



# Report on a theoretical review of the conceptualization and articulation of justice in legal theory

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I am enthusiastically looking forward to further debates in the ETHOS project on the remaining disagreements or misunderstandings. All errors are mine.



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## About ETHOS

*ETHOS - Towards a European Theory Of Justice and fairness*, is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening the knowledge on the European foundations of justice - both historically based and contemporary envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reserve inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal, that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed "lived" experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared to giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice, and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition,
- b) legal framework,
- c) daily (bureaucratic) practice,
- d) current public debates, and
- e) the accounts of the vulnerable populations in six European countries (the Netherlands, the UK, Hungary, Austria, Portugal and Turkey).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands who coordinate the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019

## Executive Summary

This report attempts to give an overview of justice in legal theory delineated by its purpose to explain non-lawyers how lawyers frame and perceive justice concerns in their discipline, to explicate the kind of screen through which law or lawyers approach justice issues. It therefore focuses on those legal disciplines where issues of justice are most salient, in order to provide an overview of “justice with a legal flavour”. These disciplines are especially legal theory (in the narrow sense), constitutional law, and fundamental/human rights law, out of which the latter ones in Europe are necessarily interwoven with the law and legal scholarship of the European Union.

Law is highly specialized, historically strongly influenced, largely still national, in short, plural. Thus, any overview of “law” will be a gross overgeneralization of legal principles from quite different legal systems. Furthermore, any such abstract discussion risks reinforcing one’s own narrative by claiming universality where in fact it does not exist. Therefore, this paper explicitly only formulates claims on “the law” with regard to European and Western legal thinking, and its findings might not be applicable elsewhere.

A fundamental question of the relation of law and justice is whether law is “about” justice at all. Legal scholars have for long theorised this problem in the debate between natural law and legal positivism, which will be introduced here firstly.

While the debate cannot be closed here, its overview is important because it provides entry points into other debates in law which have particular relevance for the question of justice. This report relies on the following such entry points in particular: on the question of universalism and particularism of human rights and the relevance of critical theories, especially critical race theory in relation to vulnerable groups, on the importance of rule of law and procedural justice, and the tensions between substance and procedure, and on the (partial) positivisation of natural law in the form of fundamental constitutional and (European) human rights.

In this latter regard, the report follows a twofold path. In a general approach, the report sketches the basic forms, frameworks and mechanisms in which justice concerns are translated into law in Europe, with special regard to the limitations and increasingly perceived justice deficiencies of the European legal construct.

In a specific dimension, the report introduces the reader to the basic structure of some particular human and fundamental rights which are most important from the perspective of distribution, representation and recognition – the “justice angles” of the ETHOS project.

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## I. Introduction

The question of the relations of law and justice is an overwhelmingly broad one. In order to make it possible to answer in one paper, it needs to be broken down into separate sub-questions of differing generality. Firstly, the question can mean whether any law, necessarily, has relation to justice at all. This requires a definition of law and a definition of justice. This paper takes as given that law here refers to a common sense understanding of those institutionalized norms which emanate, are sanctioned or accepted as legitimate by the coercive authority of the state. While this definition is problematic from many perspectives, the author takes it not to be the task of this deliverable to resolve the question of the concept of law which could not be resolved in a few thousand years of intense thinking. What needs to be emphasised, compared to the other dx.1. deliverables, however, that law is not only a scholarly discipline, but also a complex social practice with various institutional actors. Thus, the unit of examination is not single, or homogeneous, but multiple, fragmented, and plural. Law is different when understood as

- (i) law in the books or black letter law (i.e. all the texts adopted by the legislation and other law-making authorities, including judges in the common law tradition),
- (ii) law in the institutional practice (i.e. in the interpretation of courts, and authorities applying the law),  
and
- (iii) law in the actual realization of social life.

Legal *scholarship about all these* is again quite another matter with its high specialisation, if not compartmentalisation. While every legal system craves for or claims certain unity, it remains quite true that different branches of law will have a different approach to justice principles, or display different types of justice concerns at all, and will operationalize different modes of accommodations. This paper will only refer to the kind of legal fields which are portrayed in the official or mainstream theory as providing the foundation and unity to the entirety of law: namely constitutional and human rights law. It has to be noted at the outset, however, that no actual legal order can guarantee at any given point of time full consonance with those foundations, and not only

because those foundations in practice are contested in interpretation, but simply for reasons of contingency, lack of efficiency, diversion due to partial interests and so on. The need for courts and increasingly, constitutional and human rights review is a concession that the consonance is never complete.

The second important differentiation is of course that law is examined by philosophy, by political theory and by social theory as well. All of these disciplines have something to say about law and justice, and all of these have resonances in legal scholarship.

Legal theory thus might mean a part of political or social theory, and might mean a theorisation of the different layers of law, might mean theoretical parts of different disciplines in legal scholarship (theory of private law, theory of penal law, theory of constitutional law, etc), and might mean a theorisation of legal questions on law generally (this latter one probably is the closest to what lawyers would call legal theory in the strict sense of the word). Legal *philosophy*, on the other hand, at least in law school curriculum, is used (by legal scholars) to refer to a certain type of (largely historical) introduction to political philosophers' theories from ancient till modern. Theories of lawyers *stricto sensu* figure usually only from around the 19<sup>th</sup> century, in rare instances with some excursions into more recent interdisciplinary approaches such as law and economics, discourse theory, critical legal studies, feminist legal theory or cognitive theories of law. Thus, the self-image of legal theory at least as visible in the usual (Western) law school curriculum shows strong embeddedness into political philosophy in general, and very little professional specification until relatively recently (19<sup>th</sup> century, but sometimes rather 20<sup>th</sup> century)<sup>1</sup>. There is definitely no need to give an introduction to political philosophy as input into WP2, the "philosophers' work package."

This paper will focus on theoretical parts of some different legal disciplines, especially those where issues of justice are most salient. The discussions at various ETHOS meetings led to the conclusion that a strictly legal theory paper only would not promote the project goals, but what is needed is an overview of "justice with a legal flavour". Therefore, legal theory in the sense usually used by legal scholars, especially in the Anglo Saxon analytic or German and French continental legal tradition<sup>2</sup>, will only be presented shortly and will form only part of the writing. Instead,

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<sup>1</sup> Cf Sean Coyle, *Modern Jurisprudence* (2<sup>nd</sup> edn, Hart, Oxford, 2014) starts in its first part with Aristotle, and ends on Kant, while in the second part discusses Hart, Dworkin, Rawls, Fuller and Finnis, i.e. 20th century authors, all in the Anglosaxon debate around legal positivism.

<sup>2</sup> This opposition between Anglosaxon analytic legal theory and continental legal theory is not a simple reproduction of the difference between analytical and continental philosophy, but relates to the rough difference in the type of legal tradition of how the law is organized, what its main principles and actors are, etc, ie common law and continental law, which evolved in these different areas.

the main purpose of this paper is to explain to non-lawyers how lawyers frame and perceive justice concerns in their discipline, to explicate the kind of screen through which law or lawyers approach justice issues.

It is however already important to here emphasise that law is highly specialized, historically strongly influenced, largely still national, in one word, plural. When in the following “principles of law” will be mentioned, it will necessarily be a rather gross overgeneralization from very different legal systems. What is more, at this level of abstraction, any discussion risks reinforcing one’s own narrative by claiming universality where in fact it does not exist. Therefore, this paper explicitly only formulates claims on “the law” with regard to European and Western law (legal systems), and its findings might not be applicable elsewhere. This might be justified in a project which aims to engage with a potential European theory of justice and fairness. There are studies suggesting common human morality exists,<sup>3</sup> and surely, international human rights law aspires to legally institutionalize some of it, even if with questionable success. On the other hand, even normative universalism does not or does not need to claim there exists or will *at some point necessarily* exist a universality of legal standards in general, since nothing guarantees that law at any given place and at any given time actually conforms to human morality. This leads to a more fundamental question which will be the first one discussed in this report. Notably, whether law is about justice at all, or about something else – like survival of the community, order, peace, and so on. If at least some of the time law goes against fundamental beliefs about justice, but still remains law, then law must have some other organizing principle at its core. The first substantive section (II.) will therefore be devoted to the most important debate in legal theory – in this case, legal theory “proper” --, the one between natural law and legal positivism, and its ramifications in debates over universalism of especially human rights. The next section (III) will introduce the reader to a related aspect of law, which is often criticized and – lawyers feel – undervalued especially in the social sciences, law’s focus on form and procedure. Some lawyers would claim that rule of law is justice, or more precisely, fair procedure is the only or maximum justice law can provide. Section IV thereafter will introduce the reader to the current basic framework of justice claims in constitutional and human rights law. The last part of the paper before conclusion sketches some particular instances of law and justice relations on the examples of rights which are of

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<sup>3</sup> John Mikhail, *Elements of Moral Cognition: Rawls’ Linguistic Analogy and the Cognitive Science of Moral and Legal Judgment* (Cambridge University Press, 2011) and John Mikhail, ‘Moral Grammar and Human Rights: Some Reflections on Cognitive Science and Enlightenment Rationalism’ in Ryan Goodman, Derek Jinks, & Andrew K. Woods (eds), *Understanding Social Action, Promoting Human Rights*, (Oxford University Press, 2012) Georgetown Public Law Research Paper No. 11-124. Available at SSRN: <https://ssrn.com/abstract=1924915>



particular importance to later deliverables in the “legal” Work Package of the ETHOS project, i.e. some individual instances of law’s engagement with issues of distribution, representation, and recognition.

This paper focuses on theories of justice in the normative sense, since more empirical understandings as put forward by legal sociology and the anthropology of law will be presented in Deliverable 3.3

## II. Is law about justice at all?

### The natural law and legal positivism debate

While the general assumption in a democratic society might be that law is out there to guarantee justice in society, legal theory has struggled with this question for thousands of years. Socrates clearly thought law had priority over justice, and unjust laws were to be obeyed since legality was the prerequisite of society. The new testament conceptualized the old testament as being about law, while claiming Jesus' theory of love will eventually replace, or at least soften or complement the theory of the law. Antigone's struggle is framed as a conflict between positive law and another type of law which conforms to justice. The idea of natural law and later human rights are more explicit expressions of the ever ambivalent relationship between law and justice.

Legal philosophers call this the question of the morality of law or the relation between law and ethics. Legal positivism in its classic forms claims law and morality can and ought to be disconnected (the thesis of separability), while natural law thinking supposes that there is a higher order law (divine law or law of reason) beyond positive law which is equally part of law. While some theories are located somewhere between the two positions, ultimately the tension remains. Increasingly the debate between the two approaches seems to boil down to showing what the other side actually must or does accept from one's own standpoint,<sup>4</sup> and there are important works aspiring to

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<sup>4</sup> In this regard the two entries of the Stanford Encyclopaedia of Philosophy on natural law and on legal positivism are illuminating. Finnis, John, "Natural Law Theories", *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2016/entries/natural-law-theories/>, and Green, Leslie, "Legal (footnote continued)

transcend these differences.<sup>5</sup> This paper seeks to sum up the vast literature on the subject, highlighting the different perspectives of legal theorists (legal philosophers) with regard to the place of justice in (or outside) legal theory (legal philosophy).<sup>6</sup>

Modern legal positivism is usually taken to start with John Austin's<sup>7</sup> theory of law (1832). His work has been an influential attempt to create a systematic and conceptual legal theory which clearly differentiates between what the law is and what the law ought to be. In Austin's words, the starting point is that "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation."<sup>8</sup> Austin thereby gave the first formulation of the separability thesis.<sup>9</sup>

On the continent, Hans Kelsen's 'pure theory of law' is the starting point of any discussion on legal positivism. Kelsen wanted to avoid reducing legal science to social or natural science or morality, whence he aimed to purify legal theory from all non-legal elements<sup>10</sup>. Kelsen argued that the specifically legal lies in a specific form of validity: a legal norm is legal in that its validity is transferred on it by another legal norm. This specific legal validity is needed

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Positivism", *The Stanford Encyclopedia of Philosophy* (Fall 2009 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>.

<sup>5</sup> Neil MacCormick, *Institutions of Law. An Essay in Legal Theory* (OUP 2007).

<sup>6</sup> A side note on the names: legal philosophy might be preferred by more natural law inclined thinkers, while legal theory might be preferred by legal positivists (although exceptions abound), exactly because legal positivism wants to separate legal theorizing from moral and political philosophy. A 'pure philosophy of law' would certainly be a complete misnomer for Kelsen's theory. On the other hand, philosophy of law is associated with any type of analytical thinking, including natural law theories (eg Finnis), and legal philosophy is broad enough to include critical, sociological, etc approaches to law.

<sup>7</sup> Not to be confused with philosopher John Langshaw Austin (who otherwise was a contemporary and colleague of Hart).

<sup>8</sup> John Austin, *The Province of Jurisprudence Determined* (Library of Ideas 1954) 184-85 as cited by HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 596.

<sup>9</sup> Austin is also noted for his command theory of law, according to which law is the sovereign's command, backed by threat of punishment. This part of his theory is however remembered more from the criticism of HLA Hart's *The Concept of Law* than on its own. This will be discussed below.

<sup>10</sup> Hans Kelsen, *The Pure Theory of Law* (transl. from the 2nd German edition by Max Knight, The Lawbook Exchange, Clark, NJ, 2005)

(footnote continued)

in order to avoid the naturalistic fallacy, i.e. deriving an ought from an is. In order to avoid infinite regress, the theory needs to presuppose a “basic norm” from which all legal norms are derived. There is debate on whether Kelsen ultimately understood the basic norm in Kantian transcendental terms or felt compelled to build it in for Humean (sceptical) reasons.<sup>11</sup> In any case, the separation of law and morals by Kelsen is accompanied by moral relativism.<sup>12</sup> From that follows the requirement for the neutrality of law. This importantly does not mean that Kelsen was indifferent to injustices which he personally witnessed in Weimar Germany, being an engaged democrat until his exile in 1933. To the contrary, it appears that the two convictions of being a relativist and a democrat are tied together.<sup>13</sup> Furthermore, an important *moral* argument for the separation of law and morals in Kelsen’s theory is that the opposite thesis (of natural law) in practice will amount, he fears, “to an uncritical justification of the national coercive order that constitutes this [any particular -- OS] community.”<sup>14</sup>

Kelsen’s theory has come under strong attack for various reasons. Radbruch famously faulted legal positivism for making German lawyers defenceless against laws of criminal nature in the Third Reich.<sup>15</sup> This is now considered historically inaccurate: quite to the contrary, it seems German lawyers (the judiciary especially) rather actively – and even in anticipation -- filled the law with Nazi content in a fully non-positivistic fashion in many crucial areas.<sup>16</sup> Historical inaccuracy however does not eliminate the theoretical challenge posed by Radbruch and natural law theories in general .

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<sup>11</sup> Cf Andrei Marmor, ‘The Pure Theory of Law’, *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2016/entries/lawphil-theory/> with further references.

<sup>12</sup> Kelsen, n 10, eg 47-54, 59-69.

<sup>13</sup> „For just as autocracy is political absolutism and political absolutism is paralleled by philosophical absolutism, democracy is political relativism which is paralleled by philosophical relativism”. Hans Kelsen, ‘Absolutism and Relativism in Philosophy and Politics’ (1948) *The American Political Science Review* 42, 906.

<sup>14</sup> Kelsen, n 10, 69.

<sup>15</sup> Gustav Radbruch, ‘Gesetzliches Unrecht und übergesetzliches Recht’ (1946) *Süddeutsche Juristen-Zeitung* 1, 105.

<sup>16</sup> Matthias Mahlmann, ‘Judicial Methodology and Fascist and Nazi Law’ in Christian Joerges and Navraj Singh Galeigh (eds), *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart, Oxford, 2003) 229-242.

(footnote continued)

Before going into that, the other groundbreaking representative of legal positivism needs to be introduced, namely HLA Hart. Hart starts out of a critique of John Austin's command theory.<sup>17</sup> The external threat of sanction cannot be the defining feature of law, since that exactly does not allow for differentiation between legal coercion and the coercion of a robber gang, as we know since Augustine. Instead, Hart introduces the concept of obligation and the internal and external perspectives of looking at law. While externally, sanction theories might be able to describe (and predict) the regularity of rule following, they do not account for the fact why we consider a legal rule broken even if there is no threat of sanction.<sup>18</sup>

On the other hand, the internally based account of law and legal obligation does not mean that Hart merges law and morality. Quite to the contrary, law and morals *are to be* strictly separated, for reasons similar to that presented by Kelsen. These include conceptual clarity and the avoidance of reducing law to morality, so there remains intellectual room for critical appraisal of law, also in order to know when to disobey it. As the much quoted lines go: "So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny."<sup>19</sup>

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<sup>17</sup> HLA Hart, *The Concept of Law* [1961] (2nd edn Clarendon 1994).

<sup>18</sup> Ibid 83: "the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions." And: "If it were true that the statement that a person had an obligation meant that he was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, e.g. to report for military service but that, owing to the fact that he had escaped from the jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being caught or made to suffer. "

<sup>19</sup> Hart n 17, 210.

(footnote continued)

Hart – and much legal positivism lately – does not (need to) claim that there is no overlap (whatsoever or even significant) between (the content of) law and morals. Hart in fact believes that there is a minimum content of natural law in every legal system in order to be called law<sup>20</sup>.

What matters for positivists is the thesis that law and morals are *separable* (ie thesis of separability, not thesis of separation) in the sense that law is based on social facts, and morals are taken to be social facts. Still, this is a fundamental question for natural law theorists: to them law and morals are to be necessarily connected. Radbruch's explicit claim is exactly to this effect: a law whose content is intolerably (or unbearably -- unerträglich) unjust is not a law.<sup>21</sup>

This so called Radbruch-formula only applies to intolerable injustice, for all other cases, including "tolerably unjust" laws, Radbruch maintains the priority of legal security (or rule of law). Intolerable is not defined precisely, but in another writing Radbruch refers to human rights declarations in this regard.<sup>22</sup>

At this point it can be noted that though human rights are surely closely related to justice, their eventual codification (positivisation) in international treaties and constitutional rights catalogues appears to buttress positivism at least as much as natural law theory.

The separability thesis is not the only point where natural law theorists attack positivists. John Finnis famously criticized the possibility of taking up the kind of neutral or value-free positions legal positivists like Kelsen and Hart would want to maintain. He argues – usually<sup>23</sup> taken as convincingly – that the differences between legal theories of the positivist fashion (who claim to engage in "descriptive sociology") just as much depend on the preliminary value choices of what is significant and important in the multifaceted world of "law" as in any other analysis.<sup>24</sup> In

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<sup>20</sup> Hart n 17, 193-200.

<sup>21</sup> Radbruch n 15.

<sup>22</sup> Gustav Radbruch, Fünf Minuten Rechtsphilosophie as cited by Matthias Mahlmann, *Rechtsphilosophie und Rechtstheorie*, (Nomos, Baden-Baden, 2010) 153.

<sup>23</sup> But see Brian Leiter, 'Beyond the Hart/Dworkin Debate: the Methodology Problem in Jurisprudence' in Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (OUP 2007) 170 et seq.

<sup>24</sup> John Finnis, *Natural Law and Natural Rights*, (2nd edn 2012 Clarendon, Oxford) ch I. Evaluation and the Description of Law, 4-18.

(footnote continued)

Finnis' words, "the point of reflective equilibrium in descriptive social science is attainable only by one in whom wide knowledge of the data, and penetrating understanding of other persons' practical viewpoints and concerns, are allied to a sound judgment about all aspects of genuine human flourishing and authentic practical reasonableness."<sup>25</sup> From then on, he of course easily continues that natural law theories are the ones which do not actually shy away from explicitly taking a stance on those moral questions legal positivists leave implicit and hidden.<sup>26</sup> In this sense, legal positivism is always incomplete, and a full theory of law will include as its major part an inquiry of the standards of a just law.<sup>27</sup>

Natural law theories, Finnis included, also eminently claim that the existence of law at all – instead of anarchy and tyranny – needs to be justified, and such a justification necessarily includes referring to certain basic human needs and goods, which – as substantive values – will form the basis from which positive law derives its validity.<sup>28</sup> This implies the existence of higher law or *ius gentium* as law, to which positive law must conform in order to be called law. In Finnis' argument, the Nuremberg trials illustrate "everyone's obligation to behave with elementary humanity even when under orders not to—even if those orders have intra-systemic legal validity according to the formal or social-fact criteria of some existing legal system."<sup>29</sup>

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<sup>25</sup> Finnis, *ibid* 18.

<sup>26</sup> Finnis, *ibid* 19.

<sup>27</sup> Finnis, *eg n* 4, esp the critique of Green.

<sup>28</sup> Finnis, *n* 4.

<sup>29</sup> Finnis, *n* 4.

(footnote continued)

A further critique -- exposed by Ronald Dworkin<sup>30</sup> -- questions what it takes to be positivism's fixation on rules.<sup>31</sup> Dworkin argues law not only consists of rules, which have an all-or-nothing character, but also of *principles*,<sup>32</sup> which apply in a more or less fashion, meaning they require interpretation and balancing. What is more, it is principles through which justice concerns are typically transferred into and decided in law, ultimately and most visibly in the interpretation of courts. According to Dworkin, moral arguments *necessarily* (in contrast to the separability thesis) form part of legal argumentation as law cannot be grounded in social facts alone, but is always based on moral considerations (political morality), too. Dworkin provides many examples from US case law to show that in actual legal practice legal actors (parties, lawyers, judges) are in disagreement not about social facts, but about moral questions,<sup>33</sup> whence law's need for moral interpretation and construction. By this, Dworkin basically founds a whole new legal theory school called interpretivist legal theory, shifting the focus from legislations to courts very strongly. Especially in the area of human rights, the theory of moral interpretation has a strong intuitive appeal.

An underlying theme in the debate between legal positivism and natural law concerns the relation of law and political community, of relevance for a project on a European theory of justice. Hart and Dworkin explicitly limit their theory's reach to a supposed distinct legal system, such as that of the nation state. Finnis also explains natural law theory in terms of a legal system of a state, and appears to limit universal moral contents of the law of each state only with regard to some basic, even if fundamental tenets (*ius gentium*). They all seem to agree that the default unit of legal theorizing is the state. The following section will deal shortly with the broader context in which this question is problematized.

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<sup>30</sup>Ronald Dworkin, *Taking Rights Seriously* [1977], especially the chapter entitled "The Model of Rules I", originally published in 1967, Dworkin, Ronald M., "The Model of Rules" (1967). Faculty Scholarship Series. Paper 3609. [http://digitalcommons.law.yale.edu/fss\\_papers/3609](http://digitalcommons.law.yale.edu/fss_papers/3609).

<sup>31</sup>Note that Hart of course does not agree that this is a proper reconstruction of his views, even though there are strong arguments that even if it is not a view „he expressed“, but a view „he held“. Cf with further references Scott J. Shapiro, 'The "Hart–Dworkin" Debate: A Short Guide for the Perplexed' (March 5, 2007). Available at SSRN: <https://ssrn.com/abstract=968657>, accessed 30 November 2017, esp 15-16

<sup>32</sup>Dworkin n 30. Dworkin also differentiates policy (a standard that sets out a goal to be reached), too, but that is not directly relevant for this paper.

<sup>33</sup>An excellent detailed explication of especially these arguments in Dworkin's *Law's Empire* are provided by Shapiro n 31.

(footnote continued)



## Universalism and cultural relativism in law

Legal philosophy and theories of law in general also need to take a stance on the issue of cultural relativism versus universalism. Edmund Burke,<sup>34</sup> and the historical (or historicist) legal school on the continent (eg Savigny)<sup>35</sup> are classic proponents of the idea that every political community (or people) develops its own law, and abstractions such as human rights (as the French declaration on the Rights of Man and of the Citizen, 1789, or Thomas Paine's writings) and other universalistic aspirations (as in Hegel's philosophy, whom Savigny targeted) are foreign to the actual legal experience.

This fundamental opposition is present to this day, although the "human rights law revolution" after WW2 and its further waves<sup>36</sup> surely shifted the balance towards universalism as a default. Human rights law and theory, after all, is based on the idea that every human being has certain universal, inalienable and indivisible rights, regardless of the political community to which (s)he does (not) belong. Nonetheless, to directly base human rights on a certain conception of human nature is often dismissed as unwarranted essentialism.<sup>37</sup>

Usually, the common sense solution appears to be a compromise: universal human rights apply equally to everyone, but their actual interpretation might be culturally varied, to some – allegedly "limited" – extent.<sup>38</sup> The differing extents to which hate speech is regulated in different countries are considered to be within reasonable interpretations of the universal human right to freedom of speech. Others of a more radical sort, like Stanley Fish,

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<sup>34</sup> Edmund Burke, *Reflections on the Revolution of France* [London 1790].

<sup>35</sup> Friedrich Carl von Savigny, *System des heutigen römischen Rechts* [Berlin, 1840].

<sup>36</sup> Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK and London: University of Oklahoma Press 1991), but cf Renske Doorenspleet, 'Reassessing the Three Waves of Democratization' (2000) *World Politics*, 52, 384-406, and Renske Doorenspleet, *Democratic Transitions: Exploring the Structural Sources during the Fourth Wave*. (Boulder: Lynne Rienner Publishers 2005).

<sup>37</sup> Chris Brown, 'Human Rights and Human Nature' in Cindy Holder & David Reid (eds) *Human Rights: The Hard Questions* (OUP 2013).

<sup>38</sup> Joshua Cohen, 'Minimalism about Human Rights: The Most We Can Hope For?' in Joshua Cohen, *The Arc of the Moral Universe and other Essays* (Harvard University Press 2010) 319–348.

(footnote continued)

would claim that speech only has meaning in a community of listeners and speakers (“interpretive communities”), and, thus, that already limits what can be said.<sup>39</sup>

Apart from such sceptical or relativist, let alone politically manipulated<sup>40</sup> arguments, there is also a perhaps more fundamental sense in which issues of universalism are problematized in human rights law. It also derives from the idea of human rights that diversity and resulting particularization have normative appeal. As Neil Walker succinctly put it:<sup>41</sup>

On the one hand, most who take human rights seriously, whether as objective moral truth or as socially constructed consensus, believe there is an internal connection between the very idea of human rights, with its strong suggestion of the equal worth of all humans, and a common standard of protection, with all that implies by way of universals. On the other hand, and partly due to the same background modernist considerations of equal value and equal respect for all expressions of individual and collective autonomy in contradistinction to the pre-modern emphasis on conformity with a pre-given order, many believe that any rights-regarding regulatory architecture must accommodate difference – and so particularize – in a manner that qualifies or even challenges the underlying universalism (internal references omitted – OS) .

In this, Walker follows up on Charles Taylor’s argument that in order to resolve the issue of particularism vs universalism, first we need to inquire “the conditions of unforced consensus” on human rights.<sup>42</sup> Relying on the idea of iterative universalism proposed by Michael Walzer,<sup>43</sup> Walker envisages a kind of rescaled, decentred and

<sup>39</sup> Stanley Fish, *There is no such thing as free speech, and it’s a good thing, too* (OUP, 1994)

<sup>40</sup> As the Asian values debate eg is usually taken to be: Neil A. Englehart, ‘Rights and Culture in the Asian Values Argument: The Rise and Fall of Confucian Ethics in Singapore’ (200) *Human Rights Quarterly*, 22, 548-568 But compare Fred Dallmayr, ‘„Asian Values” and Global Human Rights’ (2002) *Philosophy East & West* 52, 173–189, and especially the argument that human rights are a “concept cluster”.

<sup>41</sup> Neil Walker, ‘Universalism and Particularism in Human Rights’, in Cindy Holder and David Reid (eds) *Human Rights: The Hard Questions* (OUP 2013).

<sup>42</sup> Charles Taylor, ‘Conditions of an Unforced Consensus on Human Rights’ in Charles Taylor, *Dilemmas and Connections* (Harvard University Press 2011) 105–123 as cited by Walker n 41, 56.

<sup>43</sup> Iterative or reiterative universalism is perhaps easiest to understand as a dialogical process in which the participating actors (coming from different cultures, traditions, religions, historical, ideological, class or other backgrounds) continually establish or approach a certain common understanding. Cf Michael Walzer, *Nation and Universe. The Tanner Lectures on Human Values*, Brasenose College, Oxford University, May 1 and May 8, 1989.

[https://tannerlectures.utah.edu/\\_documents/a-to-z/w/walzer90.pdf](https://tannerlectures.utah.edu/_documents/a-to-z/w/walzer90.pdf) accessed 30 November 2017.

(footnote continued)

networked development of the universal content of human rights.<sup>44</sup> This is in line with the work of sociologists and anthropologists of human rights, who emphasize the degree to which universal human rights law needs to be “vernacularized” or mobilized within a particular context, in line with the cultural and religious traditions in that context.<sup>45</sup> It also follows the empirical observation that any given social context will be characterized by a certain degree of legal pluralism, the co-existence of different norms within a given social field.<sup>46</sup>

Another recent account with regard to the chances of universalism comes from the intersection of cognitive science, philosophy of mind and human rights law. Matthias Mahlmann in particular claims that there is empirical basis for human rights universalism, if properly interpreted in a mentalistic theory of moral cognition.<sup>47</sup> Such a theory might still accept – and claims to account for – the existence of “constitutional pluralism.”<sup>48</sup>

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44 “In such a decentered authority system, no one has the last word. System polyarchy is a function both of multi-levelness and of plurality within levels, which features reinforce each other. Dialogue between courts, and the search for common ground or, at least, the appeal to common public reason in defense of continued difference, is, on this analysis, not just the echo of a deep moral universalism, or indicative of a growing sense of family resemblance, but a structural inevitability borne of the incomplete and interdependent authority of multiple judicial sites.” Walker n 41, 55.

45 Mark Goodale and Sally Engle Merry, *The Practice of Human Rights: Tracking Law between the Global and the Local*. (Cambridge University Press 2007), Sally Engle Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’ (2006) *American Anthropologist*, 108, 38-51.

46 Barbara Oomen, ‘The application of socio-legal theories of legal pluralism to understanding the implementation and integration of human rights law’ (2014) *European Journal of Human Rights*, 4, 471-495, Brian Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global?’ (2008) *Sydney Law Review*, 30, 375-410.

47 Matthias Mahlmann, ‘Mind and Rights: Neuroscience, Philosophy and the Foundations of Legal Justice’, Chapter 5 in Martin Sellers (ed), *Law, Reason and Emotion* (CUP, 2017).

48 Matthias Mahlmann, Normative Universalism and Constitutional Pluralism (July 7, 2017). Chapter 16 in Iulia Motoc, Paulo Pinto de Albuquerque, and Krzysztof Wojtyczek (eds), *Liber amicorum András Sajó: Internationalisation of Constitutional Law*, 2017. Available at SSRN: <https://ssrn.com/abstract=2998526>, accessed 30 November 2017.

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## Critical race theory

An important contribution on the relation between law and justice originate in critical studies, and especially critical race theory (CRT). This originally legal theory (or philosophy) has become a comprehensive theoretical discipline placing special emphasis on the situation of vulnerable minorities in general, its original focus of race having been broadened. Critical race theory has evolved to the study of different oppressions experienced by persons belonging to non-mainstream groups regarding their race, gender or class,<sup>49</sup> in this sense the name of CRT is misleadingly narrow. Relatedly, CRT has been inspired by critical legal studies and radical feminism from the beginning. CRT introduced the idea of social construction of the race,<sup>50</sup> and such important notions as Kimberlé Crenshaw's intersectionality. Thereby, Crenshaw criticized anti-discrimination laws failing exactly those who are vulnerable to double marginalization, such as women of colour.<sup>51</sup>

Critical race theory differs from other theories mentioned before in that it has been not only a scholarly endeavour, but at the same time a movement, political activism. Its formation was a reaction to the discontent of US activists and civil rights scholars with the slowing down or even rolling back of civil rights achievements in the 1970s' after the progressive 1960s'.<sup>52</sup>

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<sup>49</sup> As is used by a central textbook of the field, Jean Stefancic and Richard Delgado (ed), *Critical Race Theory. The Cutting Edge* (3rd edn Temple University Press 2013).

<sup>50</sup> Ian F. Haney López, 'The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice (1994) Harv. C.R.-C.L. L. Rev. 29, 1.

<sup>51</sup> Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 1, 139. Available at: <http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>.

<sup>52</sup> Stefancic and Delgado (n 49) 3.

(footnote continued)

An insider description of the default approach of CRT is provided by Delgado and Stefancic as: “critical race theory questions the very/ foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.”<sup>53</sup>

CRT therefore belongs to the theories of a radical outlook, like critical legal studies (CLS), by emphasising law’s role in maintaining – and hiding -- inequality and unjust structures.

As to the issue of race, CRT takes racism as an underlying and “normal” condition of our existing societies, which is mostly invisible but powerful. CRT would strongly criticize colour-blind equality policies for their meagre – if at all – impact on the actual power relations and emphasise that injustices persist largely unhindered behind the neutral façade of law.

What is more, Derrick Bell, one of the founders of CRT, importantly claimed that the advances made in terms of civil rights in the US were serving the interest of whites (the interest convergence thesis), and they are not the result of society having “matured” to refuse blatant injustice and racism. For instance, *Brown v Board of Education* is explained by changing material circumstances, and resulting changes in white self-interest, rather than of changing morality.<sup>54</sup>

CRT as all critical theories is quite critical of legal formalism, which might be a reason why it has been less successful in Europe, especially in continental or civil law legal systems.<sup>55</sup>

The difference between CLS and general Marxist or Marxian theories<sup>56</sup> on the one, and CRT on the other hand lies in its approach to law. Despite of its strong critique of both the façade-like features of law and of the incremental

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<sup>53</sup> Richard Delgado and Jean Stefancic, *Critical Race Theory. An Introduction* (NYU Press 2017) 3.

<sup>54</sup> Derrick Bell, ‘Brown v. Board of Education and the Interest Convergence Dilemma’ (1979-1980) *Harv. L. Rev.* 93, 518.

<sup>55</sup> Mathias Möschel, *Law, Lawyers and Race. Critical Race Theory from the United States to Europe* (Routledge 2014) 104.

<sup>56</sup> See, eg, Hugh Collins, *Marxism and Law* (Oxford University Press 1982) esp Ch 2 ‘Law as an Instrument of Class Oppression’ 17-34.

(footnote continued)

tactic of the civil rights movement, CRT does not go as far as Critical Legal Studies<sup>57</sup> in dismissing law as a hegemonic tool altogether. Quite to the contrary, CRT scholars consider “rights not simply an external instrument, but [...] deeply engrained and even constitutive of identities and the human psyche.”<sup>58</sup> CRT has also influenced the case law of some courts, especially in the United States,<sup>59</sup> confirming that rights litigation shall not be given up because it is the only tool racial minorities have, and which is important also symbolically. Thus, CRT implies that rights are significant for – even constitutive of – legal justice.

### III. Rule of law, procedural and substantive justice

#### Classical rule of law thinking and due process

In understanding the relationship between legal theory and justice, the idea of rule of law and its ramifications for the concept(s) or conceptions of justice in law is of prime importance. The notions of procedural and of substantive justice and the tensions between them are present in legal thinking to a perhaps larger degree than in other social sciences or the humanities.

According to an often referenced definition provided by the Secretary General to the UN Security Council, “rule of law” as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated,

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<sup>57</sup> Mark Tushnet, ‘An Essay on Rights’ (1984) *Texas Law Review* 64, 1363.

<sup>58</sup> Möschel (n 55) 54.

<sup>59</sup> Möschel cites the following cases: *State v. Buggs*, 581 N.W.2d 329, (Minn. 1998); *America v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998); and *Taylor v. Metzger*, 706 A.2d 685 (N.J. 1998) cited in; or *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994), partly relying on Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York University Press 2001), 42, 115, 118. Möschel (n 55) 109, fn 155.

(footnote continued)

and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>60</sup>

Procedure is considered to lead to justice in a fundamental sense by lawyers. Procedural justice is the rule of law itself in as much as it is the opposite of arbitrary decision-making, i.e. rule of man.

Rule of law (or Rechtsstaat in the German tradition) at its very minimum thus means *legality*, that the state must observe its (own) laws. Already the *notion of law* however is not obvious. Not only philosophers, but international human rights treaties, and also courts adhere to the view that law is not simply any text adopted by parliament (or any common law rule developed by courts). According to the European Court of Human Rights, the requirement in the Convention that limitations to human rights be „prescribed by law” refers to a certain *quality* of law. A law needs to be *accessible* in that „the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case.”<sup>61</sup> The quality of law requires also that it be predictable, *foreseeable* in the sense that „the citizen must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”<sup>62</sup>. Furthermore, the law needs to be such which excludes arbitrary interference, meaning it has to limit discretion in some meaningful ways. This can be done if the law is *sufficiently clear*. In the words of the Court „the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.”<sup>63</sup> Accessibility and intelligibility of the

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<sup>60</sup> Report of the Secretary General to the Security Council (2004), The Rule of Law and Transitional Justice in Conflict and Post-Conflict Countries, <https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/>, 4, accessed 30 November 2017.

<sup>61</sup> Sunday Times v United Kingdom (no 1), judgment of 26 April 1979, §§ 46

<sup>62</sup> Id.

<sup>63</sup> Olsson v Sweden, judgment of 24 March 1988, § 61.

(footnote continued)

laws was specifically elevated to the level of a fundamental constitutional value in many countries.<sup>64</sup> The very idea of the rule of law inheres a certain publicly accessible rationality in order for laws to be legitimately obeyed. In many continental jurisdictions, the most important principle derived from the rule of law clause of the constitution is legal certainty. The stability inherent in legal certainty is seen as a guarantee of freedom, similarly to Montesquieu, Hayek and many more: if laws are stable, they operate almost like laws of nature: one is free to decide whether to adhere to the laws or incur the sanction for not adhering.<sup>65</sup>

My action can hardly be regarded as subject to the will of another person if I use his rules for my own purposes as I might use my knowledge of a law of nature, and if that person does not know of my existence or of the particular circumstances in which the rules will apply to me or of the effects they will have on my plans.

Note however that there is no general, or at least Europe-wide human rights ban against individualized laws, legislating to harm or benefit one or a few persons, even though that is a clear violation of the generality criterion for „law“ or *nomos* so salient in philosophy. Such laws might still be found problematic in as much as they violate the equality clause, but that will often come to play only with regard to certain predetermined groups and via the mediation of complicated doctrinal standards. An explicit ban on so-called bill of attainder<sup>66</sup> is included in the US constitution, but it only applies to laws of punitive nature. German law, or rather, legal scholarship, on the other hand has a strong attitude against *Sondergesetze* or *Sonderrecht* (special law) in general, for historical reasons. That resistance however does not always translate into actual legislation, as the early debate on anti-terror legislation in the Bundesrepublik testifies,<sup>67</sup> where specific laws were introduced against the RAF despite scholarly criticism. More generally, the idea that exceptional circumstances require exceptional law is foreign to classical rule-of-law thinking. On the other hand, historical reality from ancient till modern almost invariably has defeated this principle.

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<sup>64</sup> Eg in France, Décis. n° 99-421 DC, loi portant habilitation du gouvernement à procéder, par ordonnances, à l'adoption de la partie législative de certains codes), JO 22 déc. 1999, p. 19041 ; AJDA 2000. 31, chron., J.-E. Schoettl ; RTD civ. 2000. 660 et 662, chron. N. Molfessis.

<sup>65</sup> Friedrich August Hayek, *The Constitution of Liberty* (Routledge, 2006) 134.

<sup>66</sup> Section 9, Art 1. US Constitution.

<sup>67</sup> Eg Uwe Berlit und Horst Dreier, 'Legislative Auseinandersetzungen mit dem Terrorismus', chapter 3 in Heinz Steiner ted, *Protest und Reaktion* (Springer, 1984) 227-318, esp. 267-268.

(footnote continued)



Actual law thus has provided powerful arguments for critics, like Carl Schmitt, who maintain that the rule of law is ultimately dependent on its negation, the exception.<sup>68</sup> Closer to our time, the mushrooming emergency (and special terrorism-related) legislations all over Europe ever since 9/11 and since the more recent European terror attacks also provide ample evidence of the ease by which rule of law states fall back into a Schmittian legal framework, creating different law (or even non-law or “legal blackhole”<sup>69</sup>) for different categories of persons, friends and foes.<sup>70</sup> Such a fallback can be explained by an at least temporary *democratic* support for the priority of perceived substantive justice over formal rule of law.

Still, there is a strong feeling that concerns for “a due process” are present in every “civilized” legal system as a 1908 decision of the US Supreme Court<sup>71</sup> put it. Roman law already had a developed system of procedural requirements, stating e.g. that one witness is not sufficient (*unus testis nullus testis*) in a process.

The traditionally most elaborate and strictest rules of procedural justice are to be found in the area of criminal (procedural) law, and the entire field together with its institutions (especially public prosecutors and courts) is often called the criminal justice system.

This is also a field which has been interwoven with fundamental rights from their earliest codification (cf Magna Carta, Habeas Corpus etc in English history). These rights of criminal procedure include the prohibition of retroactive criminalisation and punishment (*nullum crimen sine lege, nulla poena sine lege*), the presumption of innocence, privilege against self-incrimination, right to an independent judge, right to a lawyer, professional and other (e.g. family) privileges from the duty to testify, and so on. These are sometimes summed up under the general name “right to a fair trial” as in Art 6 of the European Convention of Human Rights and art. 47 of the Charter of the

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<sup>68</sup> Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* [1922] (trans. by G. Schwab, Chicago: University of Chicago Press, 2005).

<sup>69</sup> Generally David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006); on a specific example: Johan Steyn, ‘Guantanamo Bay: The Legal Black Hole’, (2004) INT’L & COMP. L.Q. 53, 1.

<sup>70</sup> Carl Schmitt, *The Concept of the Political* [1932] (trans. by G. Schwab, Chicago: University of Chicago Press, 2007).

<sup>71</sup> *Twining v. New Jersey*, 211 US 78, 110–111, 1908 as cited by Samuel Issacharoff, ‘Due Process in Law’ in James D. Wright (ed), *International Encyclopedia of the Behavioural and Social Sciences* (2nd ed, vol 6, Elsevier 2015), 697.

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Fundamental Rights of the European Union (CFEU). The possibility to a remedy (recourse to an appellate procedure included) is either considered an independent right or a corollary of fair trial.

Procedural guarantees are therefore perceived as criteria for fairness: if a criminal procedure conforms to all such rules, the resulting verdict is deemed to be just.

Different jurisdictions differ as to the particulars of the procedure. For instance the requirement of explicit warning about rights pre-interrogation (the famous *Miranda*-rule of the US Supreme Court) cannot be found in some European jurisdictions,<sup>72</sup> even though the right to remain silent is embedded in the system of the European Convention, too.<sup>73</sup>

Administrative and civil law also have procedural rules, in the continental legal systems categorized as distinct legal disciplines/branches of law, i.e. administrative procedure and civil procedure, with their own codes. While these procedural laws not only aim to justice, the organizing idea behind them is the loyalty to the constitutional principle of rule of law/rule of law state (Rechtstaat or *état de droit*).

Respect for procedure does not always eradicate other concerns in actual law. German criminal legal scholarship knows the concept of social adequacy (Sozialadäquanz), which means that even if formal elements of a crime are fulfilled by an act, it might not be punished if the conduct is within the range of socially accepted norms. The concept, introduced after WW2 by Hans Welzel, and somewhat outside the mainstream of criminal law scholarship, gained prominence in recent years with regard to the debate on circumcision of boys.<sup>74</sup>

A quite similar example is the concept of “social dangerousness” e.g. in Hungarian criminal law (of *socialist* origin)<sup>75</sup>. The judge can take into account the dangerousness of the act for society, nonetheless only as a mitigating/exculpating

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<sup>72</sup> For a collection of equivalents of the Miranda warning see <https://www.loc.gov/law/help/miranda-warning-equivalents-abroad/index.php>

<sup>73</sup> *Murray v. UK*, (1996) 22 EHRR 29.

<sup>74</sup> Thomas Exner, *Sozialadäquanz im Strafrecht. Zur Knabenbeschneidung* (Duncker & Humblot GmbH, 2011).

<sup>75</sup> The concept has been very much criticized, mostly for its socialist pedigree, and for its deviation from the rule of law, but was still kept in the new Criminal Code of 2012 (Act C of 2012).

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factor, not an aggravating one. That means that if formal elements of a crime are fulfilled, it still cannot be punished if it is not dangerous to society. This is nonetheless, and importantly, a one-way street: dangerous acts which are not strictly and clearly codified in criminal law will not be punishable under this theory, just as the social inadequacy of behaviour is surely not enough for punishment in German law.

Thus, procedure/form has to be respected as a preliminary condition before the substantive concern can be accommodated, but substantive justice might derogate from procedural justice. A similar idea in law is that of equity, which requires a certain regard for the substantive consequences of a legal solution. The notion originates from Roman law where it meant a praetorial power to mitigate the strictness of the law,<sup>76</sup> but which then evolved into a specific type of English common law.<sup>77</sup>

### Restorative and community justice, reconciliation

A different clash between formal and substantive justice concerns are exposed by CRT scholars: they are especially attentive to the various obstacles faced by vulnerable minorities in the criminal justice system, which hinders the exercise of their due process rights. Various techniques of law enforcement and judicial decision-making, such as racial profiling or statistical generalizations in the criminal justice system often recreate and reinforce racist stereotypes.<sup>78</sup> Crime victims belonging to vulnerable groups have also less opportunity to seek redress or are even silenced by oppressive structures according to the CRT scholars.<sup>79</sup>

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<sup>76</sup> Marek Kuryłowicz, 'Das römische Recht als Ideals eines richtigen und gerechten Rechts' (2013) *Comparative Law Review* 16, 247. In English classically: William Warwick Buckland, *Equity in Roman law. Lectures delivered in the University of London, at the request of the Faculty of Laws* (The University of London Press, 1911).

<sup>77</sup> Buckland, *ibid.*

<sup>78</sup> Eg Jody D. Armour, 'Race Ipsa Loquitur, Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes' Ch 26 in Stefancic & Delgado (n 49) 261-272; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, The New Press 2012).

<sup>79</sup> With regard to women, see Catharine MacKinnon, *Women's Lives, Men's Laws* (Harvard University Press 2007).

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A less radical, but complementary and more practically oriented approach in criminology is community justice. It aims to correct or complement the failures or weaknesses of the state criminal justice systems in serving justice to victims, offenders, their families and communities. These include various programs and projects aiming at crime prevention, policing and reintegration at community level, with a focus not on the state but on family, locality, and immediate circles of the victim and the offender.

A theoretical framework on which such community justice systems operate is guided by the notion of restorative justice. This, in contrast to classic top-down punitive approaches of criminal law, focuses on bottom up initiatives with the goal of improving the life of the community. As an important discussion on the theoretical bases of community justice puts it: “The concept of community justice can be seen as a challenge to traditional criminal justice practices and concepts that draw distinct boundaries between the role of the State and the role of communities in the justice process. In a community justice model, priority is given to the community, enhancing its responsibility for social control while building its capacity to achieve this and other outcomes relevant to the quality of community life.”<sup>80</sup>

The idea of restorative justice proposes that justice will be served by repairing the damage done by the crime, instead of retribution, and inflicting harm on the offender. Many different models of restorative justice have evolved, some include the participation of police officers, while others operate in a more social work-oriented framework. Furthermore, restorative justice is an idea which might be of use of not only regarding crimes which inflict palpable damage, but for instance also regarding integration and legalization of unauthorized migrants.<sup>81</sup>

Restorative justice could be understood to relate to issues of civil matters, such as personal injury as well. Radzik for instance applies reconciliation theory – which is one way restorative justice is theorized, mostly in relation to

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<sup>80</sup> David R Karp and Todd R. Clear, ‘Community justice: A conceptual framework’ (2000) *Boundaries Changes in Criminal Justice Organizations* 2, 323, 324.

<sup>81</sup> As suggested eg by Michael J. Sullivan, ‘A Restorative Justice Approach to Legalising Unauthorized Migrants’ (2017) *Restorative Justice* 5, 70.

(footnote continued)

criminal wrongs and atrocities – to tort law.<sup>82</sup> In that, she claims the approach of corrective justice is preferable to the usual Aristotelian idea of compensation which underlies mainstream tort law.<sup>83</sup> Financial compensation, even if it is also paid with regard to “moral damage” is not adequate to truly redress emotional and other immaterial harm. For instance, financial compensation for bullying does not restore the feeling of safety and recognition. Instead, in such and similar cases, the idea of reconciliation would emphasize a relational process, where it is the relationship which ought to be corrected in order to restore self-esteem and integrity.<sup>84</sup> In this sense, restorative justice aims at recognition of full membership in the community of persons who suffered harm.

While these alternative, substantive approaches, critically important in pointing and reducing substantive injustices disregarded or even created by the law, are on the rise, mainstream legal doctrine is less focused on them.

Generally speaking, in the case of collision between procedural and substantive justice, law will side with the former one. In exceptional cases, the egregiousness of the injustice might lead to the acceptance of renouncing or loosening procedural standards as in the Nuremberg trials, especially the ban on retroactive criminalisation (of acts which were not considered criminal at the time of their commitment). Note that this will be of course differently conceptualised by positivists and more natural law inclined theories. Positivists will claim that there are limits to law, and there are cases where judges will apply something else than law. Natural law theorists will claim, and courts definitely side with them,<sup>85</sup> that *ius gentium* always was law, thus, no real problem of retroactive justice arises.<sup>86</sup> Again others will consider that classic criminal law is not the most adequate to deal with historical injustice, and would argue for institutionalizing reconciliatory forms of justice, such as the Truth and Reconciliation Commissions in post-apartheid South Africa.

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<sup>82</sup> Linda Radzik, ‘Tort Processes and Relational Repair’ in John Oberdiek (ed) *Philosophical Foundations of the Law of Torts*, (Oxford University Press 2014) 231–49.

<sup>83</sup> *Ibid* 233.

<sup>84</sup> *Ibid* 234-237.

<sup>85</sup> But for details on how complicated that can become in actual case law, see William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, (OUP 2012) esp. Ch 2 on *Nullum Crimen Sine Lege*.

<sup>86</sup> Finnis eg (n 4).

## IV. Constitutional law, international law: fundamental human rights as positivized natural law

### A practical response to a theoretical question?

The lesson from the horrors of World War II and genocide at the level of positive law seemed to be evident: to codify -- and, thus, turn into positive law -- natural law in the form of international (universal and regional) human rights treaties and in the form of stronger ("legal") constitutional rights catalogue in domestic legal systems. In 1948 the United Nations adopted the Universal Declaration of Human Rights, after which the newly-formed Council of Europe drafted the European Convention on Human Rights, which entered into force in 1953.

While the idea of such universal rights might seem self-evident, its actual realization is quite another matter.

First of all, totalitarian regimes were often signatory to these human rights declarations and treaties, and included fundamental rights in their sham constitutions. Compliance problems at the international (and European) level abound, and there is conflicting evidence at best for the claim that international treaties in fact promote human rights or make societies more just in any sense.<sup>87</sup> One study even found a negative relationship between formal

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<sup>87</sup> Linda Camp Keith, 'Human Rights Instruments' in Peter Cane and Herbert M. Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (OUP 2010).

(footnote continued)

rights protection and actual rights compliance.<sup>88</sup> Definitely more research on the empirical level is needed for a final say on this issue.<sup>89</sup>

Quite apart from this, however, the devil is in the details when it comes to democratic societies as well.

The first problem relates to what Sunstein calls incompletely theorized agreements<sup>90</sup> or what Rawls called overlapping consensus. Just as overlapping consensus remains a limited, if at all plausible presupposition, positivised natural law cannot free itself fully from the challenges of the neutrality debate. Human rights and constitutional law are not (and cannot be) a codification of a single particular political philosophy, such as for instance liberalism.

Human rights and fundamental rights are formulated in such an abstract way that many can agree to them on surface, but disagree on their actual meaning and realisation in any given context. This relates to the problem Hart labelled as “the open texture of law”<sup>91</sup> (any law, any legal norm, and not only for it is text<sup>92</sup>), but is exacerbated in the case of human rights and constitutional law, i.e. those norms which are most prone to become the centre of conflict over justice claims.

What non-lawyers often miss about positivized human rights is that already at the textual level, rights are limited. Every human rights document, be it international or domestic, includes so called limitation clauses, and if not, as in

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<sup>88</sup> *ibid*

<sup>89</sup> Oona A. Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) Faculty Scholarship Series. Paper 839. [http://digitalcommons.law.yale.edu/fss\\_papers/839](http://digitalcommons.law.yale.edu/fss_papers/839) accessed 30 November 2017. On the other hand see Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009), Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The persistent power of human rights: From commitment to compliance* (Cambridge University Press 1999), Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford University Press 2013).

<sup>90</sup> Cass R. Sunstein, ‘Incompletely Theorized Agreements in Constitutional Law’ (2007) University of Chicago Public Law & Legal Theory Working Paper 147/2007.

<sup>91</sup> Hart n 17, 128-135.

<sup>92</sup> But see Frederick Schauer, *On the Open Texture of Law* (2011) University of Virginia School of Law Public Law and Legal Working Paper Series, 35/2011, <https://ssrn.com/abstract=1926855> or <http://dx.doi.org/10.2139/ssrn.1926855> accessed 30 November 2017.

(footnote continued)

some rights formulations of the German constitution, courts will construct them (in the German case as so-called inherent limits)<sup>93</sup>. Rights can be limited in the interests of public order, national security, public health and in most cases even in the interests of public morality understood as majoritarian sensitivities. Such limitations often need to be proportional, in line with democracy and enacted by parliament, but do still form a partial restriction of the right concerned. This is why, for example, freedom of speech or religion or assembly is hardly ever fully free. (The other issue is that rights can be limited by other rights, i.e. the conflict of rights problem. This at least in theory can still remain liberal, e.g. in the Kantian sense, even though in practice it again depends on the interpretation. Kant would hardly agree that films or art works can be banned or access to them limited in the name of freedom of religion if religious majorities perceive them as offensive, but it is exactly the case in the jurisprudence of the European Court of Human Rights.)

These fields of law became battlefields of moral interpretation, even if sometimes covered in legal technicalities. While legal techniques and internal logic might limit (though not according to everybody, e.g. the critical legal scholars) the spectrum of reasonable interpretations of any given norm, they certainly cannot reduce it to one single correct answer in especially the field of human rights.<sup>94</sup>

### Frames and structures of justice debates

Law, especially constitutional and human rights law is a formal framework, providing a structure in which justice debates are filtered and resolved in a rule of law state, at least officially.<sup>95</sup> This structure is becoming fairly universalistic at least in the formal sense, since methods of interpretation and standards of review become more and more harmonised in a process which is often called 'judicial dialogue' and 'migration of constitutional ideas'. The following will give an overview about the most important features of that apparent emerging consensus. Nonetheless, it has to be borne in mind that despite similarities in the formal approaches to human rights adjudication inter-, and transnationally, divergences in the substantive sense remain important.

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<sup>93</sup> Eg with regard to freedom of religion, cf Art 4 of the Grundgesetz and any commentary on it.

<sup>94</sup> Even Dworkin claims only that such a correct answer could be expected by a Herculean judge. Ronald Dworkin, *Law's Empire* (Belknap Harvard 1986).

<sup>95</sup> But see studies on legal pluralism in the sense of informal legal orders parallel to or taking over the official law. Sally Engle Merry, 'Legal Pluralism' (1988) *Law & Society Review* 2, 869-896.



### Supremacies and hierarchies

Law has an aspiration to systematisation and order, hence what we usually call legal system and legal order. This concern for order and system is a justice concern in the sense that only predictable, foreseeable and logical, rational rule/coercion is deemed to be justified. This can be called the “general justice concern”, and it has a strong affiliation to the notion of procedural justice or rule of law as procedure. Nonetheless, any ordering also quite clearly means prioritisation of certain justice claims over others, even if the prioritisation might sometimes be complex, incoherent or even hidden. An important question is therefore where a legal inquiry starts, i.e. what is the default setting from which one argues in any given particular situation. For instance, in the European Union legal order, the default setting has always been, and still is, the four fundamental freedoms, i.e. the free movement of goods, capital, persons (meaning workers or job-seekers rather than persons in general) and of services. This is widely seen to create a “free market bias” of the European Union, whereby ‘negative integration’ hinders possibilities for social justice, or welfare state measures even at the member states level.<sup>96</sup>

EU fundamental freedoms are also essentially different from the four freedoms as set out by Franklin Roosevelt in his famous 1940 address to Congress (the freedom of expression and of religion and from fear and from want) that formed an important basis of international human rights law. In discussing the foundations of EU law, one author recently described these as ‘constitutional (in)balance’ between the market and the social.<sup>97</sup> An increasing number of authors for this and analogous reasons argue for a de-constitutionalisation of Europe<sup>98</sup>, which might go as far as taking the fundamental freedoms out of the quasi-constitutional treaty, and relegate it to the level of secondary

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<sup>96</sup> Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999).

<sup>97</sup> Sacha Garben, ‘The Constitutional (Im)balance between “the Market” and “the Social” in the European Union’ (2017) *European Constitutional Law Review*, 13, 23-61.

<sup>98</sup> Fritz W. Scharpf, ‘Towards a more democratic Europe. De-constitutionalization and Majority Rule’ (2017) *Zeitschrift für Staats- und Europawissenschaften*, 15, 84-118.

(footnote continued)

law.<sup>99</sup> This would allow a derogation from the fundamental freedoms (“free market”) in the normal EU legislative process without changing the treaties. Others suggest the need for a European Social Union as a lesson to be drawn from the latest financial and economic crisis. This requires a reconsideration of the EU’s founding fathers’ vision in which economic policy is supranational, while social policy remains national. This division is untenable in the circumstances of monetary integration.<sup>100</sup> The recently adopted European Pillar of Social Rights although soft law (only recommendation, not having the full binding force of law) could be seen as a step in the direction of a Social Union. However, it has so many built-in concessions and deliberately weakened enforcement prospects, that it rather testifies to a political unwillingness on the part of both EU institutions and of the member states.<sup>101</sup> Most what can be hoped for in these circumstances is that courts (at both the national and the EU level) will be willing to step up and take into account the Pillar principles in their interpretation of other (“hard”) EU law.<sup>102</sup>

This short presentation on the EU debates show how the default setting determines or channels (for some, diverts) justice claims. But it also coincides with the structural question of supremacy. In the nation state legal order, the constitution is the supreme law of the land, resulting in an obligation that all other legal norms, from laws to the last local decree, should be in consonance with the constitution. Courts, sometimes only constitutional, sometimes ordinary, have competence to review and set aside lower ranking norms if they violate the constitution<sup>103</sup>. The European Union legal order complicates this issue to a great extent. Here it suffices to note that EU law claims

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<sup>99</sup> Dieter Grimm, *Europa – Ja, aber welches? Zur Verfassung der europäischen Demokratie* (München, C.H. Beck, 2016).

<sup>100</sup> Frank Vandenbroucke, The Idea of a European Social Union, Paper submitted for publication as an introductory chapter in: Frank Vandenbroucke, Catherine Barnard, Geert De Baere (eds), *A European Social Union After the Crisis* (Cambridge University Press, forthcoming). Manuscript on file with the author.

<sup>101</sup> Zane Rasnača, (Any) Relevance of the European Pillar on Social Rights for EU Law? 17 November 2017, <http://europeanlawblog.eu/2017/11/17/any-relevance-of-the-european-pillar-of-social-rights-for-eu-law/>.

<sup>102</sup> Cf *ibid.*

<sup>103</sup> In the Netherlands, courts do not have the competence for constitutional review, but they are very open to interpretation of human rights by the European Court of Human Rights (affiliated with the Council of Europe, not with the EU). Thereby, the case law on the European Convention of Human Rights *de facto* is operationalized similarly to constitutional rights in other countries.

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supremacy (often called primacy) over national law according to classic case law of the European Court of Justice.<sup>104</sup> Constitutional courts in some member states have partly resisted this interpretation, claiming that in case EU law violates the national constitution, they have competence to set aside EU law.<sup>105</sup>

Furthermore, the Treaty on the European Union contains a clause on the respect for so called national constitutional identity in Art 4,<sup>106</sup> which is understood to grant a certain exception from the supremacy of EU law in important (constitutional) cases, and, thus, allow for variation among the member states. This creates problems for the perspective of justice in the sense that it necessarily entails differential treatment along citizenship, or, more precisely, border lines in the European Union, in exactly matters which are considered of crucial importance. *Arguments for respect for constitutional identity strongly rely on the “democratic deficit” and legitimacy problems of the EU, which – formally – nation states do not show.*

Without going into the immense literature on these subjects,<sup>107</sup> here it suffices to conclude that the issues of supremacy and national identity remain a contested field, and it is especially contested because it is a formal structure of deciding which particular conception of justice is to prevail, framed in the language of national identity.

On the other hand, apart from general structural decisions, like that of the deep structure of EU law, all law, be it national, European or international, shows concerns for what might be called ‘specific justice’ claims. These include especially human or fundamental rights, and certain constitutional principles, which for reasons of being constitutional (and not universal-international) show divergences even within liberal democracies. This is the case whether welfare state is constitutionalized or not, or whether it is considered to be a fundamental right or only a

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<sup>104</sup> *Costa v ENEL* [1964] ECR 585, C-106/77, *Simmenthal* [1978] ECR 629, C-106/89 *Marleasing* [1991] ECR I-7321

<sup>105</sup> Eg Paul Craig, Grainne de Burca, *EU Law. Cases and Materials* (6th edn, OUP, 2015) Ch 9.

<sup>106</sup> „The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

<sup>107</sup> For a systematic analysis recently see Elke Cloots, *National Identity in EU Law* (OUP 2015).

(footnote continued)

state aim, which the state has to strive for, but *which is not enforceable as an individual fundamental right in court.*

The 1993 Vienna Declaration on human rights<sup>108</sup> proclaims that

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

In fact, however, the overall situation is that negative, “first generation” political and civil rights are much more institutionalized, and generally better supported by enforcement mechanisms both at the international, and in most cases, at the national level, too. For instance, at the international level, it is the International Covenant on Civil and Political Rights which is accompanied by a court-like supervisory organ which can issue opinions on individual complaints, the Human Rights Committee, while the parallel pact, the International Covenant on Social and Economic Rights only has a mechanism where states are required to submit reports on their own. In Europe,<sup>109</sup> the European Convention on Human Rights and Fundamental Freedoms, with its allegedly most effective enforcement mechanism among international human rights organs in the world, does not include social rights (although sometimes the Court’s case law can be understood to reach out in that direction). Its counterpart, the European Social Charter is supervised only by a “committee”, not a court with fully enforceable individual complaint mechanism, although a collective complaint mechanism was introduced, with ambivalent success.<sup>110</sup>

While many advances have been made in this regard (in terms of the quantity and quality of the soft law instruments, interpretations, and the collective complaints mechanism itself), the fact remains that all in all, human rights law is structured in a way that prioritizes individual rights and individual enforcement mechanisms. Human rights law, and international law in general, is apparently even less present with regard to such immense collective

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<sup>108</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

<sup>109</sup> For an overview of non-judicial overview mechanisms (ie outside the European Court of Human Rights) of the diverse human rights treaties in Europe see Gauthier de Beco (ed) *Human Rights Monitoring Mechanisms in the Council of Europe* (Routledge, 2012).

<sup>110</sup> Cf Olivier de Schutter (ed) *The European Social Charter: A Social Constitution for Europe* (Bruxelles, Bruylant, 2010) and Holly Cullen, ‘The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights’ (2009) *Human Rights Law Review*, 9, 61–93.

global challenges (sometimes conceptualized as “third generation rights”) as climate change and overexploitation of the planet.

There is no space here for a meaningful analysis of what sorts of human and fundamental rights have emerged, and what their actual interpretation in practice is. The last section will briefly set out the specific rights which will form the focus of investigating justice as recognition, representation and redistribution within the later deliverables of the ETHOS project. Before that, however, the central and illustrative example of the more structural and formal frames of situating justice claims need be explicated.

### Interpretation: the general limitation test

Interpretation is the prime methodological subject in legal scholarship, since interpretation is the method by which black letter law is explained, explicated, and applied in real cases. Thus, interpretation, and especially judicial interpretation as the ultimate authority, in which justice claims are analysed and sorted out in a certain legal order. Judicial interpretation is increasingly globalized in the formal sense. There is an emerging -- virtually universal -- interpretative framework in which human rights disputes are decided. It is roughly the same framework for instance in Canada, EU Member States, India, Israel, Mexico, Russia, South Africa or the United States. The same framework does not mean that the output will be the same, too. There are however some structural incentives in this framework which steer particular justice debates in certain ways, and which themselves ought to be considered as a realization of the idea of judicial or legal justice.

Also depending on the stance one takes about the relative priority of procedural or substantive justice, some might find the framework conducive to just outcomes by its own force, while others at the other end of the spectrum might consider it a façade of justice, or even a technicality by which injustice is neutralized. In-between positions abound, the mainstream view being perhaps that the framework has enough *flexibility* to accommodate different justice conceptions, and in any case, does not fully predetermine or provide any automatic solution to any given legal dispute. Substantive differences in different jurisdictions confirm the mainstream view.

*a) What is a right and can it be limited? 'Scope' and 'interference'*

The default assumption of human rights interpretation is that it is the limitation of the human right which needs to be justified and not the existence of the human right. For that, however, one needs to assess whether the measure complained about interferes with the right in question at all. This requires a delimitation of the „scope“ or ambit or „area of protection“ (Schutzbereich) of the right. The tendency of most<sup>111</sup> rights adjudication is to allow for a broad scope, and to consider as interference all kinds of measures (ie legal, factual, etc.). How the court draws the scope will delimit the potential for interference. For instance, the ECtHR used for some time to consider same sex relationships being part of private life (in fact, homosexuality), but not family life in the Convention. A groundbreaking change in jurisprudence was when the Court first accepted that same sex couples form a family for the purposes of Convention jurisprudence.<sup>112</sup>

A further dimension for which the scope analysis is of definitive importance concerns rights which are absolute, i.e. where no limitation can be justified. Absolute rights are for instance freedom from torture at the international and European level, the prohibition of death penalty in Europe, or the right to human dignity in Hungarian (at least formally) or in German constitutional law. In case of an absolute right, any interference into the scope will automatically mean a violation of the right. Therefore, some courts might be inclined to keep the scope of absolute rights rather narrow. This is very visible for instance in the difference between the German and Israeli understanding of human dignity, the German being rather narrow,<sup>113</sup> the Israeli broader. In the latter case, dignity is not unlimitable, but is construed as a kind of subsidiary, catch-all right for reasons of the constitutional text (lack of a full-fledged fundamental rights catalogue).<sup>114</sup>

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<sup>111</sup> The US Supreme Court is partly an exception here.

<sup>112</sup> Schalk and Kopf v. Austria, Application no. 30141/04, judgment of 24 June 2010.

<sup>113</sup> See eg the so-called Rudolf Hess memorial march decision of the German Federal Constitutional Court. BVerfGE 124, 300 (2009).

<sup>114</sup> Cf Aharon Barak, *Human Dignity: the Constitutional Value and the Constitutional Right* (CUP 2015).

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### ***b) For what purpose? Legitimate aim***

Should a court find that a certain measure interferes with the scope of a right, it will inquire whether the interference pursued a “legitimate aim” (how legitimate aim is called might vary from jurisdiction to jurisdiction, but it is always there in some sense).

A legitimate aim is usually something listed in the underlying rights document itself, and covers aims like protection of the rights of others, of public order, public health, morals, national security and so on.

(Classic) Hungarian constitutional law used to accept as legitimate aim only (conflicting) constitutional rights and so-called *constitutional* values. For instance, simple public order was not found to be of significant constitutional importance to constitute a legitimate aim for the restriction of freedom of expression.<sup>115</sup>

On the other hand, other courts, like the ECtHR would not nominally take up such a position, since public order figures as an explicit legitimate aim for restriction in Art 10 of the Convention.

As it is visible from this example, the meaning of public order (or other such “aim”) is also necessarily a question of interpretation. It might be that one court excludes it from the potential reasons for restrictions, while another does not, but still both come to more or less the same conclusion in the substantive level of protection. Conversely, it might be that two courts use the exact same categories nominally, but still arrive to different conclusions in the substantive sense.

Legitimate aim is rarely the step upon which an interference fails the review process. Courts tend to accept the reference of the government claiming that a certain measure pursued a legitimate aim.

### ***c) To what extent? Proportionality and balancing***

After having found that an interference pursues a legitimate aim, courts will apply standards different in detail. The German court would check whether (i) the measure is suitable or capable (*geeignet*) of reaching or furthering the legitimate aim; (ii) whether it is necessary (*erforderlich*) for reaching the aim (i.e. there is no lesser or “milder” means of furthering the aim than the one used); (iii) and, finally, whether the means used is “adequate”

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<sup>115</sup> 30/1992 (VI.30) AB decision of the Hungarian Constitutional Court.



(angemessen), i.e. that the aim pursued is not in a disproportionate relation to the severity of the interference. This tripartite test is called the proportionality test in general, and step (iii) is called the proportionality test in the narrow sense.

Other courts will leave out some steps or merge two together, but the main point is similar: only such limitations are permissible where there is a proportionate relation between the aim pursued and the severity of the interference with the fundamental right. The decision about proportionality requires a weighing or balancing between “importances” assigned to the aim and to the right.

Again in German doctrine, which is perhaps the easiest to follow in this regard, the importance of the fundamental right will depend on its relation to human dignity, the foundational and absolute right. Should a right or one of its aspects which is less central or relatively distant from human dignity and from the closely related free development of personality be affected, then it will have less weight.

Conversely, should the aim be particularly important (e.g. should the aim be furthering the free development of personality or respect for human dignity), then this needs to be taken into account in the balance. Similar considerations arise in most legal orders in the context of fundamental rights adjudication, even if the role of human dignity might not be as central and unifying as in German law.<sup>116</sup>

Thus, in the most apparent way, here emerges the image of justice as proportionality, or justice as balance. The backbone of it is dignity in some legal orders, something else in others (e.g., traditionally, US constitutional law is taken to be centred around “liberty”, not “dignity”), or nothing at the general level, only particular concerns arising out of a given constellation of circumstances (ad hoc or case by case balancing), or any variation of these.

Balancing and proportionality analysis are often criticized as inherently and inevitably subjective,<sup>117</sup> thinly veiled judicial arbitrariness for various reasons (incommensurability prominently among them). It is perhaps illustrative of

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<sup>116</sup> Cf eg Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) *University of Toronto Law Journal*, 57, 383.

<sup>117</sup> Cf Bernhard Schlink, Proportionality (1) in Michel Rosenfeld and András Sajó (eds) *Oxford Handbook of Comparative Constitutional Law* (OUP 2012).

(footnote continued)

the controversy around proportionality that in the Oxford Handbook of Comparative Constitutional Law, two different articles were published under this title (proportionality 1 and proportionality 2), both written by law professors who used to be important judges in their country.<sup>118</sup>

If one comes to the conclusion that balancing will always include a subjective element, then the problem of “countermajoritarian difficulty”<sup>119</sup> is multiplied. Courts, and constitutional courts in particular, are countermajoritarian institutions in that they are entitled to ultimately interpret and in most cases even set aside or invalidate the laws adopted by legislative majorities. It is hard for such institutions anyway to withstand the pressure of the majority. Should they be perceived not as objective arbiters of conflicting claims, but as substituting one subjectivity (that of the legislation or government) for another (their own), then the legitimacy of their whole endeavour is undermined. This problem is exacerbated in the case of international or supranational courts, since they are even further away from the legitimacy line of the “people” of the nation state.

On the other hand, judicial practice seems keen on adhering to the proportionality analysis. In fact, proportionality and balancing have been spreading like global legal epidemics in recent decades. It either lies in the (exploitable) power of the image of justice, or in some more structural necessities, which *truly* compel courts to apply it. The next section will highlight some instances of how that application looks like in the context of specific substantive rights.

## V. Distribution, representation, recognition in law: specific human rights

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<sup>118</sup> Cf Schlink, *ibid* with Aharon Barak, Proportionality (2) in Michel Rosenfeld and András Sajó (eds) *Oxford Handbook of Comparative Constitutional Law* (OUP 2012).

<sup>119</sup> Alexander Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics* (Yale University Press 1986).

The ETHOS project takes these three aspects as aspects or subcategories or dimensions of justice. Therefore, the following will give an overview about where these dimensions are to be found in law and whether they are harmoniously knitted together in a bigger whole or are in tension or even exclusionary of each other.

### Distribution: property versus social rights

Redistribution is by far most apparent in issues related to property and social rights. This will be the subject of a deliverable in WP3 (right to housing, D3.5). The right to property is now a weakened right (compared to let's say freedom of expression, religion or privacy) in most legal systems, and at the European and international level. The legislator is relatively free in the realm of economic and social policy. Nationalization, taxation, market regulation, labour law, rent control, welfare measures all affect the right to property, but courts will usually<sup>120</sup> not block such measures, and find that the interference into the property right was justified. The European Court of Human Rights for instance would only check whether an interference achieves 'a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights,'<sup>121</sup> and only finds a violation of the right to property if the affected 'have had to bear an individual and excessive burden'<sup>122</sup> compared to others. This is clearly a result of the evolving understanding of social justice within the framework of the welfare state, and will be discussed in D3.3. and D3.5.

On the other hand, this constitutional understanding does not eo ipso require states to grant very strong social rights either. It does eminently does not mean that law (even human rights law) inherently, on its own, would be able to halt 'neoliberal' or other specific economic policies which undermine social security or which expose the

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<sup>120</sup> When they do, such as the US Supreme Court in the controversy over the constitutionality of New Deal, at the end they back off. Cf Daniel E. Ho and Kevin M. Quinn, 'Did a Switch in Time Save Nine?' (2010) *Journal of Legal Analysis* 2, 69.

<sup>121</sup> *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 63, 19 February 2009; *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 69, Series A no. 52

<sup>122</sup> *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, § 72, Reports of Judgments and Decisions 1996-IV.

(footnote continued)

propertyless or otherwise precarious to the instability of the market or austerity measures. The Court of Justice of the European Union for instance specifically allowed for reducing social protection in order to uphold financial equilibrium.<sup>123</sup>

There seems to be a compromise (at least in Europe, and the US, but cf. South African doctrine which conceptualizes social rights as strong claim rights) which allows the state to limit property rights in the interests of welfare significantly, *but it does not require it to do so* in the first place. This is exemplified by how French constitutional law maintains at the same time the relevance of the individualistic property protection of the 1789 Declaration of the Rights of Men and of the Citizen, and the visibly socialist understanding of the 1946 constitution. Elsewhere (e.g. Germany and Hungary, but also at the ECHR level) welfare entitlements can be taken away if procedural fairness is observed. Note also that, in accordance with this, the most developed welfare states, i.e. Scandinavian countries do not typically grant social rights at the constitutional level. These issues will be examined in detail in WP3, deliverable D3.5.

On a more theoretical and general level, law is not unaware of the inherent link between (re)distribution and equality. An illustrative doctrine in German constitutional law in this regard is the doctrine of so-called *derivative Leistungsrechte* (right to a service) or *Teilhaberechte* (right to a share or right to take part) of the Federal Constitutional Court<sup>124</sup>. Accordingly, if the state provides a service, which is scarce, such as a public university system, then the places cannot be distributed in an arbitrary manner, but distribution is subject to requirements of adequacy (“sachgerecht”) and equal treatment, since that follows from the right to equality in Art 3 and from the principle (not a right) of social state in Art 20 of the Basic Law (Grundgesetz).

This therefore means that whenever the state is redistributing a good, be it naturally given or created (established, operated) by the state, the state needs to adhere to requirements of equality and rationality (this latter might mean consideration of merit, as with study places, or might mean need, and so on). In this regard, deliverable 3.5 will engage in a comparative study about how different states distribute the social good of housing, to what extent this is conceptualized as a right or as a simple policy objective, and whether there is a recognizable justice principle of

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<sup>123</sup> C-196/98, *Hepple and others*, ECLI:EU:C:2000:278. Cf also *Rasnača* n 101.

<sup>124</sup> BVerfGE 33, 303.

need or something else behind the law. In a more general sense, D3.3. will examine how vulnerability is conceptualized in law.

### Representation: electoral rights

Representation in constitutional and human rights law is concentrated on the representative system, i.e. the right to vote, and the fairness of elections, including the voter districts. A central question of every electoral system is a dilemma between fair representation of the population through proportionate representation and the need for the stability of government. Here therefore one justice claim is that a just system of representation is that where every voice gets potentially heard and has an equal weight.

In reality, however, electoral systems around the world, and also in Europe, the focus of ETHOS, are rather grossly disproportionate in varying ways, not only by application, but by design. International human rights law as well as the EU has a very meagre impact on this, since it mostly consists of soft law (recommendations, guidelines which are not per se binding), and any attempts to internationalise (homogenise) standards are likely to fail on the resistance of national governments in power. Electoral laws are also considered to belong to the core of national sovereignty, a concept in use of much of legal debates, despite its rather obvious political exploitation. All in all, the human rights system necessarily focuses on the individual even in the area of voting rights, and does not – cannot, for lack of competence – comprehensively correct disproportionalities in the system as a whole.

The stability of government is a further, perhaps more principled objection to a fully proportionate representative system. There is at least some evidence -- for instance that of the 3<sup>rd</sup> and 4<sup>th</sup> French Republic, which saw an average of less than 6 months' duration for a government -- that proportional representation hinders governmentability. Simply, there might be too many factions in society, and mirroring them too many divergent parties who will not be able to form lasting coalitions, and the state descends into chaos. Here therefore justice is contrasted with the need for stability and order.

Further down the line from design to implementation however different problems appear more acute today. This concerns especially the question of access to vote, and more precisely, of how electoral regimes might be purportedly or inadvertently prevent the exercise of the vote for vulnerable minorities, or exactly those who would likely vote out the establishment from power. The US system of voter registration is famous for its extremely distorting effect, but also current Hungarian debates about voting rights for people who emigrated from Hungary, and for ethnic Hungarians outside the borders who became citizens demonstrate. This will be examined comparatively in deliverable 3.5.

Law, however, on its own explicitly cannot claim that representation is about representing minority *interests*. People are free to vote against their own or anybody else's interest. There is a right to vote and participate in election, referenda and so on, but there is no right to interest representation. There is no *legal* (even if there is a democratic or political) principle according to which interests of each and every (or even any) segment of the population are to be represented by those in power, because the notion of interest is too vague or contested for being substantively legalised. It is only a political presupposition, but not an actual legal obligation, that representatives represent the *interests* of the represented. Human rights law however does still further representation of minority interests by means other than a right to interest representation. This includes a complex system of equal treatment, non-discrimination and minority rights. Much of the work in Work Package 3 (D3.4) will consist of checking to what extent these human rights and principles are realized in actual legal mechanisms (the hypothesis being that they clearly are not when it comes to those most in need of them).

## Recognition: status

Recognition is at the heart of human rights and constitutional law in several fundamental aspects. Perhaps the most general is that rights are *recognized and not created* by the state.

The second is the recognition of the equal worth of every person. In the opening words of the Universal Declaration of Human Rights, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>125</sup>

This will imply a right to legal personhood (every human person is a subject of law, rights and duties), a right to equal treatment, and many more. In some systematic interpretations, all fundamental rights can be derived from this principle of (or right to) human dignity.

The concern for recognition is *specifically* present in the area of so-called status rights, and generally everything related to legal status. Status rights are rights of the person to be recognized as member of the community, first of all citizenship, but also other statuses as refugee and protected person. This means that in the (“current”) non-cosmopolitan world order, recognition of someone is always accompanied by exclusion of others, who do not fulfil the criteria of the status. Universal human rights -- with mostly minimalistic content --, are the only standards which apply to everyone universally, and the enforcement and actual compliance with universal human rights is again a different matter.

A further dimension is whether a given state recognizes (ethnic) minorities by providing special status like cultural and language rights (education, and so on). Ethnic minorities sometimes have special self-governing structures or even territorial autonomy. In this case, the justice claim for recognition is fused into the justice claim of representation. This is a particular consequence of the development of the nation state. On the other hand, nation states do subscribe to international human rights treaties providing minority rights, even if not all of them.

At a more social level, human rights law also gives recognition to a range of non-mainstream groups’ members equal dignity. This includes first of all equal treatment, but also positive measures with regard to racial, ethnic and religious minorities, LGBTQ+ persons (although this more in judicial practice than in specific international treaty

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<sup>125</sup> Preamble, UDHR.

law), persons with disabilities, and women (who are technically not a minority). Part of this discourse focuses on “preferences” and identities in a general anti-paternalistic framework, while the other part emphasizes correcting past or not so past injustices which have created and have maintained unjust structures.

Human dignity might also be a source for justiciability of social (redistributive) rights, especially if understood as a right to be able to live a life in conditions adequate to the human nature. In this vein, there might be a positive obligation on the part of the state to guarantee a certain minimum livelihood, housing and health care.

Children receive special status in human rights law at the international and most domestic levels, where the directing principle is that the child’s best interest is of priority in every legal context (like family disputes, refugee and migration law, criminal justice system, media law, and so on). Deliverable 3.6. will compare how that principle plays out in the actual legal framework of different countries with regard to those most in need of recognition: children belonging to vulnerable minorities. Their status will be examined in the particular context of education, since that is the place where preparation for full membership in the substantive sense is supposed to take place, and, conversely, where chances for recognition are often lost or undermined for a lifetime.



## VI. Conclusion

This paper set out to give an overview of justice in legal theory. Limitations and caveats needed to be introduced at the outset, for reasons of the complexity and heterogeneity of the subject. Extension in a sense was also introduced, since some of what was presented here is not considered legal theory usually by legal scholars, but more an introduction or highlights from constitutional and human rights law. Such limitations and extensions are justified with regard to the potential audience of this paper. This imagined audience consists of philosophers and social scientists in the first place, and “lay people” in the second. The aim of the paper was to give an overview to them about how law perceives and filters justice concerns. A special emphasis was placed on aspects which are likely unknown or suspicious to non-lawyers: procedures, frames, and standards, in the hope that the importance of these will be better appreciated, if not in the normative, but at least in the descriptive sense.

The following overall conclusions can be made on the basis of this overview. Legal thinking is eminently occupied with the question of justice. Positivists and natural lawyers share a common concern in this regard, even if their answers sharply diverge. Legal scholars furthermore are as divided on the questions of universalism and whether justice can only be realized in a particular political community as any other discipline.

Human rights law, and international law as evolved at least since World War II changes the default approach to these questions fundamentally. Positive law on these fields starts out of the assumption of universalism or at least universalisability of justice claims.

Constitutional law, in (some, but influential) individual states, has for long developed a plethora of principles, standards and mechanisms which aim to structure and order justice contestation *within* a society, with particular regard to preserve liberty. What is more, these structures and standards become more and more global, even if perhaps more formally than in substance.

Thus, on its surface, there is definitely convergence in how law approaches justice, between national legal orders and on the European and international level alike (these go under the name ‘globalization of constitutionalism’ and ‘constitutionalization of international law’). This process on the one hand does not guarantee that already “achieved” levels of rights protection (“justice”) are preserved, as for instance the general weakening of constitutional or human rights constraints in the area of antiterrorism testifies. This is largely due to the tensions

between human rights and democracy, which translates into a tension between courts and majoritarian organs of legislation and execution.

On the other hand, globalizing standards, whether it is the rule of law or the proportionality principle, find diverging applications in different legal orders. As justice issues in law inevitably arise as questions to be decided by interpretation (and even that largely in a particular case), formally similar standards do not guarantee a similar outcome, but still keep possibilities limited.

Finally, in specific contexts of substantive justice contestation, such as the questions of justice as distribution, as representation and as recognition, human rights law will likely exert strongly varying effects on the rest of the legal system. Redistributive justice is constitutionalised only to a relatively low level: courts protect neither property, nor social rights particularly strongly. Representation is similarly an area where courts typically face at least prudential constraints. Recognition is in contrast so fundamental to legal thought, that one could expect a much clearer and stronger legal stance from courts than in the other previous settings. Whether these tentative hypotheses are true, however, are left to the further and more empirically based work in the project.

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