nature and from oppressing social traditions. From this it follows that for his development man is reliant on social intercourse with others in a 'communication society'. Communication in its full sense can succeed only if certain conditions are complied with. The communication partners must rightfully expect of each other that they are sincere and that they are speaking the truth. (To lie now and then is acceptable, but this works only by virtue of the fact that people in general can expect honesty from each other.) Moreover, in ideal communication, one must appeal only to arguments which are acceptable to all participants. Inequalities in status and power may not play any role. In most actual societies these conditions are not complied with, which hinders full human development. From communicative human nature follows the normative ideal that actual societies must be reorganised in a way that enables an unlimited and truthful exchange of information and arguments, not influenced by inequalities in power or by indoctrination. This version of natural law implies that society and law are built upon a democratic deliberation procedure, based on the principles of freedom and equality. Societies which do not comply with this must be emancipated toward such an ideal, power free, communication community.

According to this view, the criterion of impartial argumentation and decision-making would, moreover, be immanent in legal reality as such: in the institution of an independent judiciary, the hearing of all parties, the distribution of the onus of proof, and the requirement that judicial sentences be adequately motivated. Admittedly, actual judicial decisions may frequently be influenced by social prejudices and partial interests. Nonetheless, as soon as these biases come to light, this will evoke criticism. Law's characteristic claim to impartiality implies a critical standard for testing positive legislation and jurisprudence: is this law or sentence justifiable from a neutral point of view, that is, can it be the outcome of a reasonable discussion between free and equal parties?

Critics of this variant of natural law argue that it, too, is based on an arbitrary selection from the totality of human characteristics. Open argumentation on an equal footing is viewed as the essence of human communication, which in turn constitutes the essence of human nature. But, in fact, people use language equally to manipulate, to defraud, to command, in short, as an instrument of power.

In general, the reproach is that natural law makes itself guilty of 'top hat' reasoning: the natural law advocate first inserts his moral preferences into his definition of

nature, and subsequently in triumph derives his morality from nature thus defined, just like a magician who conjures a rabbit out of his top hat after himself first concealing it there.

1.2.3 Descriptive Legal Positivism and Its Critics

In reaction to the indemonstrable metaphysical character which is often ascribed to traditional natural-law theories, *legal positivism* wishes to determine the concept of law exclusively on the basis of the concrete legal phenomena of everyday social reality. This movement identifies 'law' with positive legal orders, rejecting any reference to preceding legal values. Because actual positive legal orders can be very unjust, measured against the traditional natural-law theories, this approach has the consequence that immoral law is regarded as 'law', too.

The most important task of legal positivism then becomes to develop a theory of law which records all phenomena of positive law, and distinguishes these from non-legal social phenomena, such as etiquette, morality and politics. That this is a difficult task appears from the disagreements between the successive positivistic theories of law and between the positivists and their critics, which will be discussed in this section. The theory of John Austin gives a simple, and at first sight plausible, description of law: law consists of commands of the sovereign who enforces them through sanctions. On closer inspection, however, Austin's theory requires refining, which is provided by the theory of Herbert Hart: law is not merely based on power, for the competence of the highest legal authorities, such as the legislature, itself again is based on rules that invest them with authority.

To this Ronald Dworkin has reacted with a third legal theory which entails so many corrections to Hart's positivism that it no longer wishes to be called 'legal-positivist'. This latter theory reintroduces a necessary relation between law and morality, without, however, reverting to traditional natural-law metaphysics. It concludes that it is impossible to make an absolute distinction between law and morality, because, in the practice of positive law, moral principles inevitably play a role, particularly in the interpretation of legal rules. According to Dworkin, judicial interpretation should be regulated by the liberal principle of equal concern and respect.

Subsequently this ethical turn of legal philosophy has been criticised by the Critical Legal Studies (CLS) movement because of Dworkin's denial of social and legal reality. In fact, these critics contend, law is nothing other than a continuation of the political struggle, but with other weapons. All reference to justice only masks partial interests. If the distinction between law and politics were indeed to be that fluid, it would subvert the association of law with the morals of natural law, as well as the claim of legal positivism that law is a self-standing system which can be identified by formal criteria. Incidentally, leading critics of CLS favour a politics of emancipation that has been called 'super-liberalism'.

1.2.3.1 Austin: Law as Commands of the Government

The legal positivist John Austin (1790–1859) gives a simple, and at first sight acceptable, description of law as a social phenomenon. First, law consists of commands to act in a specific way. However, this description equally applies to other social phenomena, such as morality and etiquette. Legal norms distinguish themselves from these by their institutional character: they derive from a central institution. Austin calls this institution the 'sovereign', being the supreme authority in society. (In many legal orders local authorities, for example, derive their legislative powers from a central legislature, which is the highest legal authority.) Austin defines the 'sovereign' as the person or group whose commands the members of a society are in the habit of obeying, without itself owing obedience to any higher authority.

Moreover, unlike morality and etiquette, law has the function of ensuring that social interaction takes an orderly course. Law must, therefore, be effective. As appears from Austin's definition of the sovereign, law's effectiveness is partly guaranteed by the fact that citizens are accustomed to obey the commands of the highest authority. Yet, legal certainty requires more: people who nonetheless deviate from the norms, must be called to order by means of coercion. Thus, Austin defines law as the commands of the sovereign, maintained through the force of sanctions.

This positivistic definition implies that law may consist of very unjust commands. As long as the sovereign manages to enforce his decrees, then in Austin's view one can speak of law. This does not, however, mean that the moral evaluation of law is impossible. Austin simply states that this is not a legal matter. His positivistic concept of law wishes to be completely value-free. In other words, the determination of what law is, in this positivistic legal theory, is of a completely different order than the evaluation or moral merit of positive law. The question of when one ought to obey the law likewise belongs to the non-legal, moral perspective. The positivistic statement that, for example, the law of Nazi Germany is 'law' in its full sense, does not imply that it should be obeyed. It simply reflects a neutral observation of social facts.

In short, Austin emphasizes the social function of law of ensuring order: a central institution establishes its content, so that everyone knows what he has to comply with – in contrast to the much more diffuse and heterogeneous normative systems of morality and etiquette, which are not centrally organised. Furthermore, those who deviate from legal norms are kept under control by means of organised state force, which is absent in the case of morality and etiquette.

1.2.3.2 Hart: Primary and Secondary Rules

According to the legal positivist H.L.A. Hart (1907–1992), Austin's legal theory can give no account of a number of characteristics of positive law. Hart attempts to capture these shortcomings in a more nuanced theory. In *The Concept of Law* (1961) he contends that law is more than simply obedience to a sovereign government, caused by the threat of sanction and conformity to custom. A first objection against

Austin's legal theory states that custom and enforcement are insufficient to explain obedience to the law. A stable legal order requires that at least a number of legal subjects – specifically the authorities themselves – consciously accept the legal order as authoritative. On the basis of this objection, Hart substitutes the concept 'rule' for Austin's 'commands' and 'custom'.

The concept 'custom' refers only to an externally observable regularity in conduct. A 'rule', in addition, includes the awareness that the conduct ought to take place in that way. This normative consciousness constitutes what Hart refers to as the 'inner aspect' of the law. A rule, then, exists when the members of a group manifest a specific external conduct with regularity, and also accept a standard implied therein as correct. The latter appears when they criticise others (as well as themselves) for deviating conduct. By contrast, deviation from a custom is generally not a ground for criticism. When somebody occasionally deviates from his custom of sleeping on his right side, he will not be called to account by himself or by others. 'Not stealing' is, on the other hand, associated with the consciousness that one ought to respect what belongs to someone else. Therefore, theft implies the transgression of a rule, resulting in the attribution of blame. For that matter, in Hart's view the acceptance of a legal rule is not necessarily based on moral convictions. Conformism or self-interest can serve as motivation, too. Moreover, Hart does not require that, for a legal order to exist, *all* members of society need to accept it as authoritative. As social reality frequently shows, a legal order can function efficiently, even though a large part of the population experiences it as oppressive. For the actual existence of law it is sufficient that the majority in a society conform to the rules only in their external conduct (for example, because of fear of sanctions), as long as at least a number of its members, particularly the legal authorities, accept these rules as the standard for conduct.

A second objection to Austin's legal conception declares that the state, in turn, derives its powers to sanction from legal rules that regulate its competence. In this respect Austin's legal definition is circular: he defines law as the commands of the sovereign, but then it appears that the sovereign itself is defined by means of law. Moreover, legal rules that assign authority can hardly be described as commands backed by the threat of sanctions.

In conformity with this second objection, a further criticism of Austin states that he does not do justice to the specific structure of law in describing it as the 'commands of the sovereign'. As already mentioned, the institution of the sovereign is itself a legal figure, the power of which is determined by rules that assign authority. Apart from rules relating to legal subjects, law thus equally consists of rules which concern the legal institution itself. In other words, the legal norms that regulate the conduct of the legal subjects derive their own legal validity from higher norms that regulate the competence of the legal authorities. Law thus exhibits a layered, hierarchical structure of rules. The rules concerning the competences of the legal institutions likewise have a layered, hierarchical structure. In many legal systems, norms that confer authority themselves obtain their validity in turn from an aggregate of co-ordinating highest norms: the constitution.

For these reasons, Hart describes the law as a system of two kinds of rules. First, there are 'primary rules', which contain prescriptions for the members of society. In the latter respect they are akin to Austin's commands. Additionally, Hart distinguishes 'secondary rules'. These are rules which regulate the validity of the first kind of rules. They include the rules which identify the legal authorities, such as the legislature, the judiciary and the police. These secondary rules regulate the coming into effect and application of the law (and thus replace Austin's 'sovereign').

Differing from Austin, Hart consequently pays ample attention to the normative, internal aspect of law: to the fact that, at least for a number of participants, the legal order is more than mere force, as they are convinced that the law should be obeyed. Ultimately however, he still derives the legal order from a social fact. This happens when he asks whence the highest authority-assigning legal rules (the constitution) derive their authority. Hart then does not refer to a still higher natural-law norm, but to the actual acceptance of these rules by the authorities, and thus to a social fact.

Unlike classical natural-law doctrine, Hart thus rejects the view that normative legal consciousness – the subjective awareness of the participants in a legal order that the law should be obeyed even when there is no coercion – refers to an objective supra-positive, natural-law norm. At issue is a subjective conviction, which applies only to the 'internal point of view' of the participants in a legal order who accept its norms as correct. From the 'external perspective' of a scientist, who investigates the specific legal order like a sociologist or cultural anthropologist, such norms are not legitimate or illegitimate. An anthropologist can, for example, give a value-free description and explanation of the social fact *that* in some Inuit communities it is regarded as appropriate to send older members of the group to freeze to death, without subscribing to that norm himself. In this respect legal rules are comparable to the rules of a game. The participants in a boxing match will accept the rules of the game and complain when one hits the other below the belt. Just like a judge, a referee cannot function when he does not accept the validity of the rules. However, a neutral spectator will simply ascertain that some people clearly find pleasure in beating each other up in accordance with specific rules, without himself accepting these rules as fair.

Furthermore, from the perspective of a critical ethics, the norms which the participants in a legal order accept as right may be rejected as utterly immoral. Hence, most members of the classical Greek legal order advocated slavery, whereas according to most modern ethicists this is unquestionably unjust. According to Hart's legal positivism, a legal order which is viewed as unjust in this way, nonetheless qualifies as 'law' as long as (a sufficient number of) participants accept its authority. Hart endorses the thesis of Austin's legal positivism that the existence of law is to be distinguished from its moral merit.

Hart nonetheless speaks of a 'minimal natural law'. He contends that all existing legal orders must at least contain a number of fundamental norms, such as a prohibition against violence, because this is necessary for every human society. This minimalistic version of natural law is not derived from a metaphysical,

essentialist conception of man, but from human nature as it is observable by anyone. Hart points to empirical characteristics of man, such as his instinct for survival, his dependence on cooperation with others, and his egoism, which conflict with this; as well as to the condition of the world within which man must live, particularly the existence of scarcity. Hart's minimal natural law consists of rules which make communal life possible by reining in egoism, and preventing conflict about the distribution of scarce goods: rules which prescribe respect for everyone's physical integrity and property, rules for compliance with contracts, and the enforcement of rule-conforming conduct. Hart's minimal natural law does not consist of eternal, unchanging metaphysical laws. It is possible for empirical circumstances to change, and with that the rules which are necessary for the survival of man. If there were no scarcity, the need for property would be less urgent. Should people become more altruistic, sanctions might be superfluous. But as long as human life remains as it is, every human society will be based on this minimum natural law.

However, on the basis of these empirical characteristics of human life, at most a very minimal morality or natural law can be posited (of the kind that was referred to above as 'naturalistic natural law'). At stake is staying alive, not *good* living. The advantage is that the simple biological fact of the instinct for survival is for most people a plausible and uncontroversial starting point, whereas the conceptions as to what a good life entails diverge diametrically. (Although in proceeding thus, one has already excluded from discussion a fundamental problem, which Camus in his *Le Mythe de Sisyphe* (The Myth of Sisyphus, 1942) referred to as the most fundamental: 'There is but one truly serious philosophical problem, and that is suicide' (Camus 1991, p. 3).[4] Hart countered this objection by remarking that law is not meant for a suicide club.) The disadvantage is, however, that this minimal assumption provides an insufficient basis for a morality in the full sense, which can serve as critical standard for positive law, as traditional natural-law theory would want. Hart acknowledges that a legal order which complies with his requirements can nonetheless be very unjust. Survival in a group, for example, indeed requires the existence of the institution of property, but not that property be justly distributed. Even a society that is based on slavery, thus on inequality and a lack of freedom, is compatible with his minimal natural law. According to Hart, survival in a legal order after all does not require that *all* members of the society accept the existing rules as fair. It is even sufficient when a powerful minority does so, while the majority conforms to the rules only under the pressure of coercion. Such a system of norms Hart calls 'law', even if it is unjust and oppressive.

For these reasons Hart is an adherent of legal positivism: 'law' exists when in a specific area an aggregate of primary and secondary rules is accepted, at least by the authorities, and in general is efficiently enforced on the rest of the population. Law bears no necessary relation to morality, except in so far as each legal system will contain the rules of Hart's minimal natural law, as they are a necessary condition for

[4] See further in this respect, Sections 8.2.4 (psychoanalysis) and 9.5.1 (deconstruction) on the death drive.

social and legal order. However, these minimal rules of natural law cannot serve as a critical moral standard for the law, as they guarantee only order, and not a just order. Moreover, they do not constitute a meaningful critical standard, because, as a sociological fact, they will already be present in every stable legal order. In all societies there are such things as property, contracts and punishment. (One may add to this that the co-ordination of social action in more complex societies requires that the legal rules are published, that they are clear, that they are not changed at random, and that they are interpreted consistently. In *The Morality of Law* (1964, 1969), Lon Fuller summarized such principles as 'the inner morality of law'. However, Hart points out that they only guarantee legality and efficacy, not justice. Fuller's argument that the requirement of publication would prevent the enactment of unjust laws fails. In societies where slavery is generally accepted, nothing impedes the publishing of slave-enactments.) Under the concept 'law', Hart thus includes all actual legal systems. Legal science must analyse their content in a value-free manner. Hart points to the pragmatic importance of taking stock of the positive legal order as a whole, even when it appears partially unjust. It would, for example, be impractical if someone who seeks legal advice obtains information only concerning the just part of positive law, or if a law student would study only the morally just part of a specific legal order because only this part is real 'law' (as natural law would have it). As in the case of Austin, the moral valuation of law falls outside of Hart's legal positivistic programme: it is a non-legal issue, which is not, however, less meaningful.

Hart's legal positivism, in short, corresponds with Austin's in its separation of law and morals: law is what the legal authorities posit as such; it can accidentally be just, but equally, unjust. Hart improves on Austin, as his theory, by means of the introduction of the concept 'rule', takes account of the important social role of normative (legal) consciousness – even if this does not refer to something objective. He furthermore gives an account of the layered structure of law – the validity of rules lower in the hierarchy depends on those that are higher – due to the distinction between primary and secondary rules.

1.2.3.3 Dworkin's Criticism: Rules and Principles

Subsequently Ronald Dworkin pointed out in *Taking Rights Seriously* (1977) that Hart's depiction of law as a social phenomenon is also too simplistic. Dworkin rejects positivism, and specifically accuses it of unjustly taking for granted that law and morals are separate. He bases his criticism on an analysis of how judges proceed in solving hard cases which are not unambiguously covered by laws and precedent. Dworkin bases his analysis mainly on American law, where the Supreme Court plays an important role because of its power to test the constitutional validity of laws. The American Supreme Court therefore participates to a much greater extent in public moral debate than is the case in countries without constitutional review.

Thus, a number of legal phenomena that are considered as contingent by Hart, are promoted to essential characteristics in Dworkin's concept of law. Hart recognises that the interpretation by judges is often –

> guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles. Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values. … No doubt because a plurality of such principles is always possible it cannot be *demonstrated* that a decision is uniquely correct: but it may be acceptable as the reasoned product of informed impartial choice. In all this we have the 'weighing' and 'balancing' characteristic of the effort to do justice between competing interests (Hart 1961, p. 200).

However, Hart (1961, p. 201) maintains, this does not prove a *necessary* connection between law and morals because 'the same principles have been honoured nearly as much in the breach as in the observance'. In Dworkin's view, it is characteristic of judicial practice as such that judges are looking for right answers in hard cases by balancing the moral principles that provide the legal rules with a reasonable purpose. Dworkin, moreover, claims that adequate interpretation can indeed yield the right answer for any hard case. Hart, by contrast, maintains that in many cases law is far too indeterminate for that.

> In these cases it is clear that the rule-making authority must exercise a discretion, and there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found (Hart 1961, p. 128).

Likewise, Hart (1961, p. 196) recognises that all modern states at least pay lip service to the moral principle that 'all human beings are entitled to be treated alike'. However, this connection between law and morals is contingent, because many legal systems have excluded large classes of people from their protection. To be sure, the legal order of any society will be influenced by the prevailing moral traditions. But again, the accepted morality may very well rest on superstition and withhold its benefits from slaves or subjected classes. It is not necessary at all that it coincides with 'standards which are enlightened in the sense that they rest on rational beliefs as to matters of fact, and accept all human beings as entitled to equal consideration and respect' (Hart 1961, p. 201). Dworkin, by contrast, contends that judges should find their right answers by interpreting legal rules from the perspective of the highest principles of (American) law: equal concern and respect – or the liberal triad equality, brotherhood and liberty.

Like Dworkin, legal positivists nowadays agree that law consists of more than legislation: the judge must interpret legislation and supplement it in cases that were not foreseen by the legislature. Dworkin, however, disagrees with legal positivists as to the nature of judicial decision-making. According to Hart's positivistic theory, the judge creates new law when he decides hard cases, on the basis of his discretionary power. Legal positivism, after all, states that 'law' is what is acknowledged to be such by legal authorities, specifically the legislator and the judiciary. Law does not exist prior to its determination, so that the law comes into being only *by means of* the decision of the judge that solves a hard case which is not yet covered by law and precedent. In other words, in a hard case a judge does not find the law, but creates it. Dworkin objects to this view with the response that judges themselves see this differently. The judge does not view his decision in a hard case as a creation out of nothing that rests on his subjective choice. He tries to anchor it in existing

law, for example, by way of systematic interpretation, or by reasoning analogically or *a contrario* (pointing at a relevant difference). To be sure, he has the free space to choose whether to regard the law as applicable to the hard case by analogy, or *a contrario* to regard it as non-applicable, and thus to formulate judgments with opposing outcomes. His choice in favour of analogical or *a contrario* reasoning is, however, not arbitrary, but remains bound to the legal system. Judges wish to judge as justly as possible, not on the basis of their personal view of justice, but in accordance with the 'spirit' of the positive law. (The personal preferences of a judge of course in fact sometimes also influence his decision. But in his role as judge, he cannot use them explicitly to justify his decision. Judgments which are too subjective would be open to criticism.)

Dworkin, therefore, views the law as a unity consisting of more than written laws and judge-made law. The spirit of the law is hidden in the moral-legal principles which constitute the background motive of legislation and judicial decisions. Legislation is after all an attempt to give shape to a political community in accordance with certain moral ideals – at least in the Western world.

Dworkin concludes that Hart's 'rule' model of the law is too simplistic. Positive law consists not only of rules, but also of *principles*. While rules provide direct and clear-cut indications (which, for example, prohibit murder or regulate the powers of the public prosecutor), principles rather provide a background orientation for the interpretation of rules. For instance, in the United States the principle of equality constitutes the basis of legislation, and ranks as a guiding principle for all judicial decisions.

Such moral-legal background principles often do not explicitly form part of positive law. They, for example, do not have to be formulated in the constitution. Legislators are sometimes not even aware of such principles, often precisely because they appear self-evident to the legal community in question. Dworkin nonetheless does not allude to objectively existing natural-law values which precede positive law. His principles are tied to the existence of a positive legal order in a specific legal culture: they constitute its silent background ideology, and according to Dworkin form part of positive law itself. They, therefore, differ per culture and per legal system.

The lawyer can trace such basic principles by means of a systematic interpretation of the legal order as a whole: he must reconstruct it as a hierarchical normative structure, by formulating foundational principles that can summarize and justify as many legal rules as possible under their heading. He must, therefore, construct a moral theory which makes explicit the implicit coherence and purpose of laws and judicial decisions. Dworkin refers to this as the dimension of *fit*: the reconstruction must befit most of the laws and legal decisions that occurred in the past. But interpretation is forward looking as well. The legal system does not constitute a closed dogmatic whole, but an open system which develops into the future: within the possibilities of the existing law, the judge aligns himself in a hard case with the solution which is most justifiable in light of the general moral principles of his legal culture. Dworkin, therefore, gives the element of *justification* an additional role in the ideal

judicial reconstruction: in cases that allow for several reconstructions that, in accordance with the *fit* criterion, suit the existing law equally well, the judge must choose that reconstruction which can best be justified from the perspective of the ideals of justice of the specific society. After the lawyer has reconstructed the legal order in this vein, he should use the foundational principles thus discovered as guidelines for the further interpretation of the law in concrete hard cases.

As already mentioned, Dworkin bases this conception of the law on the way in which judges actually justify their decisions in hard cases: by connecting with the spirit of the law, as this appears from overt laws and precedent. Drawing upon the radical consequences of this discovery, Dworkin then proposes that judges should take this approach even more seriously in the future: judges should always decide the law through an analysis of the central principles of their legal order as a whole. These principles should not only give direction to each judicial interpretation; according to Dworkin they also ensure that the law already implies a right answer to hard cases before the decision has been made (even though this is not made explicit until the judgment). Citizens can, therefore, likewise have subjective legal rights without these being expressly proclaimed: they nonetheless follow from the legal system viewed as a coherent whole. Differing from legal positivism, such rights are not created *by means of* the judicial decision. Dworkin, therefore, contends that an actual judicial decision which is in conflict with fundamental legal principles, does not constitute 'law', or, at any rate, is legally wrong.

Dworkin recognises that in reality lawyers often disagree about the best interpretation of the law. Different interpreters can point to divergent principles as foundation of the legal order. Hence, one lawyer may regard the equality principle as the most fundamental in a specific legal system, and another the principle of freedom. However, as Dworkin points out, such disagreements do not imply that there is not one right interpretation. On the contrary, the very fact that lawyers discuss alternative interpretations with each other proves that they all assume their own answer to be the right one. Otherwise argumentation would make no sense. Even if final agreement will never be reached, the striving toward the best, most coherent interpretation is included in the actual practice of lawyers. In this spirit they should go on developing the law.

In contrast to legal positivism, Dworkin states that the interpretative role of the judge implies a necessary relation between positive law and morality. After all, the judge searches for the background principles that legitimise the legal order as just. He cannot, therefore, engage in a legal discussion without becoming involved in a moral discussion as well. The moral-legal principles consequently determine his interpretation of the law in concrete cases. According to Dworkin a systematic analysis of American law would point to the principle of equality as its fundamental principle. This does not entail the uniform treatment of all citizens, but a right to be treated as equals, or to equal concern and respect – Dworkin's rephrasing of the liberal principles of equality, fraternity and liberty (*respect* for a person's autonomy).

Does this not imply that jurisprudence assumes a political character that infects its claim to impartiality? Dworkin concedes that his approach will often lead to

judicial decisions that are politically controversial, for instance, in cases concerning abortion or euthanasia. In this sense, good judges are indeed involved in politics. However, they do not judge on the basis of party politics, nor are they influenced by their own political preferences. Their interpretation is still impartial, as it is guided by the immanent moral principles of the legal system. Thus in Dworkin's view, it belongs to the core tasks of the judicial power to protect the constitutional rights of individuals. Even if in constitutional review majority decisions of the legislature are overruled, this does not turn the judges into political activists.

Dworkin does not appeal to eternal and universal natural-law values, but to values which are implied in the existing legal system and the encompassing legal culture. He thus rejects the positivistic separation of law and morality. Nevertheless, he distinguishes these normative spheres from each other: in contrast to morality, law is institutionalised. Because of its function of ensuring social order, its content is to an important extent determined by central legal institutions, such as the legislature and judiciary. The content of the central legal principles must, therefore, primarily be derived from positive law as determined by the legal authorities – the dimension of *fit* in judicial interpretation.

This, however, means that the relation between law and (liberal) morality in Dworkin's theory is quite fragile. Dworkin himself realises this insufficiently because of his focus on American law. An analysis of the American Bill of Rights and other legal domains will certainly reveal that equal individual freedom is its founding principle. However, following the Dworkinian method of interpretation, the anti-Semitic legal system of Nazi Germany, as well as of the apartheid system in South Africa until 1994, would be traced back to a principle of fundamental *in*equality.

From this follows that Dworkin's legal theory only allows for immanent moral criticism of the positive law in a specific legal culture: legal rules lower down in the hierarchy can be rejected should they conflict with the fundamental principles of the same legal system. Criticism of the moral quality of the foundational principles themselves is, however, excluded. Such criticism would, in Dworkin's legal theory at any rate, not be of a legal, but of a purely moral nature. In contrast with the natural-law tradition, Dworkin's legal theory is, therefore, unsuitable to serve as a critical standard for a legal system, such as that of Nazi Germany, which is viewed as immoral in its entirety. In this regard Dworkin himself states only that, from the moral perspective of American legal culture, the normative system of the Nazis is simply something incomprehensible, and can be understood only as a perversion of law. However, from the perspective of the Nazi legal culture, the liberal principles of American law will equally appear as a perversion of law. By taking this relativistic view, Dworkin abandons any open discussion with cultures that have ideals which conflict with the American liberal values.

Since the Dworkinian principles are closely connected to positivised laws and case law, it has been contended that Dworkin's objections against Hart can be overcome quite well in a more nuanced version of the legal positivist programme that includes legal principles. The point of departure is positive law, identifiable by its

establishment in accordance with the secondary rules which regulate legislation and judicial decisions. Rational reconstruction then yields the unwritten central moral principles which are inherent in the positive legal system, and which can thus be indirectly identified in a positivist way. Next, these principles determine how a judge should interpret hard cases. Thus, what law entails is not determined by moral standards but, in an indirect way, by means of formal criteria. So far, legal positivism may be able to accommodate Dworkin's critique, without having to admit that the law implies right answers for all hard cases. Positivists may still maintain that judges often have to complement the incoherency of the legal system by the use of their discretionary power.

However, this extended version of positivism would only include the principles that belong to Dworkin's dimension of *fit*. In Dworkin's view, positive law does not constitute a closed system that can be identified by means of formal criteria. Indeed, as a *relatively* autonomous system, law is open to its social environment and to future social developments. Therefore, a judge cannot avoid taking notice of the dimension of *justification*: positive law can be understood only in the light of a broader moral discussion concerning what the law ought to be. The moral principles of the social environment that play a role here cannot be identified with the formal criteria of legal positivism. On the other hand, legal systems being relatively *autonomous*, ideal-typically 'law' can still be defined in a positivist way, for the bulk of its rules and principles can be identified formally. The remaining topic under discussion is whether social principles that do not fit, but yet influence, jurisprudence are to be conceived as legal standards, or whether they rather have an extra-legal, moral status.

1.2.3.4 Critical Legal Studies

Dworkin's legal theory, and particularly his association of law with morals, has been criticized by the Critical Legal Studies (CLS) movement, consisting of legal scholars, such as Duncan Kennedy, Roberto Unger and Peter Goodrich, who adopt a critical stance towards law under the influence of Critical Theory (see Section 9.1.5), postmodernism (Section 9.1.4) and deconstruction (Section 9.5).[5] The Crits purport to unmask the claims to objectivity and justice of the law, unveiling the suppression of the socially weak that lies behind it. This 'ideology critique' is intended to open the way to emancipation for oppressed groups.

Against Dworkin, the Crits argue that law does not at all constitute a coherent whole that generates right answers for hard cases. This should not come as a surprise when one takes a realistic look at the process of legislation. Indeed, even democratic laws are products of power politics: political compromises in which diverse political parties invest their conflicting interests. Parties with a libertarian program will

[5] We have as a rule refrained from capitalising philosophical and legal movements, except in instances where capitalisation is required to point out that a specific movement is at stake; in other words, in order to avoid confusion.

stress freedom, egalitarian parties will place emphasis on equality, communitarians will favour solidarity. As a consequence, legal codes comprise a patchwork of conflicting ideological aims. In their interpretation of the law, judges must inevitably make ideological choices in favour of one of these political agendas. Therefore, the Crits conclude, jurisprudence will reflect the political controversies of the legislature. Their critical view on the genesis of the law is thus linked to a claim in the field of justification: the fact that law forms a patchwork of contradictory values renders it impossible to rationally reconstruct it in a coherent way on the basis of immanent moral principles. And even if that would be possible, the Crits argue, actual judges would fall so far short of Dworkin's ideal of the perfect judge that their interpretations would still be partisan. In the radical version of this critical view, legal reasoning turns out to be mere rhetoric. Jurisprudence is not just political-yet-ethical in the sense of Dworkin, but brutally political, being the amoral product of power relationships. From behind its cloak of impartiality, the law is exposed as nothing but a continuation of social suppression by legal means.

Kennedy's summary of his critical studies, *A Critique of Adjudication*, contains an extensive critique of Dworkin, precisely because he is 'the emblematic modern American legal theorist' (Kennedy 1997, p. 75).[6] Kennedy appreciates Dworkin's theory as the most 'realistic' within liberalism, because Dworkin concedes that adjudication does not confine itself to the neutral interpretation of the legal material. His ideal judge not only justifies his decision by *fit* with the legal system, but also by coherence with the general views about justice that are prevalent in society. So far so good. But Dworkin's theory contains the further unrealistic assumption that these dimensions of 'fit' and 'justification' can be combined in a coherent and legitimate reconstruction of positive law. At this point Kennedy launches his critique.

First, *fit* is impossible because laws and precedents are themselves the incoherent outcomes of ideological struggle. Although the legal material does constrain the judge to a certain degree, it leaves him plenty of room to interpret it according to his own political preferences. The dimension of *justification* is not of much help either, for in modern societies general political and ethical views on justice tend to be controversial as well.

The most striking ideological struggle Kennedy exposes in American law is that between conservatism and liberalism. Unlike other ideologies, such as anarchism, communism and fascism, both opponents here are in agreement on the fundamental values of Western legal order. They endorse democracy based on majority rule, the rule of law, individual rights, a regulated market economy complete with safety nets, and a Judeo-Christian moral system. At a more concrete level, however, there are profound differences in the way that conservatives and liberals interpret these institutions. Liberals favour the equal treatment of underprivileged groups, such as workers, women and blacks, and are concerned with combating discrimination. Conservatives, on the contrary, try to preserve the traditional distinctions of status because, in their view, they reflect the natural order. Liberals are tolerant of pluralism

[6]This passage is derived from Maris (2002).

and strive for a more participatory democracy; conservatives want to maintain law and order in an authoritarian fashion. Conservatives choose the side of Capital and the free market; liberals defend the rights of Labour and of consumers, and support legislation to protect the environment against the economic power of the capitalists.

Each of these two ideological parties, moreover, is internally incoherent in the ways that they try to realise their ideological preferences. Egalitarian liberals, for instance, reject a paternalistic attitude towards deviant lifestyles, while in the economic field they advocate paternalistic protection. They invoke the needs of the majority against rights that protect traditional privileges, but appeal to individual liberty rights where these conflict with majority interests; conservatives do the opposite. Moreover, there are numerous situations where fundamental liberal principles, such as liberty and equality, are actually in contradiction with each other. Under the influence of his commitment to racial justice, for instance, a liberal will tend to prohibit hate speech, but at the same time he will be inclined to tolerate it in the name of civil liberties. A liberal judge will not even be able to find a right answer within his own ideology. Judges then, regardless of whether they are liberal or conservative, may arrive at completely conflicting answers.

Kennedy devotes special critical attention to private law. In his pioneering work, *Form and Substance in Private Law Adjudication* (1976), he maintains that in the legal relations between private citizens, two incompatible ideologies, that is, individualism and altruism, each of which sports its own legal uniform, are in a state of permanent war. Legislatures with an individualistic bias tend to make laws in the form of rigid formal 'rules', furthering predictability as a necessary condition for each individual for purposes of rational planning and the optimizing of his or her well-being. Altruistic lawmakers, on the other hand, prefer the form of open 'standards' of a more substantial tenor, such as 'good faith' or 'fairness'. Between contract partners, for instance, such standards implicate mutual obligations that go much further than the parties have explicitly agreed upon. The contractual relation requires, therefore, more solidarity than is implied in the free will and self-interest of the parties concerned.

According to Kennedy, all legal talk about rights and the rule of law, as if they were objective goods, conceals partial group interests. Kennedy speaks of an ideological struggle in which each party invokes a doctrine that legitimizes its own interests as universal values. Dworkin's liberal reconstruction of law is also an example of 'fancy theory', as is 'the project of the milieu of elite academic intellectuals self-consciously concerned with universalising the interests of various oppressed or disadvantaged groups' (Kennedy 1997, p. 300). Apart from representing partial group interests, legal intelligentsias, moreover, have autonomous interests of their own. The legal system gives them privileged access to the courts, which empowers them 'to settle ideologized group conflicts, through a mystified adjudication process' (Kennedy 1997, p. 224). They further their status by keeping up the appearance of being engaged in a neutral adjudication process; in this way they preserve the legal status quo, in the heat of the ideological combat in which they are an active party.

Unsurprisingly, Kennedy disagrees with Dworkin's contention that we should take judges seriously in their self-interpretation, as being impartial arbiters reaching for right answers. This pretension is mere window dressing. Kennedy reverses Dworkin's argument that the burden of proof to the contrary lies with the sceptics. Indeed, the deep ideological controversies about interpretation make the possibility of coherence very implausible. Up till now nobody has found a right answer, nor is it likely that someone will do so in the future. According to Kennedy, the self-concept of the judiciary is a form of self-deception caused by wishful thinking. Although judges are dimly aware that their judgments are not impartial, they conceal this from themselves and from the outside world. The general public displays the same attitude, because ordinary citizens also have an interest in keeping up the appearance of neutral arbitration: 'People want coherence for its own sake. . .because it is a pleasure, it is release from a kind of terror' (Kennedy 1997, p. 207).

Yet this inclination has undesirable consequences, Kennedy maintains. Due to the law's pretensions to objectivity, its rule is generally accepted as being natural and just, and it does not, therefore, provoke revolt. The sad by-product of this assumption has been lasting social inequality, and discrimination against weaker groups, such as the second (and third) sex, immigrants from the third world, and members of the fourth estate, or women, homosexuals, blacks and workers.

Kennedy (1997, p. 17) presents his subversive critique of adjudication as a 'project for changing the world'. He and other critics of CLS intend 'to delegitimate the outcomes achieved through the legal system by exposing them as political when they masquerade as neutral' (Kennedy 1997, p. 280). His critical characterizations of the legal system are intended to undermine the dominant belief in law as a natural and just order which impedes 'our efforts to realize justice and liveliness by falsely making it appear that they can't be realized' (Kennedy 1997, p. 17). In a positive sense, he wants to bring about a better world by empowering suppressed groups, so that they can participate in society on equal terms.

So far, Kennedy's approach is compatible with the Marxist critique of ideology (see Section 7.4). But his postmodern perspective also places him at a critical distance from the orthodox and neo-Marxist left. His critique is an internal one and has the aim of showing that current legal doctrines are incapable of living up to their own pretensions. He does not develop a Grand Theory, in the style of the Marxist explanation of law as a reflection of economic interests; nor does he offer any Utopian alternative. Kennedy's postmodern writings hint at a more aesthetic kind of liberation, to be attained by a permanent spiritual revolution. His critical studies intend to break up the rationalistic clusters of bourgeois culture, thus liberating suppressed vital irrational energies. They deploy –

> internal critique to loosen the sense of closure or necessity that legal and rights analyses try to generate. But rather than putting a new theory in place, it looks to induce, through the artificial construction of the critique, the modernist emotions associated with the death of reason - ecstasy, irony, depression, and so forth (Kennedy 1997, p. 342).

Kennedy recognises that this critique bites its own tail. If you deny that rational argument is possible, that very denial must be irrational too. And if all moral statements

lack objectivity, your moral alternative likewise just expresses one more emotional preference. From this radical conclusion Kennedy recoils. In the end he confesses to be closer to American pragmatism than to European postmodernist scepticism. Instead of doing away with legal reasoning completely, he rather embraces the pragmatist assumption that competing legal conceptions can be compared for their practical success. For instance, appeals to 'rights' have proved useful to oppressed groups. Therefore, the oppressed may go on using 'their rights rhetoric, when it operates effectively' (Kennedy 1997, p. 335).

More generally, Kennedy declares his belief in the rule of law, albeit with certain provisos. He agrees with liberals like Dworkin that there should be legal restraints in the relations between private persons and between public authorities and private persons. These rules should be enforced by independent judges who feel bound by the legal material. Surprisingly, Kennedy (1997, p. 13) concludes not only that citizens have rights, but also that such rights ' "exist", even if there is no Bill of Rights . . . and no legal recognition of the particular rights that particular countries consider "fundamental" '. His main proviso is that the liberal democratic rule of law cannot claim universal validity, since it has proven its relevance mainly in the context of Western culture. In short, Kennedy still believes in the rule of law, human rights, democracy and separation of powers as a desirable alternative to fascism and communism, provided that those concepts are not reified. So it seems that Kennedy's critical studies do not so much present a sceptical program, but rather a radicalization of the liberal project aimed at empowering excluded groups. (Likewise, in his later work Unger (1986, p. 41) labels his own critical program as 'super-liberalism'.)

On the other hand, Kennedy remains sceptical of Dworkin's claim that law can be rationally reconstructed into a coherent whole which renders a right answer for each legal dispute. Dworkin has responded to this critique, noting that the obvious fact that the law contains conflicting principles does not disprove his right-answer thesis. In private law, for instance, the judge should find the right solution by establishing a fair balance between individualistic and altruistic principles. This would indeed be impossible if such principles were incompatible, Dworkin maintains, but *that* CLS has failed to prove. Yet, Kennedy may very well be right in his critique that, in a dynamic plural world, judicial decisions are underdetermined by the legal rules and principles. But even if in major hard cases different decisions could be reasonably defended, this would not subvert the liberal rule of law. One way or another, such indeterminate cases are to be decided according to the formal procedures of adjudication. As long as the judge has adequately anchored his decision in the legal system, citizens should accept his arbitration as binding, even if they do not agree with its substance.

In summary, legal positivism may, at least partly, be saved from Dworkin's critique by incorporating moral principles that fit the legal system. Even if Dworkin is right in saying that legal systems are relatively open to their social context and its prevailing values, this would only allow for immanent moral criticism. The Dworkinian method of interpretation cannot overcome the boundaries of local legal cultures. Hart, then, is right in his thesis that law does not have a necessary connection with

an objective morality as the advocates of natural law maintain, nor with any critical morality that can claim universal validity. On the other hand, the identification of law and power politics of CLS would hit the mark only if their scepsis of rational ethical discussion holds. If, by contrast, it is assumed that we can learn from history, criteria for rational and moral progress in the sense of the Enlightenment may emerge from the political struggles, even if these cannot claim to represent eternal truths. This seems to be the pragmatic conclusion of Kennedy, too. In that case, the immanent claim of law to impartiality and justice can be met with a liberal standard that comes close to Dworkin's principle of equal respect. Anyhow, legal philosophers of all kinds, positivists included, will acknowledge that in modern Western societies law happens to coincide with liberal morality, albeit in a far from perfect way.

1.3 Law Between Power and Morality

In the 19th and 20th centuries legal positivism increasingly pushed aside natural-law theory. The reason for this lies partly in the ideal of a value-free science and partly in waning confidence in the possibility of formulating generally valid standards for law. Within legal positivism, as already mentioned, two variants are to be found: the one, normative, and the other, descriptive.

The descriptive version of legal positivism of Austin and Hart views the study of a legal system as a value-free scientific activity, comparable to the procedure adopted by a natural scientist who formulates a theory of atoms. It thus wants to make the study of law independent of the moral discussion concerning what law should be and when it should be obeyed. In addition, according to the descriptive positivists, law may be critically evaluated in terms of independent moral criteria. Just as the atom physicist, after the formulation of his theory, can concern himself, from a moral point of view, with the social consequences of his enquiry (for example, about the production of atom bombs), the lawyer can, from a non-legal, moral point of view, furnish commentary on the claim to obedience of the positive legal system.

Normative legal positivism bases the distinction between law and morality primarily in the certainty that the positive legal order offers, in contrast with the uncertainty regarding generally valid standards in a moral discussion. For this reason, unlike descriptive legal positivism, it attaches a normative conclusion to the establishment of what the positive law is. Because of the importance of social certainty and order, it argues in favour of an absolute duty of obedience to the rules issued by the central government, whatever their content.

The German philosopher Radbruch (1878–1949), for example, argued in the first half of the 20th century that law is directed at three aims: justice, legal certainty and effectiveness. This relation between law and justice suggests a natural-law conception. However, because of the fundamental disagreements about the substance of 'justice', according to Radbruch in social practice the principle of justice cannot serve as a critical moral standard for the law. Instead, he regards legal certainty as the ultimate legal principle. Broad agreement, after all, does exist concerning the function of law of ensuring order: it must at least guarantee the orderly functioning

of society. For that reason legal subjects must know which norms they need to comply with, in accordance with the principle of legal certainty. The indeterminacy of the concept of justice stands in tension with this. If everyone were to interpret the law according to his own moral convictions, chaos and conflict would quickly make an end to all order. The fundamental social importance of clear legal norms made Radbruch adopt a legal positivistic position, even though personally he was of a liberal social-democratic conviction: law is what the legislator lays down to be such, irrespective of its content. He added to this the normative prescription that the judge should always apply the law, even if he considers it unjust.

Radbruch, however, later made an about-turn in this respect. Towards the middle of the 20th century he was confronted with the German Nazi regime, which enacted law that in the view of liberals like himself was extremely unjust. To Radbruch's dismay, former law students who had been educated in normative positivism, as judges uncritically accepted the dictatorial, anti-Semitic Nazi laws. Absolute obedience to such a completely immoral order Radbruch now found to be unacceptable. For this reason he wanted to make the duty of obedience dependent upon moral criteria. He did not do this in the way of the descriptive positivists by arguing for an independent moral discussion concerning the merits of the law, in addition to a value-free legal analysis. After the Second World War Radbruch rejected not only the absolute duty of obedience, which German legal philosophy had associated with positivism, but also legal positivism as such. He searched for the solution in a revised natural-law doctrine, which emphasises the link between law and justice, now equating justice with human rights.

The atrocities of the Second World War led to a general revival of natural-law philosophy. In the Netherlands, for example, natural law made a comeback in reaction to the uncritical attitude of the Dutch Supreme Court between 1940 and 1945 regarding countless unjust measures of the German occupiers. In 1942 the Supreme Court had agreed with the repeal of section 1 of the Criminal Code which entailed the principle of legality (permitting punishment only on the basis of a previously existing criminal provision), making punishable all conduct that is regarded as dangerous for the social order and in conflict with the 'sound opinions' of the people. This opened the gates for great arbitrariness on the part of the occupiers. For this reason there was a need after the war for critical standards against which to measure the law. The renewed call for a moral infrastructure for the law likewise appeared during the processes at Nuremberg. In the course of these processes, Nazi war criminals were punished because of 'crimes against humanity', which, when they were committed, were not as yet positivised as crimes. This meant a violation of the principle 'no punishment without a previously existing penal law'. The trial was nonetheless justified with the natural-law argument that the Nazis could have known even before the positivisation that their inhuman conduct was criminal.[7]

[7] Against the processes at Nuremberg, it is contended that they amount to one-sided victor's law. Hence, no prosecution was instituted against war crimes of which the allied forces also made themselves guilty, such as the bombardment of civilians.

Currently the view of normative positivism that positive law has to be obeyed unconditionally is practically never proclaimed. Because of this the traditional discussion between natural-law doctrine and (descriptive) legal positivism has lost much of its practical significance. Both movements after all connect the duty to obey the law with an evaluation against moral criteria. Moreover, most of the followers of the two movements acknowledge the importance of the function of law in maintaining order, and of legal certainty. For this reason, even the adherents of natural law argue that one may be disobedient only if the legal order as a whole is fundamentally immoral. A mildly unjust order one must, on the other hand, attempt to change by legal means, because it is still better than disorder and conflict.

The remaining disagreement between legal positivists and the adherents of natural law relate primarily to the question whether moral criticism should be included within the concept of law. In so far as the relation between law and morality is concerned, the modern legal positivism of Hart has indeed come somewhat closer to natural law, although it retains the thesis that law does not have a necessary relation with morality. Differing from Austin, Hart points out that the efficient functioning of the legal order requires that a section of the participants, particularly the legal authorities, must regard the prevailing law as binding. In a subjective way, something like a normative consciousness thus plays a role in positive law, too. Furthermore, legal authorities, simply for considerations of efficiency, will always present their normative system externally as just and never simply as pure power. Both the German Nazis and the National Party in South Africa attempted to give an ideological justification for their laws. The holders of power, in doing this, open themselves to criticism based on these pretences. In short, even the legislature and the judge in an immoral legal order will never be able to withdraw themselves completely from a moral discussion. Moreover, contemporary legal positivism has integrated the criticism of Dworkin: that the law should be understood from its immanent moral background principles, and that this affects judicial decision-making. In general, the current view in most jurisdictions as to the function of a judge entails that in his interpretation he should search for a solution which is as just as possible within the system of law. This task is even more important in those legal systems where judges, because of judicial review on the basis of an enforceable Bill of Rights, have to solve political-moral problems that previously belonged to the domain of the legislature, such as the death penalty, abortion, and euthanasia.

The gulf between legal positivism and natural-law doctrine in Western culture has, moreover, been narrowed by the fact that contemporary Western legal systems have adopted the form of the democratic constitutional state, and have positivised a number of moral values which were previously developed by moral philosophers, particularly the Enlightenment values of freedom and equality. The American Declaration of Independence is an example of this. The moral principle of equality has, moreover, been positivised in the legal orders of most countries with Bills of Rights. Because of this, moral discussion has become part of positive law, even according to the criteria of legal positivism. Hence, the formulation of the right to equality in constitutions often leaves open *which* instances are to be regarded as similar for purposes of determining equal treatment. The judge or lawyer must,

therefore, give a more detailed interpretation of the principle of equality, and then necessarily has to engage in an act of moral balancing. Most people agree that the formula 'Equal cases should be treated equally' does not mean that all people deserve absolutely identical treatment. A person who is sick, for example, requires different treatment from one who is healthy. Criteria of relevance thus need to be found to distinguish justified differences in treatment from those that are unjustified. And with the question of which differences are justified in which contexts, a judge finds himself at the centre of ethical debates. The right to equality as protected in a constitution can furthermore conflict with other moral principles that have been enacted, such as the rights to education and freedom of religion. This could lead to problems of priority between the principles of freedom and equality: may, for example, a school founded on religious grounds make a distinction based on sexual orientation when selecting applicants for the teaching profession? Because constitutions often do not establish a hierarchy between these principles, one here has to revert to the ethical question whether freedom or equality deserves priority. The theory of justice of Rawls (Sections 10.5 and 10.6) attempts to give an answer to questions such as these.

Specific subdivisions of positive law likewise contain more broad, morally laden terms, such as 'good faith', 'reasonableness and fairness', and 'unlawfulness', which require more detailed interpretation.

In consequence of all of this, the central question of legal philosophy concerning the relation between law and morality remains an actual one, both for the legal positivist and for the adherent of natural law. No one can withdraw himself from the question of when law is legitimate, and whether it is possible to criticise the law from a rational, moral perspective. The next question then is: what precisely does 'justice' entail, and how can one determine its content? The problems of legal philosophy are, therefore, to be answered within the framework of ethics in general.

However, in ethics the same problem returns that came to the fore in the discussion of natural-law theory: how to justify a generally valid ethics when metaphysical worldviews, such as that of Christianity or of Plato, have lost their plausibility? The rise of scientific thinking has strongly affected the persuasiveness of such metaphysical views. Moreover, contrary to the position during the classical period and the Middle Ages, currently no self-evident consensus exists regarding human nature and the morally good life. Individuals and groups living within the same society have very diverse moral convictions. In many European countries, for example, a large majority subscribes to the values of freedom and equality, but at the same time these countries host cultural minorities who regard such values as immoral. Besides, the Enlightenment ideals can be weighed up against each other in different ways: more equality often implies less freedom. The central question therefore is whether the modern worldview can nevertheless furnish a sufficient basis for a generally accepted ethics and concept of law, which enable people to live together in a peaceful and fair way, in spite of their conflicting ideals.

This is, moreover, a global problem, because as a result of more efficient means of communication, cultures with completely opposing worldviews increasingly come

into contact with each other. The adherents of the Enlightenment contend that it is precisely the ideal of equal individual freedom that provides an answer to the problem. Their emphasis on freedom and autonomy after all allows everyone optimal space to live according to his own convictions, as long as the equal freedom of others is not affected. The law, in their view, has as function to guarantee this equal freedom. The law may, on the other hand, not enforce one particular view of the good moral life. Opponents argue against this that the liberal emphasis on individual autonomy itself likewise involves a moral preference which is not superior to other conceptions of law and morality. They even regard the ideal of freedom as inferior, because it allows freedom for an immoral mode of life as well. It would, moreover, encourage individual egoism and undermine all communal spirit. In their view, the core function of the law is to suppress immoral conduct and egoism.

The central question *Law, Order and Freedom* raises is the extent to which the liberal Enlightenment values can serve as universal foundation for law. On the one hand, most people have a basic intuition that specific moral views are better than others, and that one can even speak of moral progress in law. Consequently, most people in the West, but also elsewhere, will reject as 'primitive' or as 'inhumane' legal systems which punish theft with the cutting off of a hand, or which allow for racial segregation, or significant inequalities between men and women. This means that they actually regard a legal system which recognises the ideals of freedom, equality and fraternity, democracy and human rights, as superior to a legal system where opposing moral values find expression. On the other hand, many people nowadays incline towards a relativistic view regarding morality. They acknowledge that they can give no objective, generally valid arguments for their moral intuitions.

The question as to whether moral convictions, and particularly those of the Enlightenment ethics, can be objectively justified, can be answered only against the background of general philosophical conceptions of man and reality (the nature of being, or *ontology*, *metaphysics*) and of the possibility of knowledge of reality (theory of knowledge, or *epistemology*). In the rest of this book such general philosophical questions will be discussed within the framework of a history of Western legal philosophy.

1.4 Conceptual Framework and Brief Overview of the Subsequent Chapters

In the chapters that follow, three periods will be discussed, each with its own worldview that is characterised by a specific relation between ontology, epistemology, ethics and legal philosophy: the Greek-Roman period (having experienced its Golden Age of philosophy in the 4th and 3rd centuries BC), the Christian Middle Ages (500–1500 AD), and the Modern Age (16th century until today). In broad terms, the following historical line will be sketched: a development has taken

place from the worldviews of the classical period and the Middle Ages, which presupposed a coherent unity and purpose in the universe, to the worldview of the Modern Age, which is characterised by increasing fragmentation, individualisation and relativisation. In the domain of ethics this entails the transition from a *broad* notion of ethics which concerns the whole of human life and a natural-law doctrine derived therefrom, to a more restrained, *narrower* notion of ethics, which restricts itself to rules which are necessary for living together peacefully and fairly. This can, in law, take the form of either a liberal natural-law doctrine or a descriptive legal positivist view, the latter possibly combined with a liberal ethics.

In the Greek-Roman period and in the Middle Ages people took for granted that behind the phenomenal world within which man leads his everyday life, a higher spiritual order is concealed. This spiritual world gives unity and meaning to empirical reality. Since the empirical world is viewed as an imperfect materialisation of the spiritual world, the latter serves as the standard by which to perfect the former. According to the idealistic worldview, the good is thus objectively present in (the higher sphere of) nature. Hence, in Christianity man is conceived as a being who is, on the one hand, created in the likeness of God, but who, on the other hand, does not share in God's perfection. Therefore, in this conception man must strive to develop those aspects that he shares with God. This implies a *broad, perfectionist* concept of ethics, which commands man to align himself fully with an ideal of perfection. (Natural) law, in this view, serves to enforce compliance with this perfectionist morality, and thus to ensure that man lives in accordance with his essential nature. Plato consequently developed a theory of the ideal state with detailed prescriptions for the mode of life of all subjects, depending on their social position. The aim of Plato's state was the perfection of the populace. Such a perfectionist ethics does not make provision for any individual freedom to arrange one's life according to one's own convictions. How one must live *as* man is after all objectively determined in nature, and is not left to individual choice. In this conception there is, therefore, no place for liberal freedom rights. Plato, moreover, rejects democracy, because in this regime every person's views count equally, irrespective of whether these are in accordance with the objective standards of a just and perfect life.

Characteristic of the Modern Age is the rise of *natural science*. Modern natural science restricts itself to an explanation of empirical phenomena. The idealistic assumption that, behind the phenomenal world, another non-observable spiritual world would be concealed, is rejected as indemonstrable metaphysics. In ethics and legal philosophy this worldview has led to two contradictory tendencies: one *emancipatory*, and the other, *nihilistic*. On the one hand, people think that emancipation can take place on the basis of scientific knowledge of nature and of man: by means of objective knowledge man will be able to free himself from religious prejudices and the feudal power asymmetries of the dark Middle Ages. On the basis of a realistic view of the world, he will be able to arrive at an independently chosen mode of life. In an ethical respect, emancipation implies that each individual has an equal value as a free and autonomous person. This leads to the ideal of a society of self-conscious individuals, who in free and equal deliberation with others can establish the course of their own lives. These emancipatory ideals are most

strikingly formulated in the values of freedom and equality of the 18th-century Enlightenment, and the related constitutional ideals of democracy, the rule of law and human rights (Chapter 5). This ethics is directly opposed to the ethics of Plato and Thomas Aquinas, who regard an individual definition of life as utterly immoral. The Enlightenment philosophers, on their part, in general wish to challenge the authoritarian tendencies in the ethics of Plato and Thomas Aquinas.

This emphasis on individual autonomy implies a *narrow*, *liberal* notion of morality. The individual is responsible for arranging his own life. For this reason morality does not prescribe a specific mode of life on the basis of an ideal of the perfect man, as in the classical and Christian broad, perfectionist concept of ethics, but leaves man free in his choices. In this modern conception, man's autonomy, his ability of self-legislation, constitutes the core of human dignity. Because of its limited claims, this modern morality is referred to as a 'narrow morality'. Government and law, in this view, likewise have a limited function. They must not impose a virtuous life in a perfectionist sense on all citizens, but limit themselves to creating the conditions for the equal freedom of all. Differing from anarchism, which regards *every* governmental limitation of individual freedom as evil, liberalism does assign certain organising functions to law that restrict liberties. It is sceptical about the anarchic presupposition that free persons will spontaneously respect each other, and takes account of the possibility that people may instead infringe each other's freedom rights and harm each other's interests. However, the liberal legal order may limit the freedom of citizens only to regulate their conflicting interests and to protect their freedom rights. It may, apart from this, not enforce a specific mode of life simply because the authorities regard it as morally good (*moralism* or *perfectionism*). The state may also not force an individual to act in a certain way because that would serve his own interests (*paternalism*). Law and morality in the liberal view thus have an internal connection, but of a specific, limited nature. Individual freedom finds its limit in the legal order which protects the equal freedom of all others, and the legal order finds its limit, in turn, in the freedom rights of the individual citizen. Individual autonomy is protected by the classical human rights, which guarantee freedom from state interference. The government may promote only the virtues which are presupposed by a liberal legal order, such as respect for the person and property of others (and possibly even virtues which are presupposed in an autonomous mode of life, such as independent thinking and openness to information). Such a narrow legal philosophy, based on the autonomy ideal, is to be found with Locke and Kant (Section 4.2 and Chapter 6). This is not to say that liberals do not support a more far-reaching ideal of human perfection than simply that everyone should be autonomous. Liberal negative freedom is not an aim in itself: it must still be realised in greater detail. Every individual should do this according to his own representation of human perfection. Almost nobody simply follows his wishes uncritically as these present themselves to him: most people organise their preferences from the perspective of life ideals which extend over a longer period. For example, even someone who is addicted to the smoking of nicotine will, on being asked, acknowledge that he would actually prefer to kick the habit because of the health risks. On a personal level everyone is thus a perfectionist in his own way. Liberals can, moreover, support more far-reaching

perfectionist ideals for all persons, for example, 'you should never lie' or 'cultural development is desirable'. However, on the level of political and legal philosophy they do not see here any task for the state, since it concerns a question of individual responsibility. One may of course still attempt to convince others of one's ideal by means of argument. Liberalism is, in other words, primarily concerned with the social conditions enabling an independent life.

The worldview of natural science, however, implies an opposing nihilistic tendency as well: values, such as those of the Enlightenment, are difficult to ground in nature as it is understood by modern science. Natural science after all limits its knowledge to nature as it is observed by the senses. The modern ideal of science implies that theoretical hypotheses must be capable of being tested by means of empirical experiments. Platonic and Christian metaphysics, which assume the existence of a higher world behind the empirical world, are, therefore, regarded as indemonstrable speculation. And it is seriously doubted whether an ethics can have its *only* foundation in the observable world. The empirical world after all equally exhibits phenomena which rate as immoral and phenomena which are regarded as morally good. The very function of ethics is making a distinction between these phenomena. Objective values are not observable *in* the empirical world. For this reason one can, according to the model of natural science, speak objectively only about observable facts, not about norms. This means that one can, equally, choose lack of freedom and inequality or favour the Enlightenment ideals. Viewed thus, the scientific worldview tends towards moral *non-cognitivism*.[8] In its most radical form, this tendency can result in moral *nihilism*: there is no objective morality; one lives only once, thus why would one place restrictions on oneself? Why would one actually take account of others? Why not live egoistically and aggressively if this is how things are? The optimistic belief in progress of Enlightenment thinking thus stands in contrast to the fundamental meta-ethical problem of the Modern Age: how can these Enlightenment ideals underpin their claim to universal validity? Does the Enlightenment really amount to objective moral progress in comparison with Greek ethics?

Non-cognitivism nonetheless does not necessarily have to lead to nihilism: it can in its turn serve as the basis for a *narrow morality*, which to a certain extent corresponds with the Enlightenment values. This may be argued for as follows. Although there are no objective moral values, people need shared rules as they have to live with each other. Therefore, one has to search for a less far-reaching system of norms that is acceptable to all members of society. One then arrives at a narrow morality that limits itself to the rules that are necessary for peaceful social life. For the rest, everyone must live in accordance with his own convictions, as a 'broader' morality cannot be objectively founded. Here a liberal view of ethics and law is thus presented as a moral solution of the 'second order' for the problem that people must live together, although they have conflicting views of the 'first order' regarding the good life (see the liberal theory of justice of John Rawls, Section 10.5 and 10.6).

[8]The thesis that moral knowledge is impossible.

One problem, however, is that this second order ethics works only when all are prepared to compromise – social stability may even require that all endorse a meta-ethics of tolerance. It does not provide an argument against a powerful group that has the will and the ability to impose its views on the rest of the members of society.

One point of criticism of adherents of a broader morality against the narrow, liberal morality is, moreover, that it provides an insufficient basis for social cohesion. In contemporary thinking this criticism of liberalism is expressed by communitarians, such as MacIntyre (Section 9.1.2), and partly by neo-Marxists (Section 9.3.1). From the time of the Enlightenment they were preceded by philosophers, such as Rousseau (Section 5.5), Hegel (Section 7.3) and Marx (Section 7.4). These opponents of liberalism object to the individualism of Enlightenment thinking. According to them it encroaches upon the solidarity which is required for social life. Moreover, according to this criticism, liberalism is based on an overvaluation of the value of autonomy: in fact, individuals are not at all capable of determining their lives autonomously, independently of the communal traditions in which they grow up. Communal life, therefore, has a higher value than individual freedom. Only in a community with others can one arrive at full maturity. These anti-liberals in many instances revert to classical perfectionist views, contending that the legal order should greatly restrict individual freedom on moral grounds. When individuals have the freedom to do what they want, according to the perfectionists, they often make short-sighted choices that hinder them in their further development. Addicts of nicotine, gambling, drugs or television, for example, make themselves the slaves of their own desires, which means that they are not *really* free. Perfectionists, therefore, distance themselves from the liberal view of freedom, which entails freedom *from* external hindrances (such as state force), and which leaves it open to the individual to decide how to fill in this free space (*negative freedom*). In opposition to this they propose a completely different, metaphysical concept of freedom: one is free when one can unimpededly develop one's true nature (*essential freedom*). According to them, the state must, if necessary by means of coercion, ensure that man is free in a complete sense: free to develop an attitude to life in which he finds the full development of his true humanity, unrestricted by his own internal irrational tendencies. The law then serves to perfect man in this direction.

The following conceptual schema explains the diverse views on freedom:

X is free from Y toward Z

X stands for the *bearer* of freedom, for example, a person or an organisation. Y stands for *restrictions* on freedom. Z stands for the *goal* which freedom is meant to serve. Freedom is, in other words, a relational concept. One must always ask oneself: who is free from what for the attainment of which goal? This book focuses on the role that the law must play in this regard. On the one hand, law creates order, by means of which it restricts everyone's negative freedom. On the other hand, everyone, with the exception of radical anarchists, is convinced that freedom without law is not possible either. In the liberal conception, law specifically serves

to guarantee everyone's equal, negative freedom against unjustified infringement by others.

In accordance with the classical version of liberalism, the human individual is the subject of this freedom (X). The individual is himself responsible for the determination of his ideals and other goals (Z). Classical liberalism deduces this from a specific concept of man: characteristic of man is his autonomy. This implies a liberal standard of human perfection: one's life is imperfect when one cannot plan it oneself.

From this, moreover, follows how liberals define restrictions of individual freedom (Y): external restrictions which stand between oneself and one's goals. Freedom is then freedom *from* such restrictions. Classical liberals refer in this respect primarily to restrictions such as physical force by the state or fellow human beings. Later liberals, however, arrived at the insight that one can equally be impeded by the *lack* of goods, such as sufficient food, health, knowledge or income. Hence the distinction between *negative* freedom from *positive* restrictions, or freedom from the disagreeable presence of something; and *positive* freedom from *negative restrictions*, or freedom from the disagreeable absence of something.[9] Negative freedom is protected by means of the classical freedom or preventive rights. When the state restricts its actions to this, one has the 19th-century minimal state. Positive freedom is guaranteed by social human rights, as advocated by social-democratic liberals: otherwise there cannot be any *equal* freedom. In the 20th century, the social-democratic version of liberalism led to a comprehensive welfare state. State and law now concern themselves more intensely with social and individual life than in the preceding century.

Should one wish to indicate the goals (Z) for which someone can use his freedom, one can draw a further distinction between 'wish-directed preferences' and 'ideal-directed preferences'. Someone who subscribes to *ideal-directed* preferences, subjects his factual wishes to a qualitative judgment, for example: 'With the type of person I want to be it is not compatible that I spend my time with pornography or drugs.' Addiction to drugs then amounts to an internal impediment to what he actually wants, or even to the development of his professed essential nature. Someone who does not make such distinctions between wishes and ideals only has *wish-directed* preferences. He acts according to all his wishes, as these thrust themselves upon him.

Almost everyone in his *own* life makes qualitative distinctions between his wishes, which result in ideal-directed preferences. Almost all people are, in other

[9]Isaiah Berlin, in his famous essay *Two Concepts of Liberty* (1958), gives a different definition of 'negative' and 'positive freedom'. Regarding negative freedom he thinks only of freedom *from* external hindrances, irrespective of the purpose. His negative concept of freedom can, therefore, also include what was described above as 'positive freedom'. On the disagreeable absence of things, he did not express himself, so that he had no need for this conceptual differentiation. Berlin's 'positive freedom' is concerned with freedom *towards* something else, and thus with the realisation of the content of the concept of freedom. Berlin, as a liberal, contests especially the version of freedom which was referred to above as *essential freedom*.

words, in their own lives perfectionists: they posit certain ideals for themselves in accordance with which they attempt to live. It only becomes problematic when *the state* is granted the task of evaluating the wishes of its citizens. Only in this political sphere does the real controversy arise between perfectionists and liberals.

According to perfectionists, it is a central task of the state to 'perfect' the preferences of citizens in the direction of some ideal of human perfection. The state then determines coercively what is good for an individual, or the 'Z' in the schema. True freedom is here again *essential freedom*: the freedom to thrive fully according to one's essential nature without impediment. Ideals of the good life are in this view objectively given with human nature and are, therefore, not dependent on the choice of the individual. According to Aristotle, this entails the nurturing of the reasonable and social nature of man that distinguishes him from the animal. Thomas Aquinas thinks of the development of the characteristics which man shares with his Creator. At issue in both instances is the elevation of the spirit over the body. Vile, animal instincts can, after all, impede higher, truly human aspirations. The internal disturbances of the vile, animal instincts can be so strong that the individual can no longer cope on his own. Liberal negative freedom of choice then precisely means an immoral restriction of one's essential freedom: it permits one to be dragged along by irrational impulses. In such an instance the state must by enforcement of the law provide for the orderly management of the internal organisation of the individual life, not only for the peaceful external relations between legal subjects. Thomas Aquinas for this reason argues for strict laws against all sexual preferences which are not aimed at procreation within marriage. Moreover, from the perspective of their Z ideal, non-liberal perfectionists define the subject of freedom (X) not as an autonomous individual, but as a member of a community. According to Aristotle, one attains one's true freedom via active participation in political life. In this collectivist view regarding X and Z, individual freedom of choice and negative preventive rights against others can thus be understood as immoral impediments to one's essential freedom.

State perfectionism finds expression in both elitist and egalitarian forms. According to classical perfectionists, such as Plato and Aristotle, only a small group is par excellence the bearer (X) of the essential characteristics of man, such as reasonableness, and thus of *essential freedom* (Z): for Plato, the philosophers; for Aristotle, the free male citizens. Other human beings are inferior, and, therefore, not X. Workers (and, with Aristotle, women) exist only to serve the elite slavishly, and thus know neither negative freedom nor essential freedom, and consequently not any impediments to freedom either. The elite must rule over the rest in a *paternalistic* and *moralistic* way. Modern philosophers, such as Rousseau (Section 5.5) and Marx (Section 7.4), on the other hand, often combine their perfectionism with an ideal of equality: one must live with all others in a fraternal community. Rousseau's *fraternal* human ideal indeed includes equality, but no individual negative freedom vis-à-vis the community. Marx's fraternalism likewise entails no negative freedom rights, but does combine fraternity with positive freedom: state care guarantees that the means to satisfy the most important necessities of life are not lacking.

Someone who on principle rejects state perfectionism is a liberal. From his perspective all these variants of legal enforcement of *essential freedom* entail positive impediments to individual autonomy, thus lack of negative freedom: suppression from which one should emancipate oneself as quickly as possible. The state must respect the wishes of citizens, whatever content they may have. Even when a liberal thinks he knows what is best for others, he deprives himself of the right to enforce his moral views upon them. Every citizen is in this domain, in the determination of Z, his own legislature. Nonetheless, the liberal state does have a task here: it must sift and bring into harmony conflicting wishes. In doing this, it, however, makes use of a narrow criterion: it prohibits only the realisation of wishes that cause impermissible harm to others. Moreover, it may actively create the conditions for the realisation of the goals of each person by eliminating negative impediments.

In summary, the views concerning X, Y and Z, and thus concerning Law, Order and Freedom, currently still are sharply divided. Hence, the question is: to which extent can the liberal principles of the Enlightenment serve as the foundation for law and society? According to (normative) legal positivism, *law* at least brings about *order*. Is it possible to argue that the order of law must, moreover, regulate the equal (negative) *freedom* of everyone, and find its limit there, too? Or do state and law have an additional moral task? Or do they perhaps have a task which goes beyond morality? History will teach this – one would hope. But perhaps my history is not yours. And your legal order not mine.