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# Law, Order and Freedom

A Historical Introduction to Legal  
Philosophy

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# Chapter 10

## Conclusion: Law, Order and Freedom

### 10.1 Introduction

In the preceding chapters a variety of central themes can be singled out. The *first* central theme is of an epistemological nature: is it possible to present a conclusive argument in favour of a specific constellation of law, order and freedom, or are such conceptions based on irrational choices, accidental conventions, or dominant power relations? The *second* central theme concerns the possibility of a legal morality, that is, of specific moral criteria for the validity of law. Traditionally this has been formulated as the question of whether a necessary relation exists between law and morality. This question is answered in the affirmative by the natural-law doctrine, in a large variety of interpretations, whereas legal positivism answers this question in the negative, also in various ways. The *third* central theme concerns the nature of the morality that lies at the basis of law. Is this a ‘broad’, perfectionist morality, which controls all domains of human life, imposing an ideal mode of life on everyone? Or should legal morality rather have a ‘narrow’, liberal character, confining itself to ensuring that human society proceeds in a more or less peaceful and fair fashion?

It is clear that these central themes interfere with each other. Someone who adopts the non-cognitivist view that decisive arguments cannot be presented for any specific normative conviction, cannot argue in favour of a necessary relation between law and morality. And someone who denies the existence of a necessary relation between law and morality cannot engage himself with the question whether law is based on a broad or a narrow morality. This interference does not, however, have to be ill-fated. Even when no definitive answer can be given to the epistemological question, much still remains to be said about the relation between law and morality. In practice it is quite possible to live with relative certainties. One does not have to be able to provide a conclusive argument in favour of the preference for matrimony over other forms of cohabitation before entering into a marriage. It is like this in science and philosophy, too: a theory can create adequate order in the chaos, even when definitive proof is absent. Perhaps the striving towards definitive proof, or the regret about its unattainability, is an infantile need. Within certain margins of epistemological uncertainty, there is scope for many arguments,

for example, about the relation between law and morality, as well as for the preference for a narrow morality over a broad morality. This likewise occurred in the preceding chapters. Nevertheless, a tolerant attitude towards the (un-)verifiability of theories may not tempt one to neglect the central epistemological questions. When fundamental disputes arise as to whether a narrow morality is to be preferred over a broad one, either between or within cultures, everyone is ultimately confronted by the question whether such controversies can be settled in a rational way at all.

The interference between these central themes specifically does not have to have any fatal consequences for adherents of a liberal morality. Liberals do not have to become dejected by the thought that conclusive arguments in favour of a specific constellation of law, order and freedom may be lacking. A narrow morality is after all a morality of the second order, which is reconcilable with the verifiability *and* the unverifiability of morals of the first order. Of importance is only that people find themselves to be fundamentally at odds concerning the moralities of the first order. One can reach this insight along various routes. Even when a specific faction would support the only correct view (but how can someone know this for sure?), other factions can still actually disagree with this. If the privileged faction imposes its view on the rest, at best an armed peace will get under way which in case of a real or supposed shift in the power balance will degenerate into war; and this is what a narrow meta-morality seeks to avoid most of all. It is sufficient that all factions recognise the fragility of their political power. Or suppose that another faction is in the right with its radical scepticism concerning the force of reason. In this case narrow morality commands them as non-cognitivists to tolerate other parties that are irrational enough to believe in reason. The notion of a narrow morality is, then, not primarily a philosophical thesis which pretends to be true or untrue, but a practical political morality which may or may not fulfil its pacifying function with success.

For the sake of simplicity, the interference between the three central themes could be reduced to an opposition of two views. One may attempt the following construction. Adherents of the possibility of conclusive arguments (let us call them 'cognitivists') are also of the view that a necessary relation exists between law and morality (cognitivists thus embrace natural law), and identify natural law with a broad morality. Sceptics (non-cognitivists), on the other hand, advocate the separation of law and morality (thus embracing legal positivism), and argue in favour of a narrow morality that at least resists the escalation of conflict. In the second section this construction is scrutinised in the light of its relation with law, order and freedom. In the third section we demonstrate that this construction is too simplistic, after which, in Sections 10.4, 10.5, 10.6, and 10.7, the complex connection between law, order and freedom in a liberal morality, as well as the perfectionist critique, will be analysed. The eighth section discusses the decisive question whether a liberal morality can claim universal validity. In the last two sections some remaining questions are answered and conclusions drawn.

## 10.2 Cognitivist and Non-cognitivist Views on Law, Order and Freedom

Classical Greek-Roman and Christian metaphysics assumes that a higher spiritual world lies hidden behind the observable, material world. In this view the empirical world as such is too unsettled, too discordant and too imperfect so as to derive objective norms from. This imperfection is compensated for by the underlying perfect order, which constitutes an ideal model for empirical reality, and brings about unity in the disharmony of everyday life. This worldview thus takes for granted the unity of 'is' and 'ought': objective norms are contained within (the higher or deeper domain of) reality.

Man himself would stand at the cutting edge of these two worlds: in bodily respect he belongs to the imperfect empirical world; by means of his spirit he has a share in the higher spiritual reality. Through the latter he can attain insight into a more perfect mode of life, and guide his inferior side in that direction. In the everyday life of man acute conflicts frequently occur between his immediate bodily needs, and what he rationally regards as the best way of action; or between his egoistic and social inclinations. Idealistic ontology provides a standard for the resolution of such conflicts. It organises the contradictions of the empirical world into a hierarchical unity, where the lower aspects (the individual and the physical) stand in the service of the higher (the social and the rational). Viewed in terms of freedom (Section 1.4), this metaphysical worldview advocates *essential freedom*, or freedom from internal impediments such as weakness of will or irrational inclinations.

This metaphysics leads to a natural-law doctrine which is based on a perfectionist, broad ethics that prescribes a fixed pattern of the good life to man, both in the personal domain (an individual virtue ethics) and the political domain (a perfectionist political philosophy). The state must, if necessary, enforce this ideal way of life by legal means. With Plato, Aristotle and Thomas Aquinas the content of this broad ethics stands at right angles to the modern values of freedom, equality, democracy, and human rights.

This perfectionist ethics has no place for individual freedom, classical fundamental rights and democracy, because nature objectively prescribes what the proper way of life entails. Unrestricted individual freedom would mean nothing else than the freedom to lead an improper life. It would come into conflict with the rational self which constitutes the essence of human beings, or with the aims that are central to human nature, thus with his *essential freedom*. The state must by means of law force the individual towards the right way of life, freedom rights being regarded as depraved. This approach also conflicts with the decision-making process of democracy where every opinion counts, even if it is inaccurate from an objective point of view, and where a quantitative criterion (the majority vote) is ultimately decisive.

In this (perfectionist) view, law does not serve to create order in an earlier chaos. It must copy the pre-given, universal and just cosmological order, which requires that people be respected in accordance with their status in this order. This can lead both to a rejection and an acceptance of the equality principle. Plato and Aristotle argue in favour of the unequal treatment of different categories of people, because they possess different degrees of rationality. The class of free men is characterised by their independence from others and their full participation in political life; they rule over the class of slaves, who lack those characteristics. In contrast, the Stoics favour universal human equality because all people are reasonable beings who are free when they follow their rational nature (without however translating this metaphysical ideal into political and social equality).

This claim of ethics to objectivity and universal validity becomes fragile in the Modern Age; this development was anticipated by the Greek Sophists who denied any higher cosmic order and considered law and morality as mere conventions. In so far as modern philosophy is dominated by the empiricist ideal of knowledge that stems from natural science, it concludes that *only* an empirical world exists. In the scientific view this world consists of aimless and competing causal processes. In the human body, for example, constructive tendencies struggle with destructive ones (such as the division of cancer cells). The survival instinct of the lion conflicts with the drive for survival of the lamb. Different human individuals can have contrary interests, too. Within the life of one individual, instinct and intellect can compete with each other, as well as egoistic and social inclinations. According to empirical science, these inclinations are all equally 'natural'. A higher reality that could rank such conflicting inclinations or interests is regarded as unverifiable. The scientist can establish only that such conflicting phenomena actually exist, and that now the one is the strongest and then again the other. A choice in favour of one of them is based on a subjective evaluation.

Because no norms can be derived from the empirical world, most empiricists tend towards a non-cognitivist meta-ethics: one can speak objectively about observable facts, since disputes about facts can be settled on the basis of an objective standard: empirical observation. The normative statements of law and morality, on the other hand, are purely subjective. Normative disagreements between different people originate in differences in their personal attitude to life.

The dissolution of metaphysics in modern times leads to a fragmentation of what used to be seen as a coherent unity: norm and reality no longer coincide, but stem from two different domains: respectively, from the subjective, inner world of man and the objective, external world. Society and individual no longer constitute a natural harmony; even within a single individual, conflicting inclinations fight for priority; and there may be as many conflicting moral views as there are individuals. According to the empiricists, every metaphysical ontology that nonetheless assumes an underlying unity, is based on human projection, fed by the human longing for a more perfect world than the actual one.

Evidently this view does not allow for a necessary relation between law and morality as the natural-law doctrine has it. From here non-cognitivists can take two paths.

First, they can proclaim something like the ‘right’ of the strongest. This was done by certain Sophists, and by Nietzsche who elaborated this idea to its radical, nihilist consequences. Nietzsche claims that ‘God is dead’, so that nature no longer implies higher values or goals, but only efforts to survive and power play. On this basis, he positions himself ‘beyond good and evil’, advocating an individualistic ideal of life that is based on the ‘will to power’ and aims at a heroic life for an elite of ‘supermen’. Nietzsche’s superman glorifies struggle, in revolt against conformity with social traditions, and particularly with the prevailing principles of human equality and democracy. In this view no rational coherence can be constructed between law, order and freedom. Every law that restricts the spontaneity and superiority of the strongest (their ‘freedom’), is reprehensible; laws that support them are superfluous, and would be counter-productive (the superior person who knows that the state will support him in his superiority becomes lax and lazy, so that he loses his superiority). Consequently the acknowledgement that objective moral knowledge is impossible can directly result in war. After all, disputes about the right way of life cannot be settled by way of generally valid standards.

In the second place, the non-cognitivist can make a virtue of necessity by solving the conflicts in a peaceful way. A narrow ethics presents an alternative, which may be based on ethical non-cognitivism in combination with the insight that human beings cannot do without social cooperation. A representative of this approach is Hobbes.<sup>1</sup> Hobbes’s narrow ethics is not based on a moral value, such as autonomy, but simply on everyone’s shared interest in survival. This is symbolised by the representation of the social contract, which contains all norms that are required for an orderly society. Indeed, Hobbes’s ethics is grounded in the very desire to prevent war that he assumes all people share. Clinging to subjective moral convictions, Hobbes cautions, leads to more war and may thus end in death.

In Hobbes’s world the metaphysical harmony of classical and Christian metaphysics is totally absent. All that remains are conflicting individual aspirations, without any organic bond. Nonetheless Hobbes still perceives some minimal harmony and unity: everyone’s self-interest points in the same direction of a shared social order, because survival on one’s own has very little chance of success. Via this detour Hobbes still arrives at generally valid public norms: a minimal narrow ethics that consists of rules which are required for a peaceful social order.

Hobbes’s ethics thus only guarantees *order*, as well as the legal rules that are required for this purpose, such as mutual respect for life, property, and agreements. It is not possible to underpin further rules that guarantee a *just* social order. Hobbes’s

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<sup>1</sup>In our version of Hobbes (Section 4.1) we incidentally neglected somewhat the non-cognitivist interpretation of Hobbes’s philosophy. Hobbes’s laws of nature can be understood as universal laws which impose themselves on those who want to survive in a situation of scarcity and competition. Problems between people then do not exist at a cognitive level, but testify to a lack of co-ordination.

ethics does not require that the legal order guarantees *freedom*. Hobbes rejects individual freedom, because he fears that every infraction of absolute state power will trigger chaos. His narrow ethics, therefore, leads to normative legal positivism: it is the sovereign who must specify what the law entails. Subjects who disagree with his decisions nevertheless do well to conform with them in order to avoid chaos. In this way, non-cognitivism leads to a minimal morality, which is positivised in law by an absolute sovereign with unlimited power. Hobbes's narrow morality is not a liberal morality at all: law does not serve freedom, but order. In the same spirit, the young Radbruch arrives at normative legal positivism. What 'justice' entails cannot be established in an objective way, Radbruch argues, therefore it is the state that must co-ordinate social interaction with general legal rules. In this way, at least legal certainty and order are guaranteed.<sup>2</sup>

### 10.3 Complications

Can we really draw a line from cognitivism (1a) via natural law (2a) to a broad morality (3a); and from non-cognitivism (1b) via legal positivism (2b) to a narrow morality (3b)? Certain philosophers fit in well with this scheme. In relation to the first line, the previous section pointed to Plato, Aristotle and Thomas Aquinas, and in relation to the second, to Hobbes and the young Radbruch. However, this is a one-sided selection from the authors discussed in this book: on the one hand, the metaphysical perfectionists, on the other hand, the non-cognitivist and anti-perfectionist advocates of social order as the highest good. Law and order with that have nicely come into their own, but what has happened to the value of freedom? How do Locke, Kant and Hegel fit into this scheme?

Let us first look at Locke. In his way he is a cognitivist: the laws of nature are anchored in the will of God, who imposes Himself on human beings (1a). Locke is, moreover, an adherent of natural law: the laws of nature are a set of rational rules that exist independently of the state. They are not derived from any human authority, but are themselves the basis of all human authority. Positive law should be based upon natural law (2a). Locke nevertheless adheres to a narrow, non-perfectionist legal morality, in particular a liberal morality, which expressly requires that the state adopt a neutral position towards the diverse moral views of citizens. It must restrict itself to creating the conditions for all ways of life that the citizens may choose (3b).

How can Locke breach our scheme and arrive from cognitivism (1a) via natural law (2a), at a narrow morality (3b)? This can be easily understood. Locke was convinced that faith, to which all are called, cannot be imposed; and that imposed faith

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<sup>2</sup>It incidentally goes without saying that a narrow morality can take on liberal features. Social order is already possible when a state conducts itself in a reserved manner. A liberal order is possible because it is in everyone's interest to retain as much freedom as is compatible with peaceful social interaction. Liberal variants of the non-cognitivist narrow ethics therefore argue in favour of a much less extensive state and law, restricted to the maintenance of public order, and which beyond that allows as much individual freedom as possible.

leads only to hypocrisy and contempt for God. A church is, according to him, ‘a voluntary society of men, joining themselves together of their own accord in order to the public worshipping of God’ (Locke 2003, p. 220). From this it follows that the state must hold itself aloof, restricting itself to the protection of a narrow morality. Law, to be sure, guarantees order, but this is only for the sake of freedom. This liberal morality and its associated tolerance are not based on any value-scepticism; on the contrary, the very respect for values, which must be embraced in freedom, forces tolerance upon the state. A state that does not respect the natural liberty rights of its citizens breaks the social contract, so that the subjects are free to revolt against the unjust laws.

Something similar we find with Kant. Can Kant’s ethics be called cognitivist? Not in the sense of theoretical reason: in this sense ethics makes no cognitive claims. However, in the sense of practical reason it certainly does: morality is characterised by a unique form of rationality, to which one must adapt one’s inclinations. In the ethical domain Kant is thus after all a cognitivist (1a). Kant defends natural law: the basic features of positive law are derived from morality and its categorical imperative (2a). He finally draws a distinction between individual ethics, on the one hand, and social and legal ethics, on the other hand. Individual ethics has a perfectionist character: it concerns the purity of the moral intention (similar to Locke’s sincere devotion to God). Kant’s socio-political ethics is, however, liberal: the value of individual autonomy requires that the state adopt a neutral position (3b). Just as with Locke, Kantian law serves to protect freedom, precisely because the perfection of man lies in his self-legislation. Unlike Locke, out of fear for social chaos Kant prohibits every kind of resistance against the state, even if it violates all basic rights of liberal natural law. Law and order thus take priority over freedom. In this respect Kant’s narrow ethics leads to normative legal positivism in accordance with the view of Hobbes (2b). This is strange, and our schema enables us to show precisely where the shoe pinches, as will appear below.

Finally, how are things with Hegel? One can for sure call him a cognitivist, even though he disagrees with the idea of an epistemology that precedes understanding (you can similarly not learn to swim on dry land, says Hegel). True epistemology implies metaphysics: it unfolds the rational core of reality (1a). Hegel is an adherent of natural law in the sense that natural rights are connected with the nature of human existence and human society. Positive law simply follows upon what occurs in other domains in a historical period, specifically in morality and ethics. Hegel disagrees with the idea of social engineering, the instrumental use of law for aims that are not imbedded in the prevailing moral traditions (2a). But which kind of natural law is advocated by Hegel? He welcomes the fact that in the Modern Age freedom rights have been accorded to everyone. In this respect he appears to be an adherent of a liberal natural law à la Locke and Kant. On the other hand, Hegel condemns liberal natural law as ‘abstract’, as it situates people in civil society where they merely pursue their private interests. People find their true destiny in ‘ethics’, which turns them into citizens of the state: not private interests, but the general interest of the political community, should concern them. However, unlike classical natural law, Hegel denies any supra-historical standard against which the actually



dominant morality can be tested. Because of this, Hegel's natural law acquires some characteristics of normative legal positivism: people do not have the right to distance themselves from the prevailing ethics of their society (and when philosophers devise better worlds, this is a form of useless conceit) (2b). We arrive at the same ambivalence when we finally ask the question whether Hegel is an adherent of a broad or a narrow ethics. Both elements of liberalism (tying in with Locke) and anti-liberal perfectionism (tying in with Plato's *Republic*) can be found in Hegel's philosophy. His emphasis on individual freedom of conscience, for example, ties in with the first, but his demand that the state should watch over the true freedom of citizens, turns him into a perfectionist (3a and 3b). The complications which come to light when we attempt to force Hegel's thinking into our scheme, show an ambiguity that is difficult to comprehend: he is a liberal and a perfectionist in one. In this respect his approach is close to that of Rousseau, whose concept of liberty consists of perfectionist 'essential freedom', rather than of liberal 'negative freedom'.

Which lesson can we draw from this? Locke, Kant and Hegel distinguish themselves from philosophers like Plato, Aristotle and Thomas Aquinas, by stressing that freedom is essential for human identity. Let us, therefore, call them *metaphysical* liberals: one of the essential characteristics of man is that he is called to freedom and the pursuit of his own reasonable insights. This can lead to a distinct liberal political and legal philosophy (Locke and Kant). It can also lead to an obscure amalgam of modern and classical ideas (Hegel). In its consistent forms, metaphysical liberalism thus leads to a liberal philosophy of politics and law (1a, 2a and 3b).

However, metaphysical liberalism is controversial. It is subject to the same difficulties as all metaphysical ideas: how is it to be proven to dissenters? Why is liberal metaphysics better than the metaphysical systems of Plato or Thomas Aquinas? If metaphysical liberalism would be the only road to liberal politics, things appear bleak. In that case, its politics will be accepted only by people who share its metaphysical presuppositions. Is it possible to arrive at a liberal political philosophy without the heavy burden of metaphysical liberalism?

In the next two sections an explicitly non-metaphysical version of liberalism will be scrutinised: *political liberalism*, which limits itself to articulating the conditions for the peaceful cooperation of persons with conflicting worldviews. It is, therefore, exclusively a practical theory of the political domain, not a metaphysical doctrine of the nature of man.

## 10.4 A Liberal View of the Relation Between Law, Order and Freedom

Political liberalism, with its original focus on religious freedom, was the child to which the religious wars laboriously gave birth. Those wars had in their turn been stimulated by the pacifying arrangement of *Cuius regio, eius religio*<sup>3</sup> of rulers who

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<sup>3</sup> 'Whose region, his religion', a provision of the religious peace of Augsburg, 1555.

were confronted with a fragmented faith community. This religious fragmentation had its origin in the Reformation, which had delivered the decisive blow to the preceding spiritual unity of the Middle Ages that was based on the merged paradigms of Aristotelianism and Catholicism, interpretations of a cosmic order that allocates an innate place to all and everyone. After political liberalism had embraced freedom of religion, this freedom extended itself to other domains: the state should not concern itself with the way in which people flesh out their own lives, as long as one person's freedom is reconcilable with that of others. This is the only way to maintain peace. Political liberalism is *political* in so far as it aims at a practical social goal: the maintenance of peace. Political liberalism is *liberal* because it regards the guarantee of freedom rights as a necessary means to achieve this purpose.

To be sure, metaphysical liberals, such as Locke and Kant, likewise regard freedom rights as a means to achieve the objective of peace. But that is not all. In addition, their freedom rights have a metaphysical foundation: they are founded on a view of the essence of man, that is, his identity as self-legislator. No doubt metaphysical liberals will also accept liberalism in the political field. On their part, however, political liberals distance themselves from their metaphysical brothers, because they want to persuade persons with other, non-liberal conceptions of man, to embrace political liberalism as well.

What does political liberalism imply? A political liberal will say that law should promote the freedom of all. This can be expressed in morally laden terms: liberal morality is a public morality designed to guide the autonomous development of the personal moralities of all citizens along an orderly course. 'Personal morality' includes the views of an individual of the goods that make life intrinsically valuable, and the way he and others should thus arrange their lives. The latter shows that personal morality has a social aspect as well: it also refers to the way of life of others. That in modern societies such conceptions of the 'good life' strongly diverge is an undeniable social fact. Some people adhere to metaphysical liberalism, others are plain libertines, a third group longs for a heroic life, a fourth wants to serve God. Obviously these ideals can lead to serious social conflicts. 'Public morality' indicates the limits within which an individual can give shape to his personal morality, taking account of the equal right of everyone else to follow *their* personal moralities. Therefore, it can be called a morality of the second order, or a 'meta-morality', that is, a meta-personal morality: a morality that formulates the necessary political conditions for the personal moralities of all citizens.

Of personal morality, little can be said which is generally valid (although many may feel a need for this). In this book we nevertheless came across philosophies that take this step: the Stoics, Kant, and maybe also Nietzsche. Of public morality, more can be said. We stated that public morality, according to liberals, provides the limits within which people can follow their diverse personal moralities. This may seem problematic because views of public morality diverge just as much as those of personal morality. Some want more freedom, if necessary at the cost of equality; others prefer more equality, if necessary at the cost of freedom, to mention a few. Here we arrive at an impasse: the means that should solve the problem is itself equally problematical.

Political liberalism has devised a solution to this meta-problem: ‘procedural liberalism’. When we cannot straightforwardly arrive at a consensus, we may still agree on a *procedure* that solves the conflict in an acceptable way. We can appoint an arbiter, or institute majority rule, however qualified, and the like. Here we arrive at the domain of politics in the acute sense of that word (political theory as moral theory of a non-ideal world). When political action in accordance with just procedures results in positive laws, these are procedurally justified.

Has morality disappeared from the scene as a consequence of this political move? Is the cohesion of modern societies ensured only because everyone accepts the outcomes of the political and legal procedures on prudential grounds (otherwise social peace would be in danger)? This is not the case. The procedural justification is equally defensible from the perspective of public morality, and citizens are prepared to accept the procedures on moral grounds as well. After all, when the unity of morality has fragmented, and the views on the good life of citizens diverge, then one of the main functions of political morality is to respect this diversity. Therefore, liberal political morality focuses on safeguarding fundamental rights that allow individuals to devote themselves to projects that might otherwise conflict with the ethical ideals of others. This moral meta-value has its incarnation in a unique moral attitude, that of *tolerance*.

Another focus is to be found in the demand that people respect the laws that result from the democratic rules of the game. Legislation often produces collective goods, for instance, penal law, that offers an optimal combination of extensive security for all citizens, on the one hand, and a modest regime of sanctions that protects suspects and criminals, on the other hand. It requires a process of give and take to establish which package of collective goods of what scope is adequate; if political negotiations do not lead to a unanimous outcome, voting takes place: *the requirement of accepting fair compromises is, therefore, a central element of liberal political morality; as well as the requirement that everyone must contribute his part to fund the package of collective goods that is democratically chosen.*

A final point of focus of liberal-political morality concerns the independence of the judiciary. Thanks to the separation of the judicial and the executive powers, the latter can be subjected to judicial decisions that protect citizens. The fact that Western governments accept the verdicts of independent judges demonstrates that their political system is not primarily based on the monopoly of power of the state, but on its intent to win the trust of its citizens: they can ensure that the state will not abuse its authority.<sup>4</sup> Moreover, the implementation of democratic legislation requires the loyal cooperation of everyone, because laws are compromises between opposing political views. Someone who contravenes a law destroys the compromise. In order to avoid the threat of escalating conflicts that would harm everyone, the interpretation of the law should be assigned to an impartial institution. An independent judiciary safeguards the compromises that are agreed upon. Although it is

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<sup>4</sup>This is where the crucial difference lies between Hobbes and Locke.

fallible, their judgment must be respected as a final decision: *the preparedness to do so is the shibboleth of all who respect liberal political morality.*

The political-liberal view of law can be summarised in the thesis that, in a world of discordant and mutually incompatible ideals, law is an indispensable instrument of public morality that guarantees everyone the free development of their personal ideals. In this view, the function of law is not to impose a particular personal morality (a particular realisation of ‘true freedom’) upon all citizens. So far, then, legal positivism is correct in its separation of law and morality. On the other hand, the view that law is an indispensable instrument of public morality agrees with the association of law and morality of natural law. (Note that ‘natural law’ here is not a theory concerning the nature of law, but a theory of *how* law should be.)

Another observation is called for here. When it is useful to rely on a tripartite of personal morality, public morality, and law, the liberal restraint in the imposition of a specific morality can be viewed in another light. Politics in the specialised sense of the word (the institutions in a specific community that establish and sanction the public rules which people should observe in their interactions) may not directly concern itself with someone’s private morality: agreed. It is not, however, self-evident that liberal politics has nothing to say about the education of people into mature citizens who should in the public sphere respect public morality. The liberal state has a task in civic education, for instance, by broadcasting television spots that warn against prejudices and racial discrimination; by encouraging people to vote in elections; or by seeing that public schools give courses on constitutional values. If citizens are not able to lead a personal life and develop the accompanying personal morality, the state must ensure that the necessary conditions for personal autonomy are realised. Does this not make the ideal of liberal autonomy self-contradictory, in the sense that ‘people are forced to be free?’ No: autonomy is a meta-ideal here, an ideal of the second order, which can be realised by every individual citizen in his own way. The only things to be enforced by the state are the conditions that are indispensable for the exercise of autonomy.

Liberalism, then, is anti-perfectionist in the domain of political morality: in this sphere it supports negative individual freedom. This is reconcilable with perfectionism in the domain of individual morality. An exemplary combination of these two elements is to be found with the metaphysical liberals Locke and Kant: human perfection consists of the exercise of autonomy and in following one’s personal, reasonable insights in one’s private life; politics should trump this with negative freedom rights. All the same, political liberals who reject metaphysical liberalism can endorse a completely different view of personal morality, for example, that freedom is an illusion, or that the essence of man consists in the pursuit of pleasure, or that man has to conform to a cosmic rationality.

A last observation: the familiar opposition between natural law and legal positivism is refined in the liberal view. The question whether a necessary relation obtains between law and morality is split up into the question whether a necessary relation exists between law and *public* morality (answer: yes), and the question whether a necessary relation holds between law and *personal* morality (answer: no).

## 10.5 An Example: Rawls's Theory of Justice

In the preceding section an ideal-typical description was given of the liberal view on the relation between law, order and freedom, and with that, between law and morality. To concretise this somewhat, we provide in this section the main outlines of the theory of Rawls, who in the 20th century gave a new momentum to political liberalism.

In *A Theory of Justice* (1971) John Rawls (1921–2002) arrives, on the basis of a social contract procedure, at a theory of justice which implies a narrow ethics. Rawls starts with the moderate non-cognitivist statement that everyone, to be sure, has a sense of justice, but that regarding the content of the concept of justice nothing more is fixed than that all people should be treated as equals. For the further realisation of this he takes refuge in an imaginary deliberation procedure which has to guarantee that its outcomes actually take equal account of all interests. Rawls for this purpose invokes a conception of the social contract which is characteristic of the modern view of a narrow ethics. The social contract is a metaphor for the criterion of universalisability or acceptability to all, which is meant to compensate for the lack of an objective, generally valid ethics: right are those principles with which everyone could reasonably agree. Rawls does not refer to the actual consensus which exists in a society, because that may be based on one-sided interests, and thus does not guarantee justice. At stake is a rational consensus in a hypothetical situation of impartiality, as the idea of justice requires. To articulate the nature of justice, Rawls formulates a number of specific procedural conditions with which the imaginary contractual deliberation has to comply. The parties to the discussion must specifically be ignorant of the specific personality and the particular position that they will have in the society to be designed. This guarantees that no one can calculate in his personal favour. After all, you can become anyone in the future society. Thus, everyone is forced to take equal account of the interests of all possible social positions.

Rawls states that all rational people in this hypothetical contractual deliberation will mutually agree to the following two principles: (1) equal freedom rights (the classical fundamental rights) and rights to political participation; (2) equal distribution of socio-economic goods, unless an unequal distribution is to the benefit of all, or, if that is impossible, of those who are the least advantaged; these inequalities must furthermore be linked with social positions that are open to anyone. The further realisation of these principles must occur via democratic deliberation. If legislation by the democratic majority, however, seriously violates the fundamental individual rights of Rawls's first principle of justice, *civil disobedience* may be a legitimate way to protest against such unjust laws. Thus, Rawls arrives at a narrow liberal ethics.

The narrow nature of his ethics, moreover, appears clearly from the argument that leads to the first principle. In opposition to the idea of a broad, perfectionist ethics Rawls contends that there is no generally valid moral norm for the perfect life, or at least that reasonable people will disagree about what should count as such. Therefore, the further determination of the best way of life remains open during the contractual deliberation. In the course of this process nobody knows who he will be

in the future society, neither which ideal of the good life he will prefer. Everyone thus has an interest in designing an open society that provides maximum space for all possible ideals of the good life. That is why everyone chooses in favour of the classical liberties that guarantee freedom of opinion and expression. Whatever ideals one may turn out to have in the future society, one will be able to live in accordance with them, provided one does not frustrate the equal freedom rights of others. In short, according to Rawls, a just state should confine itself to the distribution of 'primary goods', neutral instrumental goods, such as liberties and money, which everyone needs for the pursuit of his personal ideals. Hence, Rawls's ethics likewise ties in with the liberal autonomy-ideal of the Enlightenment.

In *A Theory of Justice* Rawls invokes the Kantian concept of autonomy. In later publications, such as *Political Liberalism* (1993), Rawls distances himself from Kant, in that he does not want to defend an all-encompassing metaphysical liberalism but only a more moderate, political version of liberalism. He thus deliberately bypasses metaphysical, natural-law controversies because these will lead to an escalation of conflicts rather than to peaceful cooperation. The only way to pacify ideological controversies in a plural society in a fair way is to agree to disagree. Therefore Rawls simply seeks to elaborate further on the ruling political traditions in the modern Western world, which already imply the basics of his narrow political morality. What does he mean with his non-metaphysical, but 'political', concept of autonomy?

It boils down to the following. When you ask people what they want to achieve in their lives, the answer will almost never be that they wish to be autonomous. At best, a person who tries to escape from prison, or who wants to emigrate from an oppressive country, will in anticipation of his move declare that freedom is his highest value. In normal circumstances, however, people pursue a happy relationship, an interesting career, and the like. Only in very special circumstances are people interested in the more abstract question whether they are free. This is the case, in the first place, when they suffer from a lack of freedom, like the prisoner mentioned above. In the second place (and this Rawls emphasises), when they realise that they are dependent on others for the exercise of their freedom, and that these others have an equally great interest in freedom. In such circumstances they have a good reason to arrive at an arrangement which does justice to all interests, given the fact that what some want can be incompatible with the preferences of others. Whoever considers this political question has exceeded the level of his private existence (including what we have called a personal morality), and has assumed a public identity (related to what we have called a public morality, which is a morality of the second order). This has important consequences.

In the first place: as private persons, people are emotionally and affectively bound to other persons and to particular values; they cannot, and will not, easily give up their loyalty to these. They feel that their position in life is strongly determined by what they did and experienced in the past, and that they have only a slim chance of radically changing it. However, as public persons they assume that everyone is rational, in the sense that he can design a life plan for himself and, if required, review it. (Rawls defines *rationality* in this context as the competence to establish one's own

ideals of life.) In some respects, this is really the case: people can deliberately plan their lives, or change direction, but this happens rarely. In real life, 'rationality' only plays a major role at moments that one is confronted with existential choices: on these occasions a person may indeed redefine his ideals. In this uncontested weak sense, individual autonomy is an empirical phenomenon that any theory of justice should take into account. But more often people just react to the possibilities that present themselves, and lack the desire of rationalising the course of their lives. Nevertheless, they all act *as if* they are all free and rational. Why the masquerade? It expresses the view that nobody has the right to interfere in the life of another person because he holds him for someone who lacks rationality or true freedom. The fiction that everyone is free and rational expresses nothing else than that people are prepared to respect each other's existential decisions, however irrational they may appear. Its aim is to protect persons who are contented with their way of life, and thus feel free from interference by others who think that the former are determined by oppressive or irrational forces.

In the second place: as private persons, people are hardly interested in the question which negative and positive duties people exactly have vis-à-vis each other, and where these come from. Usually, they attempt to live lives that are satisfying to themselves and their inner circle. In doing so they are willing to observe certain limits. Yet their main concern is not the determination and safeguarding of such limits, but their own life within this domain, and this they all know of each other. Yet, as public persons they assume that everyone is involved in political agreements about the rules that all should mutually respect. They moreover assume that nobody wants that these rules stem from the dominant power relations. On the contrary, such power relations should be subjected to rules, in the construction of which everyone is involved. Here, too, a fiction is at play, the fiction that everyone is reasonable – in this context Rawls defines *reasonableness* as the competence to equally respect the interests of all fellow-citizens. For instance, it is assumed that people cast their vote in elections in order to serve the general interest, whereas in reality most may vote for the party that optimally promotes their personal interests or for an appealing party leader.<sup>5</sup>

The ideal of freedom, then, merely requires that people allow each other maximal space within which each can arrange his own life as he likes, however irrational it may appear to the outside world, provided he likewise gives maximal space to others. Consequently, in the public domain, the ideals of *rationality* and *reasonableness* prevail as the characteristics of citizens, although to a great extent these have a fictional character. The purpose of the fiction is to enable people to adhere to their own ideals in their private domain. *Rationality* and *reasonableness* hence imply a unique ideal of freedom. Unlike other conceptions of freedom it is an ideal of the second order, which is compatible with a variety of divergent ideals of the

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<sup>5</sup>Rawls, of course, does not require that everyone participate in public deliberation, still less that they find their highest fulfilment in politics. This would be in conflict with the requirement to respect everyone as free. Rawls consequently distances himself from the political ideal of Plato and Aristotle, according to whom true freedom consists in political participation.

first order. In relation to these ideals of life, the ideal of freedom of Rawls's Political Liberalism takes a neutral stance. Yet it does not legitimate *all* moralities of the first order, since it rules out intolerant (*unreasonable*) ideals that do not respect the ideals of others. In so far as ideals clash, liberal freedom requires that such conflicts be solved according to political procedures that are acceptable to everyone.

Rawls introduces the idea of *public reason* to indicate that the use of state force should be justified only by reasons that are *public*, i.e. understandable and acceptable to all. This rules out arguments that only have private appeal, as being derived from a particular religious or metaphysical worldview. In a modern open society, a plurality of diverging worldviews will arise, about the truth of which one may reasonably disagree. It would be *unreasonable*, then, to enforce one of those views upon people of different persuasions. Therefore, the state should be neutral in ideological respect, simultaneously giving each individual maximal liberty to follow his own ideals in his private life.

## 10.6 A Liberal Law of Peoples

Under the influence of rapidly increasing globalisation, in *The Law of Peoples* (1999) Rawls discusses whether his liberal principles of justice apply in international relations. In *Political Liberalism* he maintained that his theory of justice is primarily designed to pacify ideological conflicts within Western democracies; it articulates the dominant liberal consensus, which has emerged from the learning process that Western peoples have gone through since the European religious wars. Nowadays most citizens agree upon its tolerant principles, in an 'overlapping consensus' that is supported by the major prevailing 'comprehensive' views of life. Not only metaphysical liberals will support political liberalism; modern Christians will embrace tolerance as well since they recognise that religious faith is an internal affair that should not be enforced. It would seem to follow, then, that a similar moral consensus is not to be expected outside the Western world. In other words, liberal rights are not necessarily *human* rights. Recall that Rawls has bracketed the assumption of his former metaphysical liberalism that individual autonomy constitutes the essence of all human beings (which does not imply that he has renounced his conviction that liberal states are morally superior to illiberal ones; the bracketing is primarily meant to pacify ideological struggles by excluding deeply contested metaphysical views from the political debate). Still, Rawls argues that a set of "urgent" basic rights should be implemented worldwide, albeit not the full catalogue of liberties of his first principle of justice. As for his second principle, in Rawls's view redistribution of socio-economic goods is not a universal requirement at all. According to him, it only applies within a liberal state – and even here political liberals may reasonably disagree about the extent to which the state should interfere with the free market.

The full catalogue of what is commonly known as human rights will only be acceptable to liberal peoples, Rawls admits. They will be willing to establish a second, international social contract with each other in order to protect the liberal rights



that govern their constitution according to the national social contract. On this basis they will respect each other's sovereignty. Still, a core of the fundamental rights that figure in Rawls's first principle may also be acceptable to non-liberal, yet 'decent', societies. Rawls thinks of non-democratic hierarchical societies that do not recognise all its inhabitants as free and equal persons, for instance, on the grounds of a state religion. Nevertheless, these societies are *decent* in that they are peaceful. All groups are consulted in the process of public decision-making, and the humanity of its members is recognised. The latter is secured by basic human rights, in particular, to life and personal integrity, to freedom from slavery, to liberty of conscience, and to equality before the law. These are, according to Rawls, truly *human* rights because they constitute the minimal requirements for social cooperation. By contrast, political rights and full religious freedom may be lacking. Rawls expects that liberal and decent societies may side as allies to protect their common decency against 'outlaw states', dictatorships that tend to aggressive warfare, and violate the basic human rights of their own citizens. As outlaws, these states have no claim to sovereignty. In the ultimate case, such as ethnocide, humanitarian intervention is allowed in order to protect the victims against their dictators. According to Rawls's law of peoples just war is either a war in self-defence, or one to intervene in the name of basic human rights.

Both liberal and decent peoples accept a duty of economic and other humanitarian assistance to 'burdened societies' that live in conditions which are too poor to build a decent political system meeting the basic needs of all inhabitants. Rawls denies that well-ordered countries have any further duty to compensate for economic inequalities on the basis of some ideal of global social justice. In his view, each people is responsible for its own prosperity, which is dependent on its work-ethic, political system, and birth policy. Since there is no world state to safeguard the conditions for fair global cooperation, all that liberal and decent peoples can do is to offer humanitarian assistance, promote fair trade, and protect basic human rights, in order to promote the autonomy of the least advantaged peoples. In short, in Rawls's view, there is an insufficient analogy between national and international legal orders to transpose full liberal justice to international relations.

## 10.7 Criticism of Political Liberalism

Viewed from the perspective of legal philosophy (something which Rawls does not do), Rawls's theory of justice exemplifies the thesis with which we earlier summarised political-liberal morality: in a world of conflicting and mutually incompatible ideals, the law is an indispensable instrument of public morality to regulate the free development of everyone's personal ideals – at least in modern Western societies. Liberal morality consequently presents a perspective on the right relation between law, order and freedom. Although political liberalism claims to rest on an overlapping consensus in the Western world, it has been met with fundamental criticism.

Within liberalism, it is contested how far the state may interfere with economic life in the name of distributive justice. Libertarians like Robert Nozick criticise Rawls's egalitarianism because it would unjustly impede market freedom. Instead, the state should confine itself to protecting the properties that citizens have acquired in a legitimate way.<sup>6</sup> (Obviously, the minimal liberal state should also protect their life and physical integrity.) On the other hand, socially minded liberals like Dworkin advocate more extensive social rights than Rawls's second principle allows for.<sup>7</sup>

Political liberalism is nowadays often subjected to criticism that shows perfectionist tendencies. Communitarians, such as Alisdair MacIntyre and Michael Sandel, caution that indispensable traditional communal values are threatened by the modern emphasis on individual autonomy (Section 9.1.2). In the communitarian view, human beings derive their identity from the communal traditions in which they are brought up. Autonomy, then, leads to anomy. Universal human rights are, according to MacIntyre, abstract arbitrary fabrications that belong to the rhetoric of liberal ideology. In fact, rights differ per cultural community, and cannot possibly belong to man as such. Liberalism, moreover, would encourage a one-dimensional consumerism, which has little to do with autonomy and self-development. Its stress on individual autonomy furthermore undermines the sense of social responsibility. This criticism of political liberalism harks back to thinkers such as Aristotle, Thomas Aquinas and Rousseau.

Neo-Marxists and socialists object that civil society and the bourgeois state (with its emphasis on 'human rights') are merely instruments of power of an elite of owners of private property (Section 9.3.1). As a consequence both the true interests of the exploited and of the exploiters are curtailed. Only in a communist society can the ideal of self-determination take shape: here people will spontaneously develop their potential, and nourish their social relations, without fear of being oppressed by others. The liberal praise of individual freedom is not compatible with altruistic cooperation, at most with cooperation on the basis of rational self-interest;

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<sup>6</sup>According to Nozick's *entitlement theory* property is justly distributed if it results from initial acquisition of a *res nullius* (a good that belongs to no one), provided that one leaves enough to others (Locke's *proviso*, see Section 4.2.2); or from a legitimate transfer (sale, inheritance, exchange, etc.). The *proviso* may serve as a reason for even libertarians like Nozick to concede that the state should provide some minimal social security.

<sup>7</sup>We can reformulate all of this with the assistance of the terms negative freedom, positive freedom and essential freedom which were introduced earlier (Section 1.4). 'Positive freedom' is equivalent to an 'absence of negative impediments'. Gradually the insight has grown that people are limited in their freedom not only by 'positive impediments', such as external coercion, but also by 'negative impediments', such as lack of money, lack of knowledge and unemployment. A government which realises this cannot satisfy itself with the imposition of 'negative duties', duties of abstinence (primarily by the state), but must equally recognise the existence of 'positive duties', duties to do something, namely seeing that money, knowledge or employment is available to all citizens. Still, a state that grants social rights is not perfectionist, because it does not promote any essential concept of freedom. Negative and positive liberties are simply necessary means to the autonomous choices of individual citizens.

competitive individualism continues the civil war by other means. These critics seek affiliation with Marx, but can likewise be inspired by Hegel, and, via Hegel, by Rousseau and Aristotle.

Martha Nussbaum develops a non-metaphysical version of Aristotle's normative conception of man, which she calls *internal* essentialism (Section 9.1.6). People can thrive only when the political and legal system recognises ten essential human needs and capacities. A good human life entails at least that everyone can build up relations with others, develop his intellectual abilities and fantasies, can relax, etc. The state should promote this. Unlike Aristotle, Nussbaum maintains that individuals do not coincide with their social environment, but have a life of their own. More particularly, they have the capacity to design their own ideals and live accordingly. Therefore she stipulates that the state should guarantee the individual freedom rights of Rawls's first principle of justice. But Nussbaum rejects the egalitarian distribution of socio-economic goods of Rawls's second principle. According to Rawls, each individual may use his income in his own way; Nussbaum, on the contrary, argues that the state must use financial redistribution to promote the development of the essential human capacities, even against the preferences of individuals. Thus, the state may subsidise forms of high culture that are despised by the majority. This is a perfectionist element in Nussbaum's theory. Still, she subscribes to the liberal view that individuals may not be forced to participate in such cultural activities. The state should only create the possibility of enjoying them.

Liberal morality is criticised from a feminist perspective as well: Rawls wrongly confines his theory of justice to the participants in official labour relations, neglecting the informal labour within the family. This is to the disadvantage of women, who traditionally take care of the household. To be sure, Rawlsian justice gives women equal chances to attain positions in the formal sector, but it denies the division of labour between husband and wife. It leaves those out in the cold who are stuck in their traditional housewife roles; liberals thus allow women, in the name of freedom, to remain without freedom. Liberal feminists propose to amend Rawls by extending his principles of fair distribution to family life. In reaction, other feminists advocate an *ethics of care* that aims at restoring traditional feminine values. This critique does not want to include the family within liberalism, but, like communitarians and communists, rejects liberalism as such, as an expression of competitive individualism.

Rawls's law of peoples is criticised as being insufficiently cosmopolitan, as well as insufficiently egalitarian. Why not extend the liberal principles of justice to all human beings, irrespective of which society they live in? Why should liberals tolerate 'decent' peoples that do not recognise full religious freedom, exclude minorities from public functions, and deny their citizens democratic rights? Why not global social justice, implying a worldwide duty of economic redistribution between rich and poor peoples? As to the latter, can one not question Rawls's thesis that the poor economic condition of a people is exclusively determined by internal causes? Is it not just as well the outcome of asymmetrical international relations, such as a history of colonisation and slavery, economic barriers to imports from poor countries, and unfair trade conditions?

When one reflects on all these objections, it is noteworthy that, despite their rhetorical presentation (notably by MacIntyre), frequently no radical break with political liberalism is argued for. Some critics only want to extend liberal justice to wider domains (family life, international relations). Even those who are more critical still accept democracy and the rule of law, focusing their objections on the alleged individualistic atomism of liberal justice. Moreover, this latter critique turns Rawls into a straw man. First, the individual autonomy of metaphysical liberalism does not coincide with egoism, since individuals may just as well choose to embrace altruistic ideals. Secondly, unlike its metaphysical brother, *political* liberalism does not claim that autonomy is the true essence of man. It only assumes autonomy in the political domain as a fiction meant to guarantee peaceful cooperation on the basis of reciprocity.

Other critics completely reject political liberalism. Can liberalism, against these radical opponents, defend its original claim to universal validity? Or should liberals like Rawls withdraw to a more modest position in international relations? Or are the radical cultural relativists right in denying the universality of the liberal model? More about this in the next section.

## 10.8 Liberalism: A Universal Morality?

The principles of the liberal Enlightenment are embraced in ever more parts of the world, even though many feel somewhat uncomfortable about this (as we saw, communitarians, Neo-Marxists, internal-essentialists, and feminists, often do not support a radically divergent politics, but want to bring about corrections to liberalism). Admittedly, after the fall of the Berlin Wall in some regions nationalistic outpourings occur, and forms of fundamentalism gain in influence, but this is lamented in many parts of the rest of the world. To be sure, the fact that the Enlightenment ideals have the wind behind them only proves that many find them attractive, not that they are true. Critics of liberal morality may maintain that this process merely makes the human condition direr: human life becomes increasingly impoverished as idolatry, consumerism and conceit affect communal values. That many endorse liberal values does not show that they are right. Perhaps they are just an accidental and transient product of Western culture.

This is denied by the advocates of the classical Enlightenment, who claim that liberalism reflects a universal ethics. Their claim is supported by a doctrine of cultural evolution of mankind: human civilization demonstrates a tendency towards progress in knowledge and moral emancipation. In this view, cultures that are organised on the basis of objective scientific knowledge signify progress in comparison with 'primitive' cultures that are based upon superstition. This would also imply moral progress: science-based cultures would encourage an autonomous, assertive, individual way of life, guaranteed by a democratic constitution. In this the 'primitive', morally inferior cultures lag behind, ignorant of the Enlightenment ideals. These underdeveloped societies should be 'modernised', under the guidance of the enlightened ones.

However, this claim has been criticised by cultural relativism, which we encountered in its ultimate consequences with Winch (Section 9.2). Following the philosophy of language of the later Wittgenstein, Winch maintains that human knowledge depends on interpretation that is determined by the conceptual order of one's culture. Transcultural standards of truth and rationality are absent. Therefore, scientific knowledge has no privileged claim to objectivity. With regard to ethics, then, a culture that recognises freedom, equality and democracy is as good as a culture with the opposite values. In the Athens of Plato and Aristotle slavery was considered right, in contemporary Western society it is viewed as utterly unjust. To cultural relativists the claim of the Enlightenment that history shows moral progress is simply one more expression of Western ethnocentrism.

Philosophers like Habermas and Apel (Section 9.3) agree with Winch's emphasis on linguistic interpretation, but counter his relativism with the objection that one can go beyond the factual consensus that prevails in a cultural community. It is possible to reach a *rational* consensus on the basis of exchange of information and open discussion on an equal footing. In their view, this is even a universal duty, because man is essentially a communicative being, whereas the essence of communication consists in unimpeded argumentation, unfettered by asymmetrical power relations. This requires a narrow liberal ethics: man can only fully thrive in a democratic society that allows all its members to participate equally and freely. Therefore, the liberal values can serve as a universal standard for moral progress.

The difficulty is, however, that they derive this essentialist conception of human language from a one-sided selection of cultural reality. To be sure, language can be used for a free exchange of information, but equally well as an instrument of power and manipulation. Its critical function in open and sincere communication may even be typical of Western science, which brings us back to cultural relativism. As long as cultures are isolated from each other, this may not have insidious consequences. But as soon as they clash, their ideological controversies could easily end in war, without any universal moral standard to decide the conflict.

Is this indeed the final word? Recall at this point what was said in the first section of this chapter: narrow morality is not primarily a theoretical system that can be true or untrue, but a practical political morality that aims at fulfilling its pacifying function (and would be falsified by its failure to do so). The philosophical war between liberals and perfectionists can continue in the theoretical field, as long as in the political domain the conflicting parties respect the limits of public reason, which, for example, prohibits particularist arguments to underpin the use of state force, and, a fortiori, the enforcement of particularist ideals. By their agreement to disagree, political adversaries observe the very directives of liberal morality. To be sure, this does not prove the theoretical truth of liberalism, but all the more its practical value in politics.

This practical solution primarily applies to ideological conflicts within a modern national state. As Rawls recognises, for the time being in international relations the conditions for cooperation on liberal terms are lacking. All one can hope for is that liberal values may gain gravitational force in a future where global economic interdependencies increasingly discourage war. It may be argued that here we can

learn from history by analogy with the learning process that Europe has experienced since its religious wars. As a result of this common experience, Western people now generally accept liberal democracy as the best regime. A similar process might be on its way on the world stage. In this vein Francis Fukuyama has even proclaimed *the end of history* in his 1992 book of the same name. At the end of the 20th century, Fukuyama argues, history has shown that liberalism is the only serious political theory that can be reasonably advocated. Its totalitarian rivals have proved to be unfit. Fascism surrendered as soon as 1945 (after all, the Arian race, represented by the Germans, turned out not to be the fittest in its struggle for survival). The Cold War between liberal and communist countries found a peaceful end with the implosion of Communism in the 1980s. Thus, the cultural evolution of mankind has reached its peak in liberal democracy, Fukuyama concludes. This does not imply that all wars and ideological strife are over, but only that alternative ideologies and forms of government are inadequate to cope with the requirements of modernity. The Shiite theocracy of Iran had its equivalents in the European Middle Ages; Saddam Hussein ruled Iraq like a Renaissance prince. That liberal democracy is the future is shown by the worldwide increase in democracies. This tendency to democratisation will further ensure that wars are replaced by free trade.

Such views are representative of the optimism that liberals expressed during the last decade of the 20th century – although they were also criticised as gross overstatements (pointing to the large-scale violence, famines and oppression that infest the world, in his 1993 *Specters of Marx* Derrida equated Fukuyama's 'end of history' with Christian eschatology). However, historical developments since the turn of the millennium have brought about a setback for liberal optimism. Muslim fundamentalists inside and outside Western countries have violently opposed Western supremacy by means of 'terrorism', with the attack on New York's World Trade Centre in 2001 as its major success. The successive invasions in the Muslim countries Iraq and Afghanistan under the leadership of the United States did not result in the exportation of democratic ideals that the conservative American Bush government had hoped for (while that government undermined its credibility as a liberal regime by its inhumane treatment of captured terrorists). The supremacy of Western democracies has also been challenged by the economic success of the former communist countries Russia and, particularly, China that combined capitalism with an authoritarian regime. As a new economic super-power, China was even able to support the American and European economies during a grave economic crisis in 2009.

The confrontation between Western and Muslim cultures was predicted by Samuel Huntington in *The Clash of Civilisations* (1997). In a critique of Fukuyama's *End of History* Huntington argues that after the fall of communism in 1989 the world will stage new conflicts around cultural identities, rather than around political ideologies. As main cultures or civilisations, each characterised by its particular religion and way of life, Huntington discerns the Confucian-Chinese, Japanese, Hindu, Islamic, Latin American, and Western cultures (and possibly an orthodox Russian, and an African culture). The major clashes, Huntington expects, will occur between Western and Islamic civilisations. Critics, however, have objected that Huntington

too strongly identifies culture with religion. In reality the diverse Islamic peoples are divided by large ethnic gaps. Moreover, the Islamists advocating a Caliphate or Islamic state only represent radical minorities that mainly fight their own authoritarian governments. According to Fukuyama, the fundamentalists' 'terrorism' is just a pre-modern rearguard action against the worldwide modernisation process.

China's combination of capitalism and a one-party government, the latter justified with an appeal to Confucianism (Section 9.1.1), may present a more serious challenge to liberal democracies. However, it has to be seen whether in the longer run authoritarian regimes can adequately confront internal and external problems, such as bridging the huge gap between the richer, modernised parts of China and the poor, underdeveloped countryside. The lack of freedom of information and open critique may prove counter-productive. Moreover, the burgeoning well-to-do middle class may want to combine economic freedom with political and spiritual liberties. Political liberals, then, may still stick to moderate optimism about the course of history.

However, this is not all there is to be said about liberalism on the national and international level. Whatever the practical success of political liberalism may be, principled adversaries may still stand firm in their opposition. So far, political liberalism can only claim the status of what Kant calls a 'hypothetical imperative': *if you want peaceful cooperation on the basis of reciprocity, then you should accept a liberal constitution*. Rawls may consider liberalism as the superior political philosophy in a more unconditional way, but he presents no arguments to support this claim. Non-liberals will not be impressed. Someone who takes metaphysical values so seriously that he is willing to sacrifice his own life in their name, will not accept liberal tolerance. A fundamentalist will not, simply for the sake of peace, suspend his deepest convictions about the right way of life. Likewise, liberal morality is no remedy for adherents of a heroic ethics who are convinced that people should wage a life or death battle to establish who may impose his values on society.

Yet, political liberals need not worry too much about this, at least not at a theoretical level. Even if they cannot convince fundamentalist perfectionists of the desirability of liberal restraint in politics, for their part liberals have no reason to tolerate intolerance. After all, the fundamentalists do not present any *public* reasons why others should obey their rule. The ultimate liberal way out, then, is a just war out of self-defence.

## 10.9 Answers to the Questions of Section 1.1

Of the main philosophical problems that were summarised in Chapter 1, a number have now been answered. These questions are: To what extent does law relate to morals, specifically to justice? To what extent is law simply an instrument of power? How can legal coercion be justified? When must one obey law? Up to which point may the state interfere with the private lives of its citizens? After a journey through the history of Western political and legal philosophy, in the first section of this chapter these questions were systematically split up into three related themes that emanated from the diverse philosophical theories: (1) the *epistemological* theme

of whether rational justification is possible in matters of practical and legal philosophy; (2) the theme of the relation between law and morals, that is, is it possible to formulate a specific *legal morality*?; (3) the theme of the character of legal morality, or, should the legal order be governed by a *broad perfectionist* ethics or a *narrow liberal* one?

In so far as the first two questions are concerned: in the modern worldview it is difficult to maintain that law has a necessary relation with any essentialist morality. Traditional natural-law doctrine presupposes a metaphysical view of nature, which is nowadays no longer regarded as acceptable. Yet it still appears possible to arrive at a 'narrow' concept of justice when one starts with the procedural criterion of acceptability for all. In epistemological terms (theme 1): although it is not possible to establish the truth of ethical theories on the basis of their correspondence with any metaphysical (including empirical) reality, justification may still be found in rational consensus. In Rawls's theory of justice, this takes the form of a hypothetical social contract. This procedure results in principles of justice that pertain to the constitution of the national state (theme 2), and represent a narrow liberal public morality, honouring the values of freedom, equality and democracy (theme 3). These principles of justice can subsequently serve as an independent critical moral test for positive law. This way of grounding law in a public morality can be seen as a form of natural law, when one does not interpret the latter term as an essentialist definition of the true nature of law, but as a search for a justificatory ground, and as a critical norm for the positive legal order.

These considerations concerning the relation between law and morality may also provide an answer to those other central questions of legal philosophy: when should one *obey* positive law, and when is *state coercion* justified?

In the view of Hobbes and the normative legal positivists (and, in his way, Kant) that the main function of law is to establish social order, disobedience to positive law is (almost) never justified. Indeed, they prefer a bad social order to disorder. Individuals should not have the opportunity to take the law into their own hands with an appeal to their particular sense of justice, for this would amount to collective disorder.

The narrow ethics of Rawls, on the other hand, imposes (in conformity with Locke) more far-reaching, moral demands on a legal order that claims obedience. In the first place, it requires that the state adopt a democratic form. Without a democratic say citizens have no duty to obey. Furthermore, one does not have to obey democratic laws that seriously violate the principles of justice. Yet the order-argument also plays a role in Rawls's theory of justice. Democracy is such an important achievement that one should to a certain extent accept unjust laws which came about democratically. Only in the case of very unjust law is civil disobedience allowed, but this requires a great degree of self-control from disobedient citizens. The illegal acts should be aimed only against the unjust part of the law, while showing loyalty to the legal order as a whole. Because of the indeterminacy of the idea of justice, Rawls moreover requires a very careful attitude: disobedience is permissible only when it is unambiguously clear that a principle of justice has been breached. This can clearly be established in the case of the violation of the classical fundamental rights that are guaranteed in the first principle. However, concerning



the interpretation of the second principle, that is, the distribution of socio-economic goods, much room for debate is reasonably possible. Therefore, one must in this domain leave the decision to the majority, so that the democratic order can be safeguarded.

The notion of a narrow ethics, moreover, gives a decisive answer to the question concerning the *limits* up to which the state may interfere with the private lives of its citizens. Most versions of a narrow ethics have a liberal import. Whether they take the value of individual autonomy or ethical non-cognitivism as their point of departure, the conclusion is that the individual must establish by himself how to arrange his life. In contrast with a broad, perfectionist ethics, a liberal state may, therefore, not impose a specific mode of life on its citizens simply because it regards it as morally correct. Moral decisions belong to everyone's autonomous sphere of freedom, guaranteed by the classical fundamental rights.

On the basis of such considerations the 19th-century liberal John Stuart Mill proposed the *harm principle* to determine the limits of the use of state force: individuals should be free to act and think as they like, unless they threaten to cause one another harm. State coercion is permissible only to prevent this. On this basis Mill assigns a very minimal task to state and law, and maximum individual freedom to individual citizens, in accordance with the 19th-century ideal of the minimal state: only where one individual violates the freedom and property rights of another individual, should the state interfere. Mill's conception is thus akin to Kant's thesis that the central task of law is to protect the freedom of each citizen in so far as it is compatible with the equal freedom of all others.

Hobbes, on the other hand, starting from the very same harm principle, does not recognise any principled individual liberties, because he fears mutual harm from everywhere. In his sombre version of the state of nature even peace-loving people do not escape from acting selfishly and aggressively, so that freedom may easily turn into war. Only by way of absolute power can the government properly fulfil its task – the maintenance of social order. In spite of his state absolutism, Hobbes confines his political philosophy to a 'narrow morality': there is no all-encompassing norm for *the good life*; all norms have the exclusive function of making peaceful cohabitation possible.

In the present view of narrow ethics the state is accorded a task which is more extensive than the minimal state of Mill, but more restricted than the absolutist state of Hobbes. In the current view, the state must interfere actively in the socio-economic domain (in contrast with the free market economy of classical liberalism). This intervention in economic freedom is required by liberal freedom itself: redistribution should guarantee that all citizens have equal opportunities to make use of their negative liberties. The current welfare state is based on this idea. Furthermore, the state should provide 'public goods' from which everyone may profit. This broader view of the state nevertheless falls within the notion of a 'narrow morality' because it stresses the priority of the classical freedom rights that allow individual citizens to give shape to their own lives.

## 10.10 Conclusion

In the preceding section the central questions of legal philosophy that were raised in the first chapter have been answered from the perspective of political liberalism. At the end of Section 10.8, however, we came to the conclusion that we cannot theoretically settle the epistemological dispute between political liberalism and its opponents. Rawls claims to do no more than rationally reconstruct the prevailing overlapping consensus in Western culture. It thus remains a fundamental subject for debate whether human rights and the democratic constitution represent universal values, or whether they are simply a product of Western culture. In brief: What is the value of the project of the Enlightenment? Do the Enlightenment values really provide a standard for moral progress?

In post-metaphysical times the most important argument against a universal ethics states that the contemporary world is so radically fragmented that only a relative, very temporary, place- and culture-bound agreement can be reached. Different cultures, subcultures and individuals would adhere to such widely divergent worldviews or interpretive paradigms that mutual disputes concerning facts and norms cannot be settled in a rational way. This conclusion would lead to serious political problems, because in the Modern Age worldwide communication has increased to such an extent that conflicts between cultures with opposing worldviews cannot be avoided, both on the national and the international level.

Here the political variant of a modern, narrow ethics may still provide the solution, which is based on the insight that people, despite their deep ideological disagreements, nevertheless have to live together and cooperate with each other. The notion of a narrow morality is a morality of the second order that is reconcilable with the verifiability *and* unverifiability of moralities of the first order. Everyone who wants to avoid war and suppression has to agree to a compromise, based on the liberal tolerance of a narrow meta-ethics. This particularly applies to modern Western societies that already share a tradition of tolerance. Here political liberalism has outgrown the status of an unstable compromise, being generally accepted as a *fair* arrangement. The hope is that this model may gradually be extended on a global scale as a consequence of increasing worldwide interdependence.

However, the political choice in favour of such a narrow ethics cannot be grounded in a compelling way. In the first place, it is possible that someone prefers war to orderly freedom, even if that choice could be deadly. The motto 'peace and order forever' will seem quite boring to belligerent types who, like Nietzsche, favour a heroic type of ethics. In the second place: someone who, following Hobbes, indeed prefers order, does not therefore have to prefer a *just* order as well (thus a narrow ethics in the Rawlsian sense). If a universal, objective ethics is absent, one can, moreover, consistently choose in favour of one's unadulterated self-interest and become a free rider (as long as all other citizens do not turn into free riders as well). Thirdly: it is possible that one can indeed choose in favour of a just order, but still reject Rawls's narrow theory of justice. This especially applies to non-Western societies. According to cultural relativism, every culture establishes what is right in its own way. One cannot, therefore, criticise a culture where a broad ethics is

generally accepted, and where the state indeed imposes a perfectionist mode of life. This conclusion is strengthened by the frequently repeated criticism of Rawls's theory of justice, that it reflects Western bourgeois society of the 20th century, and thus itself only has local validity. Similarly, within Western culture, communitarians may reject the model of political liberalism as too narrow, so that it should be completed with some traditional elements. In this, however, they will be confronted with the lack of generally shared traditions in the West. More threatening to political liberalism are Western fundamentalists of various creeds who are not willing to compromise in the name of social peace. With them, liberals are in a potential state of war.

On the other hand, cultural relativism may be invoked in support of Rawls's narrow political and legal ethics, because within Western culture the liberal constitution is accepted by an overwhelming majority. Political liberalism, then, can serve as shared moral point of departure for the design of Western societies, and as moral criterion for positive law. The further moral discussion within Western culture would then focus on the refinement of these ideals: What precisely does equality entail? When are inequalities justified? How must the different Enlightenment ideals be balanced in the case of conflict, as when freedom and equality collide, or when democratic majority decisions turn out to be unjust?

Viewed internationally, however, cultures with a liberal, narrow morality have not won the argument. On the one hand, the Enlightenment ideals of freedom, equality, fraternity, and the democratic constitutional state, are increasingly accepted all over the world. Most countries at least pay lip service to the values of the Universal Declaration of Human Rights. On the other hand, however, powerful non-Western countries, like China and Russia, do this in a rather cynical way. International relations are at least partly ruled by realistic power politics, also from the Western side. Here the practical solutions of a narrow political morality do not seem to work. In the case of an international conflict between a culture with a narrow ethics and a culture with a broad ethics, even Hobbes's order-argument does not provide a solution. Unlike in relations between individuals, between states enormous inequalities in power exist, so that stronger countries can without danger to themselves enforce their will on the weaker ones.

The consensus within Western societies is furthermore breached by cultural minorities with a more authoritarian perfectionist view of ethics, often imported from their non-Western regions of origin. Its members have, at best, an opportunistic reason to accept the liberal narrow ethics for the time being, as long as it safeguards their freedom to follow their own way of life (provided they do not bother others with it).

In brief: for someone who is prepared to compromise on reasonable grounds, the modern narrow political and legal ethics may be the right solution. However, no compelling arguments exist against persons and groups who regard their own perfectionist convictions as absolutely true, and therefore reject tolerance. Liberals may find some solace in the insight that their adversaries have no compelling arguments either.

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