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Legal Philosophy and Human Rights

This chapter is an introduction to legal philosophy. Legal philosophy combines two academic disciplines – philosophy and law – and therefore it is necessary to say something about these two disciplines. Subsequently we deal with how they are connected to each other, that is, with what the philosophical approach to law is. This means that two common philosophical views of the law, natural law and legal positivism, are discussed. Finally, we consider why the subject of human rights is a good starting point for engaging with legal philosophy's important themes.

Philosophy

Originally philosophy meant 'science' or 'love of knowledge', and that is why classical philosophers such as Aristotle wrote about practically everything, ranging from what we would now consider to be in the realms of biology and physics, by way of logic and rhetoric, to politics, and from the good of a human being to metaphysical issues such as the world or God. More recent philosophers such as Immanuel Kant still covered a wide range of topics, as varied as geography and epistemology. With the passage of time, and particularly since what we call the scientific revolution of the sixteenth and seventeenth centuries, the various constituents of 'science' have gradually gained independence, so that in a certain sense, philosophy has 'shrunk'.

Nowadays philosophy concerns itself, on the one hand, with theoretical matters, and considers such questions as the possibility of knowledge and science; on the other hand, it deals with practical matters like the possibilities for the well-being of the human being and human society. The term 'practical philosophy' is a good expression of what it is all about – philosophy of the practices in which human beings are involved, the philosophy of human actions in the broadest sense of the word. Practical philosophy is often called 'ethics'. That term is justified too. The word 'ethics' comes from the Greek word *ethos* and today we would translate that word as habit or custom. With regard to habit, it is significant that the word *ethos* also indicates living or dwelling. In this way ethics has to do with the way we conduct ourselves and interact with each other – in our own home, in a university or business, but also

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in the political institutions to which we belong. Ethics, then, says which of all these ways are (morally) good and which are not, and establishes the criteria by which it is possible to make such a distinction. That is why we associate ethics with questions of good and evil, with justice and injustice, even with virtue and vice. Ethics, in the sense of 'custom', is to be found in the expression 'customs and traditions', in the somewhat old-fashioned concept of morality and in the legislation of morals and public decency. In regard to the latter the obvious association is with punishable offences in connection with sexuality, prostitution and pornography.

As part of practical philosophy or ethics, legal philosophy focuses on the questions concerning the juridical organization of society. While practical philosophy in general deals with the well-being of human beings both as private individuals and as citizens in the public sphere, in legal philosophy the latter aspect is paramount. In a certain sense, however, the distinction between human beings as private individuals and human beings as citizens is itself artificial. From time immemorial some philosophers have maintained that one could only be a good person if one is part of a good society. According to Plato this connection is so intrinsic that you can only know what a good person is by looking at a good society. Even if one holds that the connection is less intimate, it remains a fact that the possibilities for a person to lead a good and successful life are determined to an important degree by the social environment and political society into which they are born. The private human being and the public citizen cannot be fully separated. Take, for example, the profession of the notary or the legal advocate: anyone wishing to occupy such a profession must meet certain professional conditions and have certain competences. In order to function properly, such a professional should not merely be 'good' in the technical, legal sense of the word, but also in the moral sense: they must serve society as a whole.[1] The same applies to the judiciary: judges have an important role in society, and how well they function not only depends on their knowledge of the law, but also on their qualities as human beings, notably their integrity.

Along these lines legal philosophy then would concern the morally good *legal* organization of society; in this way it is close to political philosophy.[2] Both are concerned with the question of when a political order is 'just'. This question – as history has made clear – can be answered in various ways. The answer can have to do with relatively minor things, such as a particular tax rate or a certain criminal penalty, but it can also concern relatively major matters,

[1] Obviously, some might argue that the common good can only be reached if such a professional focuses solely on the interest of their client. However, this is not what most professional codes state.

[2] Obviously, this is a particular take on legal philosophy. Not all legal philosophers would agree. Analytic legal philosophy is mainly interested in the conceptual analysis of central legal categories such as the concept of law itself, or authority. Legal positivists sometimes argue that there is no final answer to the question what a 'just' or a 'good' legal organization is. Variations of (German) legal positivism will be discussed in Chapter 11.

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such as the question as to whether there is really any justification for such institutions as taxation or a penal system. With this we indeed touch on political philosophy, because it concerns the good organization of the 'polis' too. Nowadays, neither political philosophy nor legal philosophy wishes to give an unequivocal or final answer to such minor or major questions; what both attempt to do is to bring together various opinions and views on these matters into a systematic and coherent unity.

In a certain sense, therefore, practical philosophy is of all times. One could even say that humans are 'ethical beings'; not because they continually do what is good and just, but because they continually judge themselves and especially others on moral grounds. Often, they do that hastily and without much reflection, but all these judgements have in common that they contain both the personal and the institutional element. Guiding concerns are questions such as 'How should I behave towards other people and (especially) how should others behave towards me? How should society be organized and what institutions are to be promoted and what to be rejected?' Such questions and opinions are unavoidable: they impose themselves on humans precisely because we are 'ethical beings'.

Since the institutions of society are nowadays to an important degree determined by law, and because the law consequently determines how individuals can organize their lives, both for themselves and together with others, it is obvious that an important part of practical philosophy is concerned with law. Legal philosophy is thus, in this understanding, 'practical philosophy' about law; law regarded not from the internal, but from an external, philosophical point of view. Legal philosophy does not content itself with establishing what the law is at a particular moment, but examines the law from the perspective of good and evil, of justice and injustice. It strives to give an evaluative judgement, even if it does not claim any monopoly on the moral 'value' of the law. Legal philosophy primarily articulates the values that inevitably play a role in law. In this sense it is not prescriptive, but descriptive. To 'do' legal philosophy is to filter the specific moral values regarding the law, to order them and examine them for their coherence, whilst being always aware of the demands of justice.

Despite the fact that the search for moral value(s) is certainly not always a priority for lawyers, they cannot avoid legal philosophy. Because every lawyer is involved in the organization of society, on a big or a small scale, in a certain sense every lawyer harbours within themselves a legal philosopher. Since nowadays the value of the law and the criterion for determining the justice of the law is often sought in human rights, these rights are central in this book.

Law

Anyone who thinks that everything will become clear now that we have finished dealing with the notoriously vague definition of philosophy and can

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start considering a definition of law is sadly mistaken. If anything, there may even be more disagreement about what exactly 'law' is than there is about the precise nature of practical philosophy. That should not come as a surprise, because law often concerns conflicting claims in which a great deal is at stake. How such conflicting claims should be resolved often depends on different views on how the law has to be interpreted. For example, is the freedom of assembly and association – to be found both in many constitutions and in Article 20 of the 1948 Universal Declaration of Human Rights – more important than 'the Elimination of all Forms of Discrimination against Women', as enshrined in a 1979 International Convention? Is it permitted for political parties, based, for example, on the different roles given to men and women according to the Bible, to claim priority of the former over the latter and legitimize their restricting of their electoral lists of candidates for public office to men only? Such a claim by a Dutch political party, however, was rejected in 2010 by the highest court in the land. Law deals not only with conflicting claims but also with conflicting values. For instance, is it within the competence of judges, sitting in national or in international courts, to set aside domestic laws that have been decided in a democratic manner because they are considered to be in conflict with human rights? Which value should prevail: the democratic decision-making process or the individual human right (as interpreted by such judges)? What is the proper relationship between legislative and judicial powers? Finally, law has to deal not only with conflicting claims and values, but sometimes also with conflicts between what a particular law demands from a person as a citizen, and what this person considers as their moral duty. Here one finds a conflict between the citizen's duty of obedience to the law and the person's duty to follow one's moral judgement. To put it more elegantly, this is a conflict between heteronomy and autonomy. This raises the following question: from what source does the law derive the authority by which it claims priority over the personal moral convictions and judgements of those who are subjected to the law? This question will be explored further in Chapter 17.

Due to these and related difficulties many scholars are inclined to accept a rather limited and apparently simple definition of law: the entirety of promulgated, regulatory and enforceable rules that apply within a particular territory. According to such a definition it is better not to speak of law in general, but of 'positive law', or posited law, from the Latin *ponere*. Positive law is, then, the law that is posited or in place at a particular time and within a particular territory.

This apparently simple definition has at least four problematic components. First, since promulgating a law is not an arbitrary act, but one that is carried out by a person or body that has the competent authority to do so, this concept of law immediately raises the issue of competence. Someone who, with the threat of a gun, robs me of my wallet, also sets a rule ('your money or your life'), but no one would acknowledge this to be a lawful rule. It is not issued by

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a competent authority.[3] The best-known body that is considered competent to promulgate legal rules is the legislative power. Obviously, the question that then arises is who has authorized the legislator to issue such legal rules? This question cannot easily be answered on juridical grounds only. The present legislator can certainly point to earlier legislators or legislative bodies and finally to an original or constitutive legislator, but from where did this original legislator derive its competence? Did it simply declare itself to be competent, but if so, on what grounds? Did it simply assume or take the power to declare itself competent, or was it based on societal acceptance or a social compact? If the first option was the case, does the law ultimately stem from (political) power? If the second, how broad must such societal acceptance be for a legal system to be valid?

Secondly, according to the simple definition, the law consists of rules, of general regulations that must be applied to concrete cases. Of course, it is possible to imagine a legal system in which the person or instance that issues the rule also applies the rule. Consider, for instance, a simple legal system in which a monarch is both legislator and judge. In modern complex societies, however, this is impossible and there exists a division of (legal) labour. The legislator issues general rules and delegates the competence to apply these rules to the judiciary. In applying, the judiciary has a certain room for interpretation because rules can only be formulated in general terms and the cases that must be adjudicated are always concrete. In daily life cases can always arise that are not foreseen by the legislator. One might then ask what really determines the law in a particular case: the rule or its application. On the basis of such considerations, Oliver Holmes, a famous former judge in the United States Supreme Court, offered a daring thesis.[4] He defended the thesis that the law was basically nothing more than a prediction of what judges will decide in a concrete case. In other words, the outcome of a particular legal case is not (at least not fully) determined by the rule, but by the way in which that case is interpreted by a judge given certain concrete circumstances. Holmes's thesis appears to be exaggerated, but it indeed happens often that, on the basis of existing positive law, it is not clear beforehand what the outcome of a particular legal case will be.

Third, the simple definition of the law speaks of the difference between regulatory and enforceable rules. This indicates an important distinction within the law. Some rules regulate the voluntary interaction between citizens: if two persons wish to make a contract with each other, they must do so in a certain way in order to make the contract legally binding. Whoever wants to marry or make a labour contract must follow certain rules. Other rules deal with what can be called 'involuntary' interaction between citizens. A clear case

[3] This is Herbert L. A. Hart's famous gunman example in his well-known article, 'Positivism and the Separation of Law and Morals', *Harvard Law Review* (1958) 71: 593–629.
[4] In his 'The Path of the Law', *Harvard Law Review* (1897) 10: 457–78.

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of such involuntary interaction is when a citizen, either deliberately or not, damages or injures another, such as in a traffic accident. The law wants to prevent such occurrences by means of enforceable rules and it sanctions the person who breaks such a rule. It is beyond doubt that the law is a system of rules that entail coercion, and that is true also of rules that regulate. If I ignore such rules, then no marriage or labour contract has been established.[5] The law, however, cannot be reduced to mere coercion, because some of its rules merely regulate relations between citizens. In short, the law 'does' different things.

This leads to a fourth and final difficulty. It is held that all the rules of the law form a 'unity' that is valid within a certain territory. Anyone with even a rudimentary understanding of modern law knows of the multiplicity of rules that are ascribed to various legal domains – civil law, constitutional and administrative law and criminal law. The question as to how these heterogeneous rules can possibly form a single unity seems to have an obvious answer. The law is a hierarchically ordered set of rules, whereby the validity of a lower rule can be 'deduced' from a higher rule, which itself in the end can be deduced from an ultimate legal rule. Yet, what is the status of this ultimate rule? Does this ultimate rule belong to positive law or is it only a quasi-rule that simply stipulates or presumes that all other rules are legally binding? Is this ultimate rule 'merely' the result of the exercise of political power or must it reflect some societal acceptance? Furthermore, the 'unity' of such legal rules that are valid within a particular territory suggests that law is tied up with the existence of a particular sovereign state: no law without a state. These days, however, no state is governed by its internal legal rules only, but by external legal rules as well, coming from bodies such as the European Union or the World Trade Organization, to name but two 'transnational' legal systems. Is 'law' still a unity if it is constituted by legal rules stemming from such heterogeneous sources?

Still, the 'simple' definition of law is useful in legal practice. Anyone studying law is chiefly concerned with the law as it is posited in rules and statutes; anyone consulting a lawyer about a concrete juridical problem wants an answer to what one can expect from the law, and in many cases it is possible to give such an answer. However, in the case of more complex questions, often concerning conflicting claims and values, or from a theoretical perspective, this positivist definition is not satisfactory due to problems, as we saw, of authority, interpretation, coercion and unity. Therefore, it is now necessary, albeit briefly, to pay attention to the classical perspectives on law that have dominated legal philosophy for centuries. On the one hand, one finds positivist thinking that regards the law chiefly in terms of statutory law and the political power whence it derives its 'authority'. On the other hand, one finds the

[5] Whether this lack of validity can then be considered a 'sanction' is discussed among legal philosophers. See, for example, Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), 33–5.

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natural law position that declares that in the last instance, the authority of the law is (also) a moral issue.

Two Schools of Legal Philosophical Thinking

It may raise eyebrows to pay attention now to a centuries-old discussion between two opposing perspectives on law. Has no progress been made on this question? In any case, these views and the concepts and contradictions that ensue from them are still current. They are still part of the present-day discourse on law. At the same time, they are found not only in abstract debate, but can also be recognized in positions taken by judges in 'difficult cases', albeit not often explicitly: this will become apparent in Chapter 8 which discusses the well-known Berlin Wall shooting cases. Precisely because this discussion took place over the centuries, many specific versions of these two perspectives have emerged and many efforts have been made to find a middle ground. It is better, therefore, to speak of schools of thought rather than strict and well-defined views. Moreover, it is frequently the case that there is something to say in favour of each point of view: we need not choose one or other of the 'camps'.

The tension between the two views is apparent in Sophocles's classic tragedy *Antigone*. This tragedy hinges on Antigone's refusal to obey an explicit prohibition, in the form of a (legal) rule issued by her monarch (and uncle) Creon, that her brother, who had been slain on the battlefield, was 'not to be buried, not to be mourned'. Following her conscience, she chooses not to obey this law and to fulfil the religious and familial duties that she derives from natural law. She gives priority to religious duty to bury her brother over the duty to obedience. For this, Antigone has received, over the centuries, a great deal of sympathy, but there are good reasons for Creon's position as well. The city of Thebes was just emerging from a period of civil war, and the establishment of a stable legal system would be of great benefit to all citizens. This would demand that one's duty as a citizen outweighs one's personal duties of religion or natural law.

Over time, various values can lie behind both legal positivism and natural law. For instance, during the Weimar Republic in Germany between 1919 and 1933 positivism stood for loyalty to the newly established republican legal order, while at the same time positive law (and the Weimar legislator) were undermined by an appeal to a conservative (higher) 'Law'. Eventually this appeal and the undermining of positive law contributed to the dissolution of Weimar and the rise to power of the Nazis. The defeat of Germany in 1945 was followed by a renaissance of Christian natural law which led to a central place in the new German constitution being given to (the inviolability of) human dignity.

Before 'defining' these two perspectives, it is important to recall the kind of questions they want to answer. First and foremost, the question of the origins of the law: is law merely a set of conventional rules established by human

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beings on the basis of their particular standards and values, or does law (also) consist of (moral) values that have a validity independent of human beings and that can be found in God, nature or reason? Is law exclusively the result of a human act of the will, such as the will of a legislator, so that any content can become 'the law'? Or is it rather a matter of knowing or discovering (moral) values and standards that, so to speak, exist beyond human will? In other words, are there sources of the law other than the mere 'fact' that a certain legal rule is posited, so that the possibility of a conflict between a posited legal standard and a higher standard exists? Is the law established arbitrarily, or subject to a higher standard and value? Linked to this question is that of whether the law is a closed system of values and standards in their own right, or rather whether a continuum exists between legal and moral values.

We must be cautious here because there is always a certain relationship between the moral opinions of society and the law. The law always reflects to a certain extent the prevailing moral views current in society: that is a sociological fact. The law's dependence on the views of society is made clear by a simple example. The fact that nowadays the law in various lands makes same-sex marriages possible is a reflection of the changed views on what marriage means and (gender) equality demands. Some people, however, hold, and here we approach a natural law claim, that marriage is an institution ordained by God between a man and a woman only and may not be extended to couples of the same sex (this subject is discussed thoroughly in Chapter 13). Positive law is, according to these people, subject to a higher religious norm and if one of its rules violates that higher norm (as in the case of enabling same-sex marriage) it should lose its validity. Therefore, the discussion between legal positivism and natural law is of greater importance than the mere sociological observation of the actual relationship between legal rules and prevailing moral opinions. That the Jewish part of the German population were declared to be second-class citizens – on the basis of the Nuremberg race laws of 1935 – was also the result of certain 'moral' opinions. Others held then that these 'laws' should never have been part of positive law in (Nazi) Germany. Partly because of these laws and its consequences the Universal Declaration of Human Rights declares that discrimination on the basis of race is strictly prohibited.

The difference between positivism and natural law concerns, in short, the question whether there is a necessary link between the legal system and certain moral values. It concerns the question of whether the law can be valid even if it does not satisfy certain minimum moral conditions. Nowadays these minimum standards are often located in human rights.

Legal Positivism

Despite the many varieties of legal positivism, its general view is that there is no necessary or intrinsic connection between law and morality; it acknowledges

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only a contingent sociological link. The validity of the law does not depend on prevailing moral views. Law should be regarded as the totality of valid rules established and upheld by competent institutions and persons. In other words, the validity of the law and the demands of justice or the standards of moral decency are different issues. According to positivism there is a sharp distinction between the law as it is and the law as one would perhaps want it to be based on one's morality. The question of justice has therefore no place in establishing what counts as law.[6] According to some positivists, the reason for this separation lies in the fact that humans cannot agree on what justice requires: myriad answers are given to the question of what justice really is. These positivists emphasize the importance of posited law on the basis of moral scepticism: no unequivocal, clear answer to the question of justice exists. Take as an example the classic definition of justice that 'everyone should get what they deserve'. That may sound convincing, says the sceptical positivist, but how can one decide who gets what? Is 'merit' the criterion for dividing up resources or should it be 'need'? Other positivists emphasize the importance of legal certainty: the authority of the law would be impaired if citizens were encouraged to take into consideration (moral) standards of behaviour that are not set by a competent authority. Basically, this is the position of Creon we have seen. Still others advocate positivism because a scientific approach to law is only possible with a well-defined 'object'. Therefore, it is necessary to distinguish law from other standards of behaviour.

Given that positivism maintains that moral considerations play no part in determining what the law is, the question of the validity of the law cannot be answered with reference to morality. A different answer is given, namely by looking at whether a certain legal standard is posited in a correct manner and whether that standard is in fact followed by those to whom it is addressed. In short, whether some rule is considered 'legal' is not decided on the basis of its (moral) content or some moral source, but on the basis of whether this norm is generally obeyed and effectively sanctioned. Effectiveness of the law must be understood here in a broad sense. It means that a legal rule is not only (generally) externally enforced, for example by means of making sanctions available, but also that this rule has been internalized in the sense that the person to whom the legal rule is addressed is also, as it were from an internal perspective, willing to accept that rule as a standard of behaviour.[7] The definition given in the early years of the twentieth century by the sociologist Max Weber still fits this view rather well: law is a system of rules – issued by a particular group of persons – whose existence is guaranteed by the

[6] Therefore, Kelsen, the proponent of the pure theory of law, describes his task as 'to unfetter the law, to break the connection that is always made between the law and morality'. See Hans Kelsen, *Introduction to the Problems of Legal Theory*. Translated by Stanley L. Paulson and Bonnie Litschewski Paulson (Oxford: Clarendon, 1996), 15.

[7] On this internal aspect of law, see Hart, *The Concept of Law*, 89–91.

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possibility of physical and psychological coercion whenever the law is broken.[8] Put in a different way, law is a particular social order within a centrally organized society based on a monopoly of (political) power. The central elements of this definition are a social system and the existence of a central institution that is authorized to enforce compliance with the existing legal rules. Obviously, this presupposes the statutory aspect of the law. After all, how can any order exist without rules that are issued and promulgated?

For this reason, the emphasis of positivism sometimes rests on the fact that the legal norm is issued. Hereof we find a classic definition in the nineteenth century command theory of John Austin[9] – the law is the totality of commands as they are promulgated or 'issued' by a sovereign and that are generally obeyed because they are backed up by sanctions. Accordingly, the law would (solely) consist of three components: (1) It is established by a person or a body that is competent to do so. (2) This person or body itself is not subject to these legal standards, but can enforce their compliance. (3) That which is promulgated has the character of an order that people obey; it is not merely an exhortation or recommendation. Precisely by emphasizing its commanding character and the obedience that follows from this, we find the element of social effectiveness in this definition too.

To summarize, according to a legal-positivist approach the law is statutory and judicial power. It is strongly connected with (societal) power because it must be effective, and this power is 'codified' because it is laid down in legal standards. Over the course of time refinements of this theory have emerged. It has been acknowledged that there are legal commands that are not always obeyed, but nevertheless do not lose their legal character. Since the legal philosopher Hart wrote his famous treatise on law, every contemporary positivist has defined law in terms of rules rather than commands. The heterogeneity of all the elements of which the law consists can be better encompassed by the broader concept of 'rule' than by 'command'.

Some claim that being issued or promulgated and being effective would in the end amount to the same thing, but the distinction is nonetheless useful. The second aspect of effectiveness has more to do with the perspective of the outsider or observer. If, as a scholar or as an outsider, I ask whether a particular standard in a certain legal system is 'law', then I look for whether it is being upheld. Being promulgated or issued reflects the perspective of the participant. Take for instance, the judge or the citizen seeking legal advice: they would first ask what is 'statutory' in law before considering the question of whether it is upheld.

[8] See Robert Alexy, *Begriff und Geltung des Rechts* (Freiburg/München: Alber, 1994), 32.
[9] John Austin, *The Province of Jurisprudence Determined* (Indianapolis: Weidenfeld & Nicholson, 1954), Lecture 1.

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