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Law, Order and Freedom

A Historical Introduction to Legal Philosophy

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Chapter 2
Antiquity and the Middle Ages

2.1 Introduction to Greek Philosophy

Greek antiquity and Christianity are regarded as the two major sources of Western civilization. Since the Renaissance, Greek culture between the sixth and the third centuries before Christ has been referred to as 'classical antiquity', and Greek philosophy since Socrates as 'classical philosophy'. The term 'classical' attributes to Greek civilization a certain exemplary significance. It specifically had an important influence on the poetry, painting, architecture and philosophy of the fourteenth and fifteenth centuries.

The exemplary character of Greek civilization is, however, easily exaggerated. In the standard view, aesthetics, harmony and rationality held a prominent place. Greek civilization was, however, at the same time characterised by war, slavery, decadence, animism and the consultation of oracles. The notions of 'Greek antiquity' and 'Christianity', furthermore, have a less univocal meaning than is often assumed. Greek philosophy in fact consists of a variety of many different, sometimes completely contradictory, philosophical viewpoints. We furthermore have to rely on very incomplete information. Regarding some periods of Greek civilization not much is known. Of certain Greek philosophers, no works at all have survived; of others, only fragments. In such cases we have to rely on what others wrote about them. Philosophers are, however, rarely a reliable source when they write about other philosophers. There is, therefore, a dearth of information, and what is known does not point to a harmony in thinking which would justify speaking of 'the' Greek philosophy.

In writing the history of Greek philosophy we thus have to remember that we are inadequately informed. We furthermore tend to be selective regarding the materials that have been handed down to us. We after all write history from our point of view, with the help of our language, our concepts and the meaning that we attach to them. In writing the history of Greek philosophy the emphasis is usually placed on its *rationalism*. This characteristic, however, requires considerable qualification. When Plato or Aristotle presents us with a system of Ideas or forms between which, for us, understandable relations exist – for example, mathematical or logical relations – we regard their philosophy as 'rational' – in terms of our standards. When Pythagoras

says that the order of the universe can be expressed in numerical, mathematical relations, this appears rational also from our point of view. This changes when the same Pythagoras by way of a (dietary) regimen for the community established by him, orders its members to abstain from harming a white cock, from eating from a whole loaf of bread and from eating beans, or when Aristotle states that it is best to conceive children in winter and when the north wind blows. Such statements do not at all fit into the Western worldview, and also not into our views of what rationality entails. One instead tends to disregard these as irrational superstitions. For the above-mentioned philosophers and their contemporaries these statements were, however, not at all irrational. These examples may appear trivial, but there are important matters to which the same applies. The Greek philosophers, for example, understood under 'democracy' a form of government where officials and judges are appointed by way of a lottery from among the ranks of the people. Competence played no role in this regard. Slaves and women were, moreover, excluded from having any say in society. The Greek concept of democracy is, therefore, difficult to compare with the modern concept. In brief, the world of the Greeks was in many ways different from our present world. We, therefore, have to realise that we cannot transpose ourselves completely into their way of thinking and life. Historiography amounts to the selective reproduction of what has been handed down in so far as, and to the extent that, it can be conceptualised by us.

It is difficult to take account of all such problems and still write a history of philosophy. We cannot escape from simplifying, selecting, and disregarding the conditions under which philosophical ideas came about, and as a result do them an injustice. It is nonetheless important for us to have some insight into Greek philosophy, as the source of Western philosophy is to be found there. It has been suggested that the history of European philosophy is actually a long commentary on the work of Plato. Kant stated in this regard that in the domain of logic there has been no progress since Aristotle. Specifically Plato and Aristotle had a major influence on the Western philosophical tradition.

With the qualification that this amounts to a somewhat selective characterisation, one could call the Greek worldview *rationalistic*: in the universe a rational order exists in which everything and everyone has its proper place and function.[1] This orderly coherence shows some correspondence with an organism: the parts are dependent on the whole and subject to it. The individual person, for example, has a set function within the political community, whilst humanity as a whole has its

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[1]Greek life also knows an explicit irrational counter-movement. Many Greeks were followers of an animistic religion which was associated with sacrifice. In particular, their worship of Dionysus or Bacchus stands in opposition to rationalism. This Bacchian religion was all but serene, virtuous and rational. It was thought that through excessive drinking and ecstatic rites it was possible to become one with the god. Perhaps the emphasis in Greek philosophy on reasonableness and a harmonious order was so great in order to serve as a counterweight to these passionate, irrational features of Greek culture: in ethics it is specifically emphasized that the passions need to be controlled through reason. Nietzsche (Section 7.5) emphasized strongly this counter-side of Greek culture.

proper place in the universe. This rational order is to a certain extent knowable to human reason. Living a 'good' or 'virtuous' life means living in accordance with one's proper place and function in this order. Everyone must do what is 'proper'. Greek philosophy thus entails a rationalistic ontology, ethics and epistemology: being, the good, and reflection on it, constitute one rational, connected whole.

In general this means a hierarchical division of reality: the reasonable and spiritual sphere represents what is higher; the discordant sphere of the material and physical, what is lower. In man both spheres combine. The good for man means that he unites with the rational world order by developing his reasonable side. Reasonable thinking counts in this rational view as the highest form of human activity, and, therefore, other aspects of human existence, such as bodily instincts, feelings and needs, have to be made subject to reason. Only in this way can harmony with the rational order of the universe be attained. Ethics in this worldview is thus based on an order which really exists, even though it is not directly perceivable by the senses.

This view of human existence as belonging to one universal order, and of the individual as part of the whole, leads to a broad conception of ethics. Such ethics in principle leaves no single aspect of life untouched, neither that of the individual, nor that of the community as a whole. Greek ethics is, moreover, *perfectionist*: everyone should strive for an ideal of human perfection. In conformity with this the Greeks also developed a doctrine of *natural law*: nature determines the higher purpose of man, that is, the development of his reasonable abilities in community with others; law must state the rules that are necessary to perfect the members of society in attaining rational virtue.

This view of man and world deviates greatly from the modern Western liberal worldview. The modern idea of individual, personal 'negative' freedom, in the sense that one can do what one wants, does not appear in the thinking of Greek philosophers. For the latter, this idea would certainly lead to irrational and short-sighted egoism. Freedom for the Greek philosophers meant *essential freedom*: to free oneself from irrational desires so that one can live in accordance with one's reasonable human nature. The state was, moreover, contrary to the contemporary liberal view, not regarded as a necessary arrangement for the protection of individual rights. A positive meaning was attached to life in the community. The individual can, in this view, only be a complete human being in a political community. Virtues, therefore, above all had a social meaning; the duties of citizens were emphasized, not freedom rights.

The Golden Age of Greek philosophy is often divided into two periods, with Socrates (469–399 BC) bridging the divide between them. In brief, Greek philosophy provides us with the following scenario. In the period before Socrates, a development takes place from *mythos* (magical-mythical thinking) to *logos* (rational-logical thinking). Under the influence of great culture shocks the Greeks lost the self-evidence of their traditional mythological worldview. From the sixth century BC the pre-Socratic philosophers, by independent critical thinking, attempted to determine how the world fits together. The first, still primitive theories derived all

phenomena from one natural phenomenon which would be the source of all others: according to one, air; according to another, fire; according to a third, water. The various philosophers thus contradicted each other.

This is why a next generation of philosophers, the *Sophists*, by way of critical reflection, arrived at the relativistic or sceptical view that truth is dependent on the viewpoint of the speaker, or even not knowable at all. They furthermore provide more specific arguments in this regard. A person who is sensitive to the cold would, for example, experience something as cold which another would call warm. Protagoras, therefore, concludes that man is the measure of all things. A universally valid natural law is, in terms of this view, impossible. According to the Sophists the law is simply something made by human beings. From a political perspective this relativising of truth can have two different results. It can either lead to *democracy*: as there is no absolute truth, all opinions are of equal value; therefore, all opinions should count equally in political decision-making. Or it can lead to *tyranny*: as all opinions are arbitrary, the view of the most powerful should determine the outcome.

With Socrates as intermediate figure, his pupil Plato (428–347 BC) entered into a polemic with Sophist relativism with the assertion that absolute knowledge of reality and a rational state order are indeed possible. Plato had personal experience of the dreadful consequences of the two state forms to which sophism leads: a tyranny which is ruled only by self-interest, and a democracy in which an irrational majority unjustly sentenced Socrates to death. In the *Politeia* (the Republic) he formulated an alternative to overcome the shortcomings of these state forms. A state institution, according to Plato, is *just*, when everyone occupies his proper place in the social hierarchy. Plato sees this hierarchical order as a reflection of a cosmic hierarchical order. According to his metaphysical ontology the world consists of more than merely the empirically observable, material reality of everyday life. Behind this hides a higher, rationally ordered world of *Ideas*, which provides the standard for the imperfect empirical world. One finds this dualism in man too: he consists of a lower part, the perishable body; and a higher part, the imperishable reasonable soul, which can obtain insight into the world of Ideas. Spiritual abilities are unequally distributed: only a small wise elite of philosophers are, according to Plato, able to obtain knowledge of the rational basic structure of reality. He regards the masses as without reason: they are led by irrational bodily inclinations. This distinction in relation to the faculty of cognition is also found in Plato's ethics as well as in his state doctrine. Human virtues differ depending on the group a person belongs to: whereas the elite eclipse everyone because of their wisdom, the masses should by means of self-control, simply rein in their own irrational instincts. The just state order is, therefore, at the same time a hierarchical order: governing power belongs exclusively to the reasonable elite. The philosopher-kings are supported by a class of guardians who excel in courage and strength of will. The everyday physical work is performed by the unwise masses. This class-state thus appears similar to the later Middle Ages with its tripartite division of clergy, nobility and peasantry. Apart from his rejection of equality, Plato also rejects freedom. With most people freedom would all too quickly degenerate into immoral licentiousness. Democracy is

similarly to be rejected: there the stupidity of the majority rules, in accordance with the fashion of the times. The wise elite should, therefore, by means of state power and indoctrination force a rational way of life onto the masses. The best form of government is, in brief, *aristocracy* in the literal meaning of the word: government by the best. Therefore, quality is important, rather than democratic quantity. In contrast with tyranny, an aristocratic government places itself, without self-interest, in the service of a just order. As philosophers, those who govern are after all motivated by their impartial love for the truth.

Plato's student Aristotle (384–322 BC) gave a more detailed definition of distributive *justice*: those who are equal must be treated equally, and those who are unequal, unequally in proportion to their (in)equality. Aristotle too, consequently concludes that a just society entails fundamental inequality, as different categories of people deserve unequal treatment. He likewise bases this ideal of inequality on a metaphysical worldview where rationality reigns supreme. Aristotle's ontology differs from that of Plato in that he concentrates on the changing earthly world. However, according to him, behind all the changes actually hides a fixed rational order. The worldview of Aristotle is *teleological*: all phenomena, according to him, have their own aim, goal or purpose. Consequently an acorn has the inherent purpose of growing into an oak tree. In the world a hierarchical order, moreover, exists between the aims of the diverse phenomena, depending on their position on a scale between matter and reasonableness. Man constitutes the highest category: he distinguishes himself from the animal owing to his reason, with which he can arrange his life rationally. Aristotle's ontology at the same time implies an ethics: *good* for every phenomenon is what assists in attaining its natural goal; in other words, what serves its full development. For man the good is then that he must perfect his reasonable essential nature; in other words, rise above his instinctive inclinations.

According to Aristotle this leads to inequalities in kind between people, a social division of labour which corresponds to the unequal distribution of their rational abilities. Free Greek men like himself are capable of complete intellectual virtue. The barbarian strangers, due to their low intelligence, have a natural capacity for slave labour. Women must restrict themselves to domestic work under the leadership of men. On the grounds of such differences within humanity, Aristotle distinguishes four kinds of legal relations. The economic relations between (Greek) men are equal; principally unequal are the relations between parents and children, husband and wife, and master and (barbarian) slave. This inequality in the domestic context is continued in political life, because in the ideal constitutional state naturally only reasonable, free men have a vote. To be sure, the Athens of that time knew the democratic state form, but in accordance with Aristotle's state doctrine only free Greek men counted.

Of the thinkers who came after Aristotle, we furthermore discuss the Stoics here. The Stoa came to the fore after the conquests of Alexander the Great (356–323 BC), who in his short life managed to conquer a large part of the then-known world. He wanted to unite the whole world in a common 'Hellenic' culture (hence the name 'Hellenistic' for the period of Greek civilization after Alexander the Great). The

Stoics wanted to free people from their irrational fears (for example, the fear of death and of the uncertainty regarding their destiny) by showing that the cosmos fitted together rationally. Man could obtain freedom by forsaking irrational desires (such as living eternally and obtaining power) which bring him into conflict with the rationality of the cosmos. From a legal-philosophical perspective the Stoics are especially interesting because they, starting from the presupposition of the moral equality of all people, broke with the traditional Greek ethnocentrism and advocated cosmopolitanism. The 'Hellenic' character of this cosmopolitanism, however to some extent devalued this idea.

The Middle Ages in this book is represented by the figure of Thomas Aquinas (1225–1274), who according to many was the greatest of the theologians and philosophers of the Middle Ages. He wanted to bring about a synthesis between Aristotelian thinking and Christian thinking. Like Aristotle, Aquinas employs a teleological worldview: everything is, because of its inner essential nature, aimed at its own perfection. For Thomas, man ultimately aims at beholding God. Thomas fits his views regarding law into his creation theology: human laws are via natural laws derived from divine law, which governs everything. From a legal-philosophical perspective, the thinking of Thomas Aquinas is especially interesting as an example of naturalistic natural law with a perfectionist tendency.

Towards the end of the Middle Ages Thomist thinking, which united faith and reason, was ripped apart. In concluding this chapter we deal briefly with Duns Scotus (ca. 1266–1308), and in somewhat more detail, with William of Ockham (ca. 1300 – ca. 1350) and Marsilius of Padua (ca. 1290 – ca. 1343). Duns Scotus separated faith from reason. We cannot reach God by way of the heathen rationalism of Aristotle, but only through humble faith. William of Ockham was of the view that humility requires that we, as believers, must at the same time give up on every attempt to understand something of God: we must submissively bow our heads to his inscrutable decrees. Marsilius of Padua derived radical political and legal-philosophical consequences from these ideas: pope and church should restrict themselves to the supernatural; the natural belongs integrally to the jurisdiction of the state. Marsilius of Padua is interesting because in his thinking we find ideas that would later, in the modern period which follows upon the Middle Ages, be worked out in the doctrines of the social contract as well as state absolutism.

2.2 Pre-Socratics

Greek philosophy – and thus the pre-Socratic period – begins in approximately 585 BC with the appearance of the philosopher Thales: not in contemporary Greece, but in Miletus, a city in Asia Minor (now Turkey). At that time, in the area of contemporary Greece, a number of autonomous city states existed with very different social and political systems. The mountainous landscape made mutual influence difficult. This led to the city states on the coast choosing seafaring rather than trading across land which was only passable with difficulty. Seafaring brought the Greeks to Southern Italy and Asia Minor, where colonies were established.

In Asia Minor the Greeks were confronted with the highly developed civilizations of Mesopotamia and Egypt which came into existence many centuries earlier in the fertile areas around the estuaries of the Nile, Euphrates and Tigris. Because of this confrontation with cultures with completely different worldviews, the Greek emigrants lost faith in their own mythological traditions. This meant the start of philosophical thinking, or the development from *mythos* to *logos*: man started reflecting independently and critically about the true nature of reality. Many of the early theories now appear primitive, but they provided the basis for the classical philosophical systems of Plato and Aristotle. A first generation of *natural philosophers* attempted to explain reality with reference to a single natural principle. Thus, Thales contended that water is the basic principle of all phenomena in the universe. Other natural philosophers pointed to the earth or air as the primordial element. Later generations formulated theories of an even more abstract nature, although mythological thinking continued having a clear influence. So, for example, Pythagoras stated that the universe is composed of mathematical relations. Behind observable reality, thus, hides a harmonious rational order, which is reflected in the mathematical thinking of man.

From the above discussion the rationalistic tendency of Greek philosophy is apparent: the reasonable stands above what is perceived by the senses, the spirit stands above the body, and knowledge comes into existence through thinking, not sensory perception. In the fifth century BC, Heraclitus and Parmenides worked out this rationalism in opposing ways. According to the conflict theory of Heraclitus, the rational order of the cosmos consists of a dynamic equilibrium of opposing forces ('War is the father of all'). This equilibrium is, therefore, subject to continuous change ('All is flux, nothing stays still'). It concerns the battle between principles, such as coming into existence and perishing, life and death, hate and love, man and woman, day and night. Such opposing principles cannot do without each other: the good only exists in contrast with the bad. Heraclitus saw law as a consequence of this rational cosmic combat. In human society this battle leads to a (temporary) hierarchical order in which individuals and groups find their proper place. This is reflected in law. Law is part of the same cosmic justice which at the same time determines the proper relation between the heavenly bodies:

> The sun will not overstep his measures; otherwise the Erinyes, ministers of Justice, will find him out (McKirahan 1994, p. 125).

By contrast, according to the static model of Parmenides, all change in the observable world is an illusion. Behind this hides a rational reality which always remains at one with itself. This was the solution of Parmenides to the fundamental philosophical problem of the relation between thinking (knowledge) and reality. Thinking requires fixed concepts which remain at one with themselves. It must be certain what a person means with the concept 'table'. If 'table' could at the same time mean 'ostrich' or 'wine', no one would know what one is talking about. However, observable reality changes constantly, as Heraclitus indicated with his opposing conceptual pairs: day becomes night, young becomes old, love turns into hate. It is, therefore,

difficult to determine whether thinking can indeed acquire a sufficient grasp of reality. Parmenides drew a radical conclusion from this: the world is only conceivable and rational if it remains completely at one with itself. And because the real world, according to the rationalist viewpoint, must correspond with what is conceivable, the changing world which we observe daily must rest on an illusion. True reality must consist of a rational unchangeable world. This equation between thought and being is characteristic of the rationalistic worldview.

2.3 The Sophists

2.3.1 Scepticism and Relativism

The first Greek philosophers thus developed a variety of mutually conflicting theories concerning the nature of reality. These could impossibly all be true at the same time. In the fifth century BC, this led to the sceptical, anti-rationalistic philosophical movement of the *Sophists*.

In the rationally oriented philosophy which preceded the Sophists, doubt was generally expressed regarding sensory perception as a source of knowledge. The Sophists now likewise expressed doubt concerning the reliability of reason, and as a result arrived at a sceptical theory of knowledge. In their opinion objective truth was unattainable. The Sophists nonetheless had different views regarding the degree of doubt. Some drew a radically sceptical conclusion. Cratylus, for example, contended that reality was so changeable and chaotic that it could not provide any support for thinking. His ontology is, therefore, related to that of Heraclitus, but it denies the assumption of an underlying rational order. For this reason, knowledge of facts and norms is, according to Cratylus, impossible. As a consequence, he refused all further discussion.

Other Sophists drew a less radical conclusion and arrived at a relativistic view of knowledge. They denied, like Cratylus, the existence of any rational order behind observable phenomena. If this universe existed, it would be unknowable. Of the world as it appears to our senses, only relative knowledge is possible. Relative standards do not straightforwardly apply to everyone and for all times. Partly because of this, *rhetoric*, as the art of persuasion, will play an important role in Sophist philosophy. The achievement of victory in a debate is the criterion by means of which different relative 'truths' are measured. The Sophists, therefore, acted as travelling teachers, who gave instruction in the art of persuasion.

We know the philosophy of the Sophists primarily from the works of Plato. These are mostly written in the form of dialogues in which the Sophists often act as opponents of Plato's teacher, Socrates. Plato is frequently unfair towards the Sophists. He cuts them down to size so that Socrates – who defends Plato's views – has no difficulty in defeating their arguments. Plato in many instances does not mention arguments which could have been used in favour of their position. The Sophists, at face value, actually have too much against them to deserve just treatment. They let

go of objective criteria so that true and false, good and bad, are no longer ascertainable. Hence the natural rational order in the world and in society, which was presupposed by the Greek rationalist worldview, became unsettled. Because of their relativising of the truth they also had no interest in the true and the good, but simply in success and power. Moreover, they required payment for the instruction they offered. Paid labour was regarded as unworthy in Athens where the greatest part of the population consisted of slaves who did all the work. Their critical philosophy nonetheless deserves more attention than Plato gave it.

The most important representative of the Sophists is Protagoras (480–410 BC). He appeared in the Golden Era of Greek civilization, which lasted from 490 to 431 BC. This period, at the end of which the legendary Pericles ruled Athens, ended with the Peloponnesian war (431–404 BC) which Athens dramatically lost. Under Pericles the state institution of Athens was aristocratic. In the course of this war, due to the fact that decadence among the rich increased and, furthermore, the plague broke out, the already existing democratic resistance against the aristocracy increased. After democracy was established, both political and judicial decision-making were left in the hands of large groups of citizens. Hence the art of persuading others became of the greatest importance. The Sophists were instructors in rhetoric. They defended the view that 'truth' and the 'good' are illusions. According to the Sophists, even if one did not have right on one's side, one could still win the argument. They, therefore, developed the art of public debate. Plato consequently accused the Sophists of a scandalous play with words. Regarding Protagoras, the story is told that he came to an agreement with a pupil that the latter would only have to pay him for his instruction after he won his first case. Protagoras, thereupon, asserted a claim in court to obtain payment for his instruction.

From Protagoras comes the famous statement that man is the measure of all things. With this statement he denies all objective truth. Some opinions can be better than others, but not 'more true'. The statement that man is the measure of all things, can relate to the single individual or to man in general. In the first case, everyone would have 'his own truth', and everyone would establish completely subjectively what is good and what is bad. This interpretation is, however, not defensible in light of two other statements of Protagoras. The first is to the effect that in relation to each topic contrary arguments can be defended equally well. The second is that there is no objective criterion independent of man with which to decide between opposing positions, but that consensus is indeed possible following upon rational discussion. This means that there is no absolutely objective truth in the sense of correspondence with reality, but that truth is possible in the sense of intersubjective agreement between participants in a discussion. A truth like that is bound to time and place, because it must be determined on the basis of the subjective views which people hold at that moment. For this reason rhetorical argument becomes extremely important.

Protagoras illustrates these Sophistic statements with reference to the opposing theories of the earlier natural philosophers: the one derives the whole world from the primordial element of water, another from air, and a third from fire. Similar to the

two statements mentioned above, none of these contentions can ever be confirmed by way of human experience. Even if there should be one primordial principle, it is not knowable to human beings. This applies to conflicting ethical theories too, each of which prescribes a different way in which to become one with the rationally true Being. For this reason, ontology and ethics are in practice of little relevance to everyday life. Absolute, unchanging truths are beyond our reach. The only way to test conflicting views is comparing them critically with each other and discussing them. According to Protagoras, man has, for this purpose, a certain rational ability and a sense of justice that can be developed through ongoing discussion. As a result people can within a society in each instance reach a temporary consensus concerning issues of ethics and law. The content of their consensus is based on what has proven successful in the society in question: the knowledge and norms which best enable human beings to adapt to their environment and achieve their purposes. It will, however, recurrently appear that the consensus that was reached is deficient in certain respects. Dissenting, opposing opinions are then voiced anew. By way of discussion the new position can prevail and, in turn, acquire general consensus. The new position will appear to be better than the previous one when it solves more problems or solves them more successfully.

The importance of Protagoras lies in the fact that he was the first defender of a view that is again taking root today, and which many find greatly unattractive: a relativistic position.

2.3.2 Law as Convention

The scepticism and relativism of the Sophists extend also to law. Earlier philosophers regarded law as a subdivision of a divine cosmic order which is knowable to human beings to a certain extent, and which serves as norm for man. The Sophists deny the existence of such an order, or at least the possibility of knowledge thereof. As a result, the interest shifts from the impersonal, rational world order to the subjective world of man. Human society is no longer viewed as the result of a natural order which controls everything, but as a human product. Man is not only able, but required, to himself make rules for an orderly society. The Sophists were thus the first to make a distinction between *nature* and *convention,* or nature and culture. Law is no longer 'found' by man in the rational order, but made by man himself.

Different Sophists developed diverse interpretations of law as a conventional system of rules. In the absence of an objective moral standard, some sought the solution in *democratic* decision-making with which as many as possible legal subjects could agree. Others saw law simply as the result of the interests of the *most powerful* in society.

Protagoras defended a moderate relativism, in accordance with his statement that 'man is the measure of all things'. Applied to law, this rule means the following: what people in a specific state regard as fair and good *is* such within that state. Law,

therefore, differs depending on time and place. In line with Protagoras's consensus model the majority of citizens must decide about the content of law in an assembly of the people. For this reason the manipulation of decision-making in the people's assembly, and in legal decision-making, is of the greatest importance. Protagoras saw in this a task set aside for instructors and public orators, and compares their task with that of a doctor. He saw as the aim of his teaching specifically the development of statecraft.

Other Sophists defended a much more extreme relativism. They denied the existence of any objective moral standard against which positive law could be tested. They did not seek the solution in discussion and in the reaching of consensus where all legal subjects participate equally. According to them law is simply the exercise of power. Thus, for example, Callicles defended a natural right of the strongest in a manner that is later again found in Nietzsche (Section 7.5). In reality conventional laws often conflict with the laws of nature. They are the product of a conspiracy of the weak masses to disempower the strong: inferior people have a base interest in referring to the natural striving for superiority of those who excel as 'injustice':

> We mold the best and the most powerful among us, taking them while they are still young, like lion cubs, and with charms and incantations we subdue them into slavery, telling them that one is supposed to get no more than his fair share, and that that's what's admirable and just. But surely, if a man whose nature is equal to it arises, he will shake off, tear apart, and escape all this, he will trample underfoot our documents, our tricks and charms, and all our laws that violate nature. He, the slave, will rise up and be revealed as our master, and here the justice of nature will shine forth (Plato 1997, *Gorgias* 484a–b).

A state institution in which the natural inequalities between people are not given effect to, a democracy in which everyone is treated as an equal, is therefore wrong. A strong man has to rise up to reclaim his natural right as master of the people.

Thrasymachus claimed that law simply gives expression to the interests of those who rule: in one country this is a single tyrant, elsewhere a small elite, farther away a democratic majority. Whoever thus has the legislative power in hand enacts laws which are called just in so far as they serve his interests: 'Justice is nothing but what is to the benefit of the strongest.' We later come across a similar statement by Marx (Section 7.4).

The Sophists were extremely important for the development of thinking about law. They untied the law from a presupposed cosmic order and regarded it as a changing human product determined by time and place. This was the start of the philosophical discussion between legal positivism and natural-law doctrine concerning the question whether positive law is simply a consequence of human convention, or whether it can be tested against a preceding, naturally valid ideal law. In so far as the first possibility is concerned, the Sophists additionally distinguished between two further possibilities: such conventions could either still be tested against the standard of intersubjective agreement, or they would simply be based on power (of a single person or of a majority).

Plato and Aristotle subsequently opposed the relativism of the Sophists and gave a new impulse to natural-law doctrine. According to them it is indeed possible to determine objectively what is just and good, independently of human consensus or striving for power.

2.4 Plato

2.4.1 Introduction

Plato was born in 428 BC in Athens. He studied under Socrates, who acted as a philosophical teacher at the same time period as the Sophists. According to tradition, Socrates each day started discussions in the street with any person he met regarding any topic that could provide insight into the nature of human existence. He concerned himself especially with questions of justice, truth and virtue. Socrates attempted to take a stance midway between dogmatism (which adopts one unproven statement as the basis of all truth) and the complete relativism of the Sophists.

Thus he, for example, attacked the Sophists for their relativistic view concerning the virtues. Under virtues more was then understood than would be regarded as such in the Western world today due to the influence of Christianity. Virtue, for example, included craftsmanship. It included all the characteristics which make people fit for their tasks. Socrates attempted to cause problems for the Sophists in the following way. He would ask them what they understand under 'virtue'. The Sophist would answer with concrete examples: the virtue of the carpenter, for example, consists in his ability to be good at carpentry; that of a doctor, in the healing of people, etc. Socrates would argue against this that there must be something which is common to all the examples, by means of which the Sophist can recognise them as examples of the same, *as* virtue. Stated more abstractly, the particular (relative) supposes the general (absolute). Socrates would, moreover, point out that the virtues that have been mentioned are not ends in themselves, but that they serve further ends. Hence, good carpentry or healing people is good in the full sense only if people can, because of this, live a more virtuous life. And a good human life, for its part, only has meaning when it constitutes a harmonious component of a natural order. It is, therefore, meaningful to speak about virtues only when we assume that these ultimately have a place in a cosmic order.

Socrates, differing from Plato after him, however developed no doctrine of virtue. Tradition records the following statement by Socrates: 'I know only that I know nothing.' With this he wanted to stimulate a critical attitude, so that people would in future be able to take their own well considered decisions. Socrates never put anything down in writing. His views became known especially through the writings of his pupil, Plato.

Plato continued Socrates's battle against the Sophists. He chose the pursuit of philosophy, although he could have had a political career as he belonged to one of the most prominent families of Athens. He was actually invited to do this, but due to

the serious corruption in public affairs he declined the offer. After travelling for approximately 10 years, he established in Athens, at the age of 40, the platonic Academy, where he, like Socrates, gave free instruction. Teaching was for Plato the most important. Despite his many writings which are known to us, he stated that the core of his philosophy was never consigned to paper. With this he sought to give expression to the view that the words of language are inadequate to impart real insight. The extent to which Socrates's voice really finds expression in Plato's work cannot be established. It seems certain that Plato wanted to elaborate on what he had learned from Socrates, but added a lot to this, as he had more faith in the possibility of objective knowledge.

2.4.2 State Doctrine

The state is, according to Plato, established due to the fact that every individual person by himself is deficient, needy and inadequate. For this reason people have to live together in a *polis* (city state). The diverse abilities of different people complement each other, and for this reason a natural division of labour is established in accordance with communal needs. The *polis* must in each instance provide for the need for food, clothing and housing. In addition, the need arises for leadership and the defence of the state. Plato, therefore, distinguishes three main functions of the state: government, maintaining order, and productive labour. These must be carried out by those who are most suitable for these tasks. According to Plato the required virtues, such as wisdom and courage, are unequally shared amongst people. For this reason all members of a state community must, depending on their characteristics, be divided into three classes. Governing must be performed by a class of people who excel in the virtue of wisdom. Those who have courage as main attribute constitute the class which carries out the tasks of defence and policing. Finally, the class of workers is constituted by the majority who are neither particularly intelligent nor particularly courageous. The most important virtue of these workers is that they use their bodily energy by way of self-discipline in a productive manner. These classes stand in a hierarchical order in relation to each other. In the same way in which every individual person must allow his bodily instincts to be led by reason, in the state the class of the wise must, via the guardians of order, rule over the class of workers. Only with such a hierarchical order of classes can there, according to Plato, be a just state.

In the state doctrine which Plato develops in the *Republic*, he consequently defends an aristocratic state ideal, in the literal sense of government by the best.[2] He joins issue, also in this domain, with the Sophists, both as regards their doctrine of democracy and their view of law as the means of the power of the strongest. It is likely that Plato's political philosophy was influenced by a number of events which led to drastic changes in the Athenian world. After Athens lost the Peloponnesian war with Sparta, the victorious city state appointed an *oligarchy* (government by the

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[2]Greek: *aristoi* = the best.

few) which consisted of the Athenian elite. The dictatorial and corrupt rule of the
'Thirty Tyrants' turned them into an object of hate. Their regime was overthrown
within a year and replaced by a democracy. Deep resentment prevailed against
the aristocrats who constituted the oligarchic government. During this democratic
period, also, an action was begun against Socrates for his ruining of the Athenian
youth, and for his dishonourable conduct towards the gods. In his role as philo-
sophical teacher, Socrates had members of the aristocratic party as his pupils, which
included a number of later tyrants. The grudge against these tyrants was probably
turned against Socrates as well. The democratic people's court sentenced Socrates
to death after a demagogic process. In 399 BC he was executed by being forced to
drink a cup of poison. This course of events probably made Plato aware of a number
of disadvantages of the democratic form of government. On the other hand, he also
despised the corrupt and decadent regime of the Thirty Tyrants, although a number
of his relatives were part of this regime.

Plato thus rejects both tyranny and democracy. He rejects democratic decision-
making because in this model everybody participates, and ultimately the majority
decides. He strongly resists such a simple criterion of number. He regards it as fun-
damentally unjustified that all views count irrespective of their content, and argues
for a qualitative test. A ship is after all not sailed by the passengers, but by an
expert: the captain. Only people with a *rational* ability to judge should govern the
state. The majority are, according to Plato, not capable of this. They live according
to the fashion of the day and allow themselves to be drawn along by fluctuating irra-
tional desires, as occurred during the case against Socrates. The government must,
therefore, be formed by the elite. Contrary to what some Sophists contended, this
elite should not consist of the powerful. The latter are after all as irrational and self-
ish as the masses, so that a tyranny would quickly be established, as was shown
by the regime of the Thirty Tyrants. In Plato's ideal society an elite of wise and
unselfish men and women would rule, so that the disadvantages of both democracy
and tyranny would be avoided.

Plato's authoritarian state ideal is based on a sharp distinction between the wise
elite and the irrational masses. His emphasis on the need for a paternalistic govern-
ment of wise experts can be understood only in light of his theory of knowledge.
According to Plato most people live in a world of appearances, because of which
they are not capable of rational knowledge. It would, therefore, not make sense to
entrust them with the leadership of the state. True knowledge is to be acquired only
by means of strict philosophical schooling. For this reason only philosophers are
capable of governing.

2.4.3 Rationalistic Theory of Knowledge and Ontology

In the domain of epistemology, Plato contests, in line with the teachings of Socrates,
the relativism of the Sophists. However, differing from Socrates, Plato places
unquestionable knowledge in opposition to relativism. Man would, owing to his
reason, be able to obtain insight into absolute truths.

Absolutely certain knowledge is, according to him, not to be found in the perceptible world of the senses. This is impossible, in the first place, because all observation is dependent upon the position and constitution of the observer. In the second place, this is impossible because what is observed is itself changeable and perishable, and thus provides insufficient certainty. Hence an object which first appears as red can in a different light appear as grey. On the basis of sensory experience, the best that can, therefore, be obtained, is uncertain, changeable *opinion*.

We arrange the changeable observable phenomena into general concepts, which do remain equal to themselves. A human being, for example, grows from a baby into an adult, and then shrinks again in old age, but despite all these changes remains included within the same concept of the 'human'. However, all cells from which he was originally constituted are in the meantime renewed completely a number of times, and he, therefore, cannot actually be said to have a fixed bodily identity over the course of time. We, moreover, still know what 'red' is even though the actual colours which we observe around us constantly change. Only because we have such fixed concepts can we bring order to changing empirical reality. According to Plato, such fixed concepts can, therefore, never derive from observable reality itself. We must already in advance have an idea of what a 'human being' or 'redness' entails, to be able to identify all the diverse particular instances which fall under such general concepts as 'human being' or 'red'. Stated differently, every comparison presumes a third, a standard by means of which comparisons can be drawn. How else would we be able to identify stick insects, human beings, bats and sloths all as 'animals'? This applies even more so to general moral and aesthetic concepts such as 'justice' and 'beauty', which are not to be found as such in observable reality. The beauty of a painting and the beauty of a piece of music are, for example, each based on very different empirical characteristics (forms and colours, on the one hand, and sounds, on the other). All material beauty, moreover, perishes with time. In addition, all things in the empirical world are not only changeable and perishable, but also imperfect and relative. In sensory observable reality, nothing is, for example, in all respects perfectly beautiful or good. To repeat, we must, therefore, know such ethical and aesthetic concepts before we can apply them to observable phenomena. (Socrates already anticipated this in his criticism of the relativistic doctrine of virtue of the Sophists.) Plato furthermore points to the universal validity and certainty of mathematical knowledge, which is independent of empirical observation. $224 + 631 = 855$ is always true, independently of the counting of observable beads on an abacus. It was, moreover, already true before anybody had factually calculated this. And it always remains true, even if all the material things on which we base such abstract calculations are lost. Our mathematical ideas can, therefore, not be derivable from the empirical world.

From this Plato concludes that such general concepts must actually exist in a separate spiritual world, preceding material reality and human thinking. He contends that the empirically observable and changeable reality is simply a world of appearance. Behind this hides a world of *Ideas* which is unchangeable and forever equal to itself, which already existed before we obtained knowledge of it. The fundamental

problem which Plato's rationalistic metaphysics attempts to solve is the same as that of Parmenides (see Section 2.2): our thinking requires fixed concepts remaining equal to themselves. Observable reality is, however, changeable, and thus not graspable by means of thinking. This raises the question of the extent to which we can succeed in obtaining a grasp of reality with our thinking. Plato solves this question in the same way as Parmenides by presupposing that true reality must coincide with what is thinkable: it must be as unchangeable as the thinking about it. The observable world is unthinkable, and, therefore, unreal.

Knowledge of such Ideas can, according to Plato, only be attained by way of a proper use of reason. The senses, which form part of the inferior material world, can provide only subjective *opinions*. The everyday views concerning matters of good and bad, true and false, beautiful and ugly, are, therefore, determined by differences in taste, personal interests, societal prejudices and so forth.

Plato, thus, defends a dualistic worldview: the materially observable world is not all there is, but constitutes a mirror image of a separate, immaterial world. These two worlds stand in a hierarchical relation to each other: the perfect, rational world of Ideas serves as ideal model for the everyday, imperfect, empirical world. The Ideas have two aspects: they constitute the meaning of general ideas, but are at the same time the ideal of perfection. The word 'cat' has a general meaning which is illustrated by all different, existing cats. However, according to Plato, 'cat' is also the ideal cat, the Idea of perfection which all different, visible cats never completely comply with. The *true* (ideal) reality thus coincides with the *good*.

According to Plato, a hierarchical order prevails in the World of Ideas itself as well. At the bottom of the hierarchy are the most particular Ideas, at the top, the most general, co-ordinating, abstract concepts. This conceptual order, for example, ascends from sub-species to species, and so on; for example: elephant → mammal → animal. Regarding the precise design of this hierarchical order, specifically the issue of how the Ideas relate to each other, Plato gave no clear explanation. He did, however, state that at the top of the hierarchy of Ideas is the Idea of the True, the Beautiful and the Good. By means of this metaphysical assumption of a normative ideal reality, Plato could escape from the relativism of the Sophists. Knowledge of the general Ideas provides an objective standard in accordance with which to organise and evaluate the changing world.

With this dualism, Plato made a distinction which is characteristic of Greek rationalistic ontology, and which afterwards deeply influenced Western philosophy: between, on the one hand, a true, reasonable world which corresponds with thinking and of which knowledge is possible via human reason, and, on the other hand, the changeable empirically observable world where only appearance prevails. Reason is thus regarded as the source of knowledge by means of which truth can be obtained. 'Knowledge' which is obtained by way of sensory observation (or what Plato calls 'opinion') is, by contrast, simply a source of error. With our senses we after all observe change and development, which cannot be grasped in fixed, reasonable categories. To be sure, the observable world exists, but not in the full sense: it is based on the fraudulent functioning of our senses, which themselves form a

component of our imperfect bodies. Most people are aware only of this imperfect material existence, and lack any understanding of the higher, rational reality.

Plato depicted this theory of knowledge in his famous metaphor of the cave. He compares people who only live in the world of sensory observable phenomena with persons who for all their lives have been sitting chained in a cave, with their backs to the opening. When shadows appear on the back wall of the cave as a result of human beings and objects that move at the opening behind the backs of those who are chained, the cave dwellers would regard the shadows as real, instead of the things which cause the shadows. Only when people by means of reason free themselves from the physically bound perspective of the senses, can they see the true reality in the full sunlight outside the cave: then the reality of the Ideas shows itself to them in the light of the highest Idea of the True, the Beautiful and the Good. Only then does one realise that what one all the time regarded as reality is simply a silhouette of the higher reality.

Access to this ideal truth is only to be obtained by way of rigorous intellectual as well as physical and ethical training: human beings should free themselves from their physically restricted viewpoint which is distorted by selfish desires. Only if people are capable of an impartial and unselfish (and thus moral) point of view, can they obtain an understanding of the rational Ideas with their own generally valid (thus supra-personal) nature. After all, because these Ideas are universal, and not affected by an egocentric and perverted perspective, they themselves, in addition to being true, also have a moral side. Because truth is, according to Plato's epistemology, only obtainable by a few after a rigorous intellectual and moral education, his political philosophy assumes a radically elitist and authoritarian format.

2.4.4 Moral Perfectionism

2.4.4.1 Perfectionist Individual Ethics

The sharp dichotomy between the inferior empirical world and the superior spiritual world of the Ideas which characterises Plato's ontology is reflected both in his individual ethics and in his hierarchical state ideal. Man forms part of both worlds: he consists of body and soul. Plato's perfectionist *virtue ethics* for one's personal life are based on this twofold position, which is analogous to his perfectionist political doctrine for communal life in the state.

Plato takes the following view on man. With our souls we are capable of rational knowledge. On the other hand, with our perishable bodies and the needs and urges which belong to them we also belong to the inferior material world. Plato calls the body the grave of the soul. He distinguishes, as the mediator between reason and passionate physical inclinations, will-power as a third dimension of man, which has as its function bringing the bodily tendencies under the control of reason. Man is, thus, characterised by three levels. The lowest level, which we share with animals, is that of sensual animal urges. The need for food and the sexual urge belong here. The second level is that of will-power. To the latter belong ambition, courage and

hope. The highest level is reason, by means of which man has access to the perfect realm of the Ideas.

Virtues serve to perfect the higher dimensions of man. Plato distinguishes between four virtues, which correspond to his tripartite portrayal of mankind. With the lower bodily instincts corresponds the virtue of *self-control*. With the higher abilities of reason corresponds the virtue of *wisdom*. Between them resides the virtue of *courage*, which via the will has to ensure that self-control is subjected to wisdom. As overarching fourth virtue Plato mentions *justice*, which he defines as 'to each what is due to him': a situation is just if everything has its proper place in accordance with Plato's hierarchical doctrine of Ideas. In casu this means that the virtues have to relate to each other in accordance with the proper hierarchical order: wisdom must guide the other virtues. Wisdom is the highest virtue because it provides an understanding of the Idea of the Beautiful and the Good, the highest Idea in Plato's realm of Ideas and the final aim of the universe. Only by way of this insight is it possible for man to perfect himself.

According to Plato, the Good, thus, does not consist in bodily pleasure, but in the complete realisation of man's rationality, that is, an understanding of the true aim of life, knowledge of the Good. For this reason the spirit has to untie itself from the material world of appearance and direct itself towards the realm of the perfect ideal reality. The knowledge thus obtained henceforth determines all desires and actions. Plato never gave a more specific definition of the Good. He was of the view that an understanding of the Good can be acquired only after long intellectual exercise and self-discipline. In addition, physical existence must be subjected to reason by means of the moderation of needs, urges and inclinations. Man only needs to strive towards satisfaction of needs in so far as this is necessary to remain alive. By subjecting need to rational control, by exercising the will, one can escape from the imprisonment of one's bodily existence: those who are chained escape from the cave. This enables one to strive for wisdom, and ultimately for justice, by way of insight into the proper relation between the virtues and the levels of the soul which correspond with them.

However, according to Plato, most people are not able to do this. They only strive for physical pleasure and wealth. They harbour no love for wisdom and, therefore, do not attempt to escape from their 'cave'. As Heraclitus said, asses prefer hay over gold. Only philosophers live in the World of Ideas, the truly perfect reality. Therefore, only they are capable of perfecting the community as a whole in accordance with normative Ideas. Philosophers are separated by a great divide from all others. The majority will never of their own accord believe the philosophers, and, even less, understand them. Socrates, therefore, also states that in a world of fools, philosophers will undoubtedly appear to be mad.

2.4.4.2 Perfectionist Political Theory

From the above follows Plato's perfectionist aristocratic *political philosophy*. As in the case of his virtue ethics, 'justice' is here the overarching virtue: 'everything in its proper place'. Because people, according to Plato, differ greatly from each other

in so far as individual virtue is concerned, they likewise deserve an unequal position in political life. Someone's proper place in society is determined by the extent to which he excels in one of the three other platonic virtues: wisdom, courage or self-control. In his ideal class state the government is formed by a wise spiritual elite, the maintenance of order lies in the hands of the courageous, whereas the non-wise, non-courageous masses, who are barely able to control their base instincts, must work to provide for the material needs of the elite.

As only well-educated philosophers have knowledge of what is good for man and society, only they can govern the state and make citizens attain perfect virtue. Therefore, the ideal rulers are 'philosopher-kings'. A philosopher is someone who has a love for wisdom and who makes this into a way of life. He lives in the reality of thinking, of the Ideas, not in the façade of the observable world. Plato's philosopher-kings endured until their 60th birthday a long and difficult training, which had to guarantee their development on the way to perfect rationality. In addition, they had to permanently relinquish earthly physical pleasure as an independent value. They relinquished all wealth, all personal possessions, all personal relations; they did not know who their children were; all of this to prevent them from being impeded in their aspiration for wisdom because of selfish inclinations. The workers and guardians, on the other hand, would have private property and personal relations with women and children. They are then, because of their partiality, excluded from all political power. Those who endure all difficult training must undoubtedly possess a great love of wisdom and really have made virtue their own. The life of the highest class is, from the perspective of those who are 'chained' to their physical pleasures, after all very unattractive. Opportunists or those hungry for power would not survive the selection process. Therefore, according to Plato, there is no chance that the government of philosophers could degenerate into tyranny.

The selection of leaders is based only on quality. Everyone with adequate talents has an equal chance of becoming a ruler. All children receive until their twentieth year the same schooling, irrespective of their birth. This education begins with music and physical exercise. Plato attempts with these methods to form a balanced and moderate character. The next stage consists of education in mathematics and dialectics in the formation of the intellect, in the hardening of the body, in deprivations for the purpose of exercising will-power and the ability to sacrifice. Those who pass selection, continue their education in the same manner. The rest fall into the class of workers. After 10 years another selection takes place, followed by another 5 years of philosophical education. Thereafter the educated undergo an apprenticeship of 20 years. They must acquire experience in all aspects of a full life, including military battle. They must learn about social life to which they would later give leadership, and gain experience in leadership functions. Those who successfully survive this apprenticeship as well, gain access to the highest class.

The philosopher-kings govern solely by virtue of a sense of duty. Not power and governing as such, but wisdom, is what they love. The state led by them specifically has the education of citizens as its task. This education is aimed at the raising of self-awareness, reflection, and the forming of citizens according to the rationalistic model. The wise rulers govern with absolute power over the other classes, who

have to unconditionally conform to the unequal political and class relationships. The rulers are subject to no other limitation than that of their wisdom. They must, among other things, strictly censure pieces of writing presenting irrational views which incite urges, needs and inclinations. Theatre and poetry are forbidden as they affect the emotions rather than the intellect. When necessary the rulers may even spread lies to ensure that citizens live in accordance with the good life. They can, for example, justify their own authority by propagating the myth that they are of divine origin. Truth and reasonable arguments derived from the doctrine of Ideas are after all incomprehensible to the masses. As Heraclitus said, the herd has to be driven to pasture by flogging.

Against Plato's state model it is often contended that the individual disappears completely for the sake of the whole. Plato, after all, mentions that the state cannot be in the service of individual interests. Moreover, in his state no individual freedom exists. Yet, the state must serve the interests which are shared by citizens. The aim is ultimately to lead citizens by means of a virtuous life to their 'natural' destiny. In Plato's theory no essential contradiction exists between individual and society, because he presupposes the existence of a universal harmonious order. The instinctive inclinations of one individual can indeed conflict with communal interests, but, in accordance with his higher essential nature, the individual person fits perfectly into the organic whole of society. The inequality between different groups of people, which is the consequence of Plato's hierarchical class state and of his elitist view of government, can similarly be justified by invoking the harmonious natural order which controls the world in line with Plato's ontology. Plato regards the hierarchical structure of his state ideal not as tyrannical, but as providing for a just division of labour. The workers are for their defence dependent on the guardians, and for their administration, on the rulers. But guardians and rulers are for their livelihood dependent on the workers. According to Plato, a kind of balance exists in reality between the three classes, which is dictated by justice. A just relationship, in other words, exists between different groups of people, based on their different natural talents. Freedom and equality, democracy and a constitutional state, are, on the other hand, pre-eminently unjust.

The ideal state, as Plato envisages it, provides the standard with which actual states have to comply, if they do not wish to degenerate. Hence, if the rulers receive inadequate philosophical education, the (ideally) just aristocracy will degenerate into a military dictatorship. From the enrichment and weakening of the rulers, an 'oligarchy' would result, as well as increasing conflict between rich and poor. Eventually the people will revolt, kill the rich, and establish 'democracy'. Now every subjective opinion is regarded as equally valid and worthy of respect. In such circumstances demagogues emerge who can turn democracy into its converse, 'tyranny'. The tyrant can at first satisfy the needs of the people. When this no longer works, he must, in order to avert attention, wage war. The cycle is completed when in this hopeless situation a wise man arises, and, with the help of the good-natured, founds the state anew.

2.4.5 Commentary

Following upon this analysis, Plato in the *Republic* arrives at a 'broad' perfectionist ethics for individual and political life. The whole of state life is aimed at the moral education of all citizens into virtuous human beings. For this purpose Plato designs an authoritarian form of government which stands at odds with the modern ideal of the democratic constitutional state and the principles of (negative) freedom and equality – which Plato, of course, did not know himself. From the anachronistic perspective of contemporary liberalism, the absolute power of the philosopher-kings brings about a significant degree of inequality between the three classes and, moreover, leaves no room for individual autonomy. Democracy, the constitutional state, separation of powers, freedom of speech, and other rights of the individual citizen are out of the question. Instead of liberal negative freedom, Plato advocates *essential freedom*: thanks to the wise paternalistic leadership of the philosophers, humanity achieves freedom *from* their own irrational inclinations *for* the purpose of a rational way of life.

Plato's arguments in favour of this model can, in modern terms, be summarised as follows:

1. Knowledge of the perfect human way of life is possible via an understanding of a higher rational reality.
2. This knowledge is, however, only accessible to an intellectual elite. The majority, on the other hand, allow themselves to be led by irrational desires which are in conflict with a true, humane, reasonable way of life.
3. The elite which attain this knowledge will use it in an unbiased, unselfish way, uncorrupted by power.
4. For this reason the elite must lead the masses and educate them in virtues which perfect human talent as far as possible. For this purpose a strict hierarchical state structure is required.
5. Because of (3), the institution of the constitutional state, which aims at restricting governmental power, is superfluous and undesirable.
6. Because of (2) and (4), the democratic form of state is irrational and immoral.
7. Because of (2), the freedom principle is likewise irrational and immoral: most people lack the required maturity.
8. Because of (2), (4), (6) and (7), the principle of equality is similarly unfounded.
9. Because of (1)–(8), a just state institution requires a lack of freedom, and inequality, in principle, for the benefit of all.

In Plato's view of the ideal rulers hides an important insight: people who are ensconced in a certain societal position, with all the attached prejudices, conventions, need and value patterns, cannot be unbiased. Their views of ethical and political matters are prejudiced. For this reason a democratic decision-making procedure does not guarantee equitable outcomes. Plato realises that it is necessary to subject oneself to a very thorough self-enquiry and very strict discipline in order to approach impartiality.

The defence of Plato's absolutist state doctrine, however, stands or falls with the tenability of his rationalistic ontology (1). The objection against this is that it is too speculative. Man lives in an imperfect world, and his ability to attain knowledge is imperfect as well. That he could nonetheless attain knowledge of a perfect supernatural world is an understandable desire; but perchance wish is the father of this thought. Perhaps abstract mathematical truths and 'absolute' Ideas, such as those of the Good and the Beautiful, are simply human constructions: idealised generalisations of what we know from our experiences and from the imperfect empirical world. That we have such ideas, therefore, does not prove that they exist independently of human thinking in an eternal world of Ideas.

If one regards the existence of a higher world of Ideas as indemonstrable, only empirical reality remains, in relation to which only uncertain 'opinions' are possible. With this the justification of a government of the wise, who have an exclusive understanding of a higher truth concerning world and values (2), would likewise disappear. When one assumes that all human knowledge is fallible – and thus relativises Plato's absolute opposition between 'knowledge' and 'opinions' – one rather arrives at a democratic view of the state in line with the ideals of freedom and equality: everyone's knowledge is in principle equally uncertain and provisional. There is no privileged elite who possesses all wisdom, so that everyone should be able to participate in a critical discussion (4). If certain knowledge concerning the absolute good is not settled, and if there is no fixed harmony between individual and community, reason seems to require that individuals be given as much as possible autonomous scope to determine their own way of life, as long as they do not disregard the equal autonomy of others. This requires a democratic state form (6) with equal freedom rights (7, 8). One is then back again with the Sophists. Experience, moreover, shows that power often corrupts (3). For this reason one can succeed better in restricting state power by means of the institutions of the democratic constitutional state with its separation of powers (5). In the twentieth century this position was defended by Popper (Section 8.4). In other words, from Plato's rationalist metaphysics a 'broad morality' can be derived. But if one is doubtful about this metaphysics, it appears possible only to arrive at a 'narrow morality'. We will, however, see that there are also philosophers who specifically do not base a narrow morality on scepticism or relativism, but on the insight that the truth can be realised only if it is not imposed through force (see specifically Locke, Section 4.2).

Plato realised that the perfect rational state is an ideal which is in reality very difficult to achieve. In a later period he started to think that the political model in the *Republic* was perhaps conceived at too high a level. The selection of rulers, for instance, will pose insurmountable difficulties. He came to the conviction that no person can be protected completely from becoming unjust. However, if there are no absolutely just kings, there is no greater horror than an absolute ruler who is not subject to the law, but subjects the law completely to his authority. Therefore, in a later work, *Nomoi* (the Laws), Plato abandons the ideal of a community with a hierarchical class structure. He then apparently adopts the position that, depending on the circumstances, different forms of government can be effective. In the *Laws*

he advocates, among other things, a legal order enacted by a democratic people's assembly. The government itself should be subject to the rule of law.

2.5 Aristotle

Aristotle (384–322 BC) was for many years a student of Plato's Academy, and knew Plato personally. He was later asked by the king of Macedonia to take responsibility for the education of his son Alexander (the Great). Aristotle thereafter returned to Athens and established his own school there.

Aristotle's philosophy starts from amazement: how does it come about that things are the way they are? This is not a question with any practical utility. Aristotle furthermore emphasises that philosophical questions concerning the nature and origin of reality can only arise when the necessities of life have been provided for. Aristotle marvelled, among other things, at our ability to obtain knowledge: how is it possible that we can come to certain knowledge of the world, whereas the latter is continually subject to change? How can we regard things as the same, whereas in reality there is nothing that is completely equal to anything else? This question was also posed by Parmenides and Plato, but Aristotle provides a different answer which ties in more closely with empirical reality. He rejects the idea of a separate world of Ideas. Aristotle's answer is that experience teaches us that in all things an essential core is present, which reveals itself in each instance in a concrete manner, and which is often subject to historical development. Take an acorn. When it finds itself in favourable circumstances, it will develop into an oak tree. This is the natural destiny of an acorn. One will never see that an apple tree grows from an acorn, and if such monsters would appear, we would reject them as unnatural. Apparently the essence of the oak tree is from the beginning of the process present in the acorn, so that the distinction between species is a natural necessity. Aristotle's 'biomorph' worldview implies that he regards the whole of reality as analogous to an acorn: things are aimed at the development of their natural capacity. In the mutual relationship between things likewise natural patterns can be discerned. Hence, plants serve to be eaten by animals, whilst animals are at the service of man. (Some people similarly appear by nature to be suitable for subjection, whereas others by nature rule over them: Aristotle thus both explains *and* justifies slavery.) Aristotle's biomorph worldview makes him an adherent of a specific form of natural law, of what we in the first chapter referred to as the biological model. Law is allocated the function of advancing the purposes active in human nature.

Contrary to Plato, Aristotle subscribes to empirical, scientific enquiry. This difference is closely connected to Aristotle's philosophy, which criticises the doctrine of Ideas of his teacher. Aristotle stands closer to what we today refer to as empirical science; he can also be said to stand closer to *common sense* than Plato. He deals with arguments against Plato's doctrine of Ideas which are partly presented by Plato himself in his dialogue *Parmenides*. The strongest of these is the argument of the

'third man'. Simply stated, it boils down to the following. Plato originally uses as argument for the existence of his Ideas that without the Ideas we would not be able to know a cat as an example of 'cat' or a man as an example of 'man'. We do not, according to Plato, in the first instance arrive at the Idea 'cat' or 'man' by comparing cats and men. The objection against this argument is that the problem repeats itself. If we need the Idea 'man' to recognise two men as specimens of the same kind, then we need a third, more ideal 'man', to similarly be able to compare the man and the Idea 'man'.

2.5.1 Ontology

One of the most important points of Aristotle's criticism against Plato relates to the place the latter accords to the Ideas: situated in a separate unchanging realm. This has the consequence that observable reality is reduced to appearance. Plato assumes that truth must be unchanging and perfect, whereas all material forms of existence are changing and imperfect.

Aristotle raises the objection that these Ideas or general concepts can exist only *in*, and because of, concrete, bodily forms of existence. What we trace in our general concepts are general Ideas or 'forms' which are active in the particular specimen. Expressed technically, in Plato the Ideas are 'transcendent'; in Aristotle they are 'immanent'.

Plato states that in order to be able to recognise two differently shaped objects as chairs we must already have at our disposal the Idea 'chair'. His method of reasoning is *deductive*: he derives the specific (the concrete examples) from the general (the shared Idea). Aristotle argues that we take the reverse (*inductive*) course and derive the general concept from the separate specimen. On the basis of the particular specimens which we observe, we form a general concept. In the latter the common characteristics of all specimens of one kind are contained, which distinguishes this kind from others. Aristotle realises that in this manner absolute certainty cannot be attained. But like Plato in his later years, Aristotle accepts that such complete certainty is illusory.

Aristotle thus, like Plato, takes for granted a dualism of general form, essence or Idea, on the one hand, and, on the other, substance or matter. However, because Aristotle locates form in material things, he is to a lesser extent subject to the critique raised against Plato that there is an inexplicable gap between the ideal and the material world.

Aristotle can, moreover, in this manner explain changes in the observable world, which Plato with his static world of Ideas rejects as mere appearance. Every specific thing, according to Aristotle, consists of a combination of form (or Idea) and substance. Substance in itself he regards as unformed, passive matter. Matter only takes on the form of a tree, a dog or a man, because the general form or Idea is at work within it, and because of which potentiality turns into actuality. This is why a human embryo grows into an adult man. Aristotle takes this biological process as model for all development and change in nature.

Aristotle also refers to 'form', because of its creative role, as the *final* or *purposive cause*. The final purpose of development is, in other words, in potentiality already present in the form, preceding its realisation. The immanent final purpose is the cause of the development towards a fully grown specimen of the kind. The inherent Idea 'man', for example, functions as purposive cause, so that the baby takes on more and more the features which are characteristic of its being human, that is, those characteristics by means of which man distinguishes himself from other living beings, and which, therefore, constitute his essence. The distinguishing characteristic of man is, according to Aristotle, the possession of reason. A human embryo has not as yet developed this, but already possesses it as potentiality. It must clearly possess this potentiality, because why would it always grow into a human being and not now and then into a Danish dog or a canary?

Such a purposive cause or essence has a *normative* import as well: it is at the same time a norm for the most proper development. If the potentiality or form in a particular specimen does not come to perfect realisation, this is, according to Aristotle, caused by the resistance which matter presents. Everywhere in nature and in human existence where movement or development is observed, this is a sign that the form is not as yet completely realised, and, thus, of imperfection. Aristotle's ontology thus implies, like Plato's, an ethics.

The hypothesis that all existence has a form in itself which is the potentiality for, and the source of, all its development, is, according to Aristotle, confirmed by an observable teleology in the whole of nature. Polar bears are, for example, because of their white fur adapted to snow, and giraffes can because of their long necks reach up high in trees. He does not only see teleology in every form of existence in itself, but in nature as a whole: the latter, according to him, constitutes a purposively ordered hierarchical unity. Lower kinds are in the service of the higher. Grass has the natural function of serving as food for cattle, whereas cattle exist to be eaten by man. Such a worldview is referred to as *teleological*.[3] The different kinds, according to Aristotle, find themselves higher up in the hierarchical order depending on the extent to which they are less material and more spiritual: for this reason the lifeless things are at the bottom, thereafter come the plants, next the animals, and finally man. Every higher kind has all the characteristics of the lower kinds in itself. They distinguish themselves from the lower species by an individual, characteristic quality which stands in a looser relationship with lifeless matter depending on the extent to which the kind in issue is a higher one: animals, for example, consume food, similarly to plants, but they can in addition move freely; man has all the animal characteristics, but distinguishes himself from them through his rational abilities, enabling him to free himself from his instincts. Thinking is the highest form of activity; contemplation is the uppermost that has been given to the human soul. As highest source and purpose of all these developments, Aristotle presupposes an 'Unmoved Mover' or 'thought thinking itself': a pure rational form, which thinks all substance 'towards itself'. The harmonious hierarchy of Plato's World of Ideas, in Aristotle's theory

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[3]Greek: *telos* = purpose.

thus returns *in* the world. With Aristotle we find nothing of the mystical-religious and utopian elements of Plato's philosophy.

2.5.2 Ethics

Because the 'forms', 'essences' or 'purposive causes' of every form of existence lead to the development of its essential nature and because all kinds in the universe are aimed at one common highest purpose, Aristotle's ontology at the same time provides a basis for his *ethics*: the good for each being is the perfection of its imma-nent potentiality, thus of what characterises the kind. As a result it can fulfil its natural function in the universe. Because man distinguishes himself from the rest of nature through his reason, the good for him is to attain harmony and happiness by means of a mode of life which is as reasonable as possible.

Happiness (*eudaimonia*) is the name which Aristotle gives to the highest good that is achievable by man. This word is tainted by a number of associations, and Aristotle knows this quite well: he, therefore, specifically points out that one should not let oneself be misled by this notion. Its meaning is not the same as the usual meaning (happiness as a situation of individual satisfaction), but ties in with Aristotle's own theory concerning the typical human aspiration for the highest achievable good – a reasonable way of life – to which he gives the conventional name 'happiness'. Aristotle describes happiness as follows:

> [T]he good for man is an activity of the soul in accordance with virtue, or if there are more kinds of virtue than one, in accordance with the best and most perfect kind (Aristotle 2004, p. 1098a (15)).

Regarding the elements of this description we provide a few comments.

Like every being, man has a task unique to him, and this entails completing the task well. Whoever completes this task in a good, or rather, in the best possible way, deserves to be referred to as happy (Aristotle is no 'hedonist',[4] but like Plato, a 'perfectionist'). Where is the highest good to be found? In the first book of his main work on ethics, *Nicomachean Ethics*, Aristotle responds: in politics. In the last book: in philosophical contemplation. Commentators accuse Aristotle of incoher-ence. His thinking is not, however, incoherent. He wants to show that an exclusive emphasis either on practical action, or a life of enjoyment, or else a life according to the intellect, is undesirable. Happiness consists in a *combination* of these: and the nature of this he wants to illustrate. Aristotle investigates how the same person has a function to fulfil, both in the domain of moral-political action and in the domain of contemplation, and how fulfilling this function well, brings along with it a spe-cific feeling of well-being. These three elements (tasks in relation to moral-political

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[4]Greek: *hèdonè* = enjoyment; a hedonist is someone who regards enjoyment as the highest goal. This Aristotle does not do: enjoyment is a natural consequence of the achievement of virtuous perfection.

action, contemplation, and the feeling of well-being that goes with it) are described in more detail in what follows.

The problem with *moral-political action* is the following: how can a reasonable soul that is bound to a desiring body, which in turn is unreasonable, properly fulfil its peculiar task (being rational)? The reasonable soul must in one way or another give direction to the irrational desires, so that the soul influences the body. But there is also an interchanging movement: the body provides the reasonable soul with the impulse to want to fulfil its peculiar task. According to Aristotle, reason itself is simply passively contemplative, and does not provide active motives for conduct. Such motives still find their source in our desires and yearnings. Hence a form of cooperation is established between the reasonable and the instinctive parts of man, which finds expression in every concrete virtue. This cooperation finds its high point in 'moral wisdom' (*phronèsis*, the virtue of the practical intellect), which dictates to us how we should act in a concrete instance.

This moral wisdom is called an 'intellectual' virtue because it relates to the practical *intellect*. It is called 'virtue' because it contributes to the ability of man to complete his task well (the exercise of his rationality). It has an adjudicating task: it must provide man with knowledge of the rules of conduct. The judgment of moral wisdom attains the form of a command, and more specifically a command directed at desire. Through compliance with the commands of moral wisdom, desires are changed into *moral virtues*. By means of the performance of conduct that is good, in the long run an inner, self-evident *habit* in favour of the performance of good conduct is established in man; in the long run man performs virtuous actions because of their immanent beauty: then these actions are performed simply because he realises that it is good to perform them. And this beauty is desired: the rationalisation of the instincts due to moral understanding derives at the same time from the instincts the desire to achieve the purpose of *phronèsis*.

According to Aristotle, moral virtues consist of the golden mean between two extremes or vices. Hence, bravery is the middle path between cowardice and recklessness, pride the middle path between vanity and modesty. Of importance are the proper relations. The best man, according to Aristotle, is someone who has an appropriate measure of pride, who does not underestimate himself, who despises whoever deserves to be despised, who has a sense of honour, who is great in every virtue, and who has a noble and good character. The best man does not avoid danger, he performs good deeds and grants favours, but prefers not to receive these (he is a superior person vis-à-vis those who are inferior), he gives assistance, but asks for nothing, he does not admire anything or anyone and has more of an interest in beautiful things than in useful things which eventually bring in money.

Whereas *phronèsis*, the virtue of practical knowledge, gives direction to the 'lower instincts', philosophy, the virtue of theoretical knowledge (which like *phronèsis* has the task of making the soul fulfil its own rational activity), is in the service of the higher, that is, of *contemplation*. Theory is knowledge for the sake of knowledge itself, without the will to influence what is known. This consideration of the higher is separated from the body, so that no desire needs to be rationalised. Philosophy is thus a habit which comes to completion only in the activity

of contemplation. Here man achieves his highest point of perfection, which is rarely attained, and then only by a few. From this it follows that not all people should strive for an introverted, celibate and contemplative life. A life of continual contemplation is not reserved for ordinary mortals. Some can accomplish this during a part of their life, most not at all. The contemplative life in accordance with the intellect ideally has priority over the active life in accordance with the moral virtues: a kind of onto-logical hierarchy, in which the latter is simply an indirect means for achieving the first mentioned (compare, for example, Aristotle's praise of contemplative life as 'the best and the most perfect of the virtues').

As to *satisfaction*, which typically accompanies action and contemplation, Aristotle rejects the idea that pleasure is uniform: different forms of pleasure are specifically to be distinguished from each other. Contemplation and action bring about true pleasure: man finds pleasure in fulfilling his task as rational being by means of his practical conduct and contemplation. Although he regards contempla-tion as the highest activity, the ethics of Aristotle can hardly be regarded as ascetic. Happiness is not to be equated with pleasure or enjoyment, but happiness without pleasure is impossible. A person who is tortured cannot be happy.

According to Aristotle, ethics as science has a very limited precision. It is not in all instances clear exactly which conduct it prescribes; it is thus not always certain what is required by the virtues. One of the reasons for this is the general character of ethical judgments. They can apply only 'in most instances', subject to exceptions or changed circumstances. Circumstances can vary infinitely. Every general moral rule will, therefore, be confronted with situations to which it is not applicable. The same applies to legal rules. Certainly, laws are generally formulated, but they must not be strictly applied in all instances. This should specifically not happen where application of the law would come into conflict with justice. Application of laws always requires equity for the concrete case.

Ethics according to Aristotle, therefore, does not consist solely of a limited num-ber of fixed universal rules or principles. Each of these contains exceptions, so that every universal ethical judgment is imperfect. Ethics is capable only of provisional, more or less adequate generalisations, which must in concrete instances be cor-rected by considerations of equity. Where they fall short, we can let go of them to look for new, better ones, or realise our own inability to make a moral judg-ment in this particular instance. Our ethical knowledge is in any event, according to Aristotle's philosophy, limited, as the normative Idea – the purposive cause – is immanent. There is, thus, no possibility of rational insight into independent Ideas, as with Plato. With Aristotle we have to depend on the observation of still imper-fect developments. Preceding the complete realisation of the *telos*, there can be no complete knowledge of the norm. On the other hand, we can on the basis of factual developments certainly have some knowledge of the immanent purposes of nature so that for Aristotle, ethics likewise does not depend completely on human arbitrariness and convention as it does for the Sophists.

2.5.3 Political Philosophy and Legal Philosophy

In the preceding discussion we considered the main features of Aristotle's individual ethics, distinct from the rest of his practical philosophy, which entails a political-social ethics, including a legal philosophy.

In so far as his legal philosophy is concerned, the most important virtue of law is justice. In general, justice entails that one gives to each his own: equals must be treated equally, and those who are unequal, unequally, according to the measure of their inequality. According to the fifth book of *Nicomachean Ethics* this can take two forms: distributive and corrective justice; a distinction which has been adopted by a number of later thinkers.

In the first place, there is *distributive justice*. Aristotle accepts that people differ in a number of respects from each other. The one is rich, the other poor, the one is of noble origin, the other does not amount to much. The differences are not a private matter, but result in different forms of treatment. In a democratic society, those who are born free deserve to participate in the administration of the city or state administration; in an aristocracy, virtue forms the basis of respect. That the free-born or the virtuous is treated with the appropriate respect, is a matter of distributive justice. This form of justice includes the principle of proportionality: man receives in accordance with what he merits, and merit is distributed unequally among people.

Secondly, there is *corrective* or *rectificatory justice*. The point of departure here is the fact that people conclude a variety of transactions with each other. Some of these are voluntary, such as buying and selling, and the taking of loans. Things which people buy and sell must in some way or another be capable of comparison with each other. For this purpose their value must be established, which finds concrete expression in a price. When people buy and sell in an honest manner, it is a question of reciprocity: what they give and receive are of equal value. Sometimes, however, someone sells a pig in a poke. If the buyer realises this, he can complain before a judge, after which he receives what he had a right to, that is, corrective justice takes place. When someone buys a pig in a poke, the transaction for his part contains an involuntary element; the perpetrator after all attempts to prevent that the one who is prejudiced is aware of what happens to him. There are many more involuntary transactions which take place on the sly: theft, adultery, false testimony. Involuntary transactions can, however, take place openly too. Aristotle gives as examples, violence, murder, and defamatory language. In these instances too, corrective action has to take place. The judge who intervenes correctively does not act proportionally, but relies on an absolute principle of equality: the injustice is compensated for without taking account of the persons concerned.[5]

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[5]Such an outcome is, viewed from a greater moral distance, only just when the preceding distribution was just: in the case of a very unjust distribution of wealth, theft can, on the other hand, be legitimate.

Aristotle's legal philosophy is a branch of his political-social philosophy. One can see this in the way in which he deals with distributive justice. Those treatments are 'just' which respect the existing socio-political divisions. Aristotle's ethics is similarly a branch of his social-political philosophy: political ethics have priority over individual ethics. A radically individual human being is a non-existing abstraction: man has an essentially social character. This does not only mean that people are for a reasonable and virtuous life dependent upon the community. One would still be able to describe this in individualistic terms: individuals need other individuals to develop their individuality; viewed thus the community would simply be an 'extrinsic'[6] good, a means for individual development. That people are social beings means specifically that being part of a community is an 'intrinsic' good, something which is in itself good and to be aspired to. Because the essential human characteristics can, according to Aristotle, only realise themselves in a community, he states that the *polis* (the whole) in logical and normative respects precedes the constitutive parts (the individuals). Consequently the whole acquires as main task the education of individuals to become good socio-political beings: moral education is essentially political education. Aristotle does not at all share the modern liberal belief that morality cannot be legally imposed, but proclaims a perfectionist view of ethics and law. When the good human being needs to coincide with the good citizen, as Aristotle contends, the authority which has the final say in the political domain has an important say in the moral domain, too. It then makes sense to prescribe moral virtues, specifically to those who do not understand the meaning of such virtues or who do not want to follow them. After all, the virtues are internalised by acting in accordance with them. By acting in a just way – for whatever reason – one becomes just.

Law is required in every form of society. The purpose of law, according to Aristotle, is the promotion of the good of man, happiness in accordance with his essential nature. Aristotle, thus, presupposes a natural law which is based on the essential nature of man, and which applies everywhere irrespective of whether it has been positivised. Positive law created by people can be tested against this natural law. Aristotle, then, maintains a strict opposition between natural law and positive law.

In general one should, according to Aristotle, obey positive law. Man is after all, in accordance with his essential nature, a communal being. From this follows the duty to live in a community. And from this follows, in turn, the duty to be obedient to the communal order. Aristotle, moreover, contends that without a duty of obedience no community would be able to exist. The duty of obedience is, however, not unconditional. The only legitimate purpose of a community is to create the conditions for the realisation of the essential human nature of its members. The duty of obedience, thus, comes to an end when the law conflicts with communal well-being.

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[6]*Extrinsic good* = good, but exclusively as a means to achieve another good; as opposed to an *intrinsic* good that is good as such.

Aristotle's political ethics and natural-law doctrine are, furthermore, not static: Aristotle is fully aware that the laws of a successful political dispensation cannot be determined once and for all. The philosopher can only furnish the broad outlines within which politics should operate; for the rest one is dependent upon what one could refer to as local experimentation. Aristotle's school consequently engaged in an extensive comparative enquiry into the various state forms. The results of this enquiry are not known to us, although tradition has it that more than two hundred forms of government were described and studied. This enquiry provides an example of how Aristotle wanted to establish insight into the real essence by way of empirical enquiry. Aristotle ultimately distinguishes between three forms of government: monarchy, aristocracy, and the democratic state. Under certain circumstances each form can degenerate into a bad variant, respectively, tyranny, oligarchy, and democracy in imperfect form.

A government is good if it looks after the well-being of the community, and the quality of a government is determined by the ethical qualities of those who govern. The best rulers are those with a highly cultivated spirit, a well-formed character, and moderate wealth. An aristocracy – government by the best – would, viewed thus, deserve preference. However, the pursuit of an aristocracy easily results in oligarchy: government by the wealthiest. And the wealthiest disregard the interests of the poorest. Aristotle notes that in certain city states the ruling oligarchs even swore an oath that they would be the enemy of the people.

Because people are not perfect – often not even good – democracy is, comparatively, the best form of government. Aristotle's view of democracy, however, excludes the majority of the population from political participation. Only the free men count. Aristotle assumes that people are unequal by nature. Rationality constitutes the essence of human beings, but according to him different kinds of people have an unequal share of this. Specifically in the case of women and (non-Greek) barbarians, the instinctive bodily side rules over the reasonable side. For this reason they should, in their own best interests, be ruled by free men in the same way in which the passions must be ruled by reason: absolutely. This can likewise be justified as a consequence of distributive justice in the political domain: political power is shared in proportion to the fundamentally unequal abilities of people.

2.5.4 Commentary

A common criticism that is voiced against Aristotle is that his worldview suffers from an indemonstrable *essentialism*. He is erroneously of the view that objective essences are to be found in nature: a number of the characteristics of a phenomenon would constitute its essence; the other characteristics would simply be accidental. Hence his rational and social dispositions would constitute the essence of man. Nature as a whole would, moreover, consist of a hierarchical order of such essences. Critics argue against Aristotle that such a selection and hierarchical ordering of essences from the totality of natural characteristics cannot be proved. It is just as feasible to make a different choice. Why would one, for example, not be able to

say, with Nietzsche (Section 7.5), that the irrational and instinctive side of man is more important than the intellectual side, and, in addition, that the individual development of a genial individual deserves preference independently of the equalising community of the 'all too many'? Moreover, nature in reality does not allow for any harmony of purposes to be seen. The purpose of the mouse is, for example, in conflict with that of the cat. Aristotle would in fact simply have projected his own subjective normative preferences onto nature, in order to subsequently again derive them from nature as 'objective', because they are 'natural'.

Opponents contend against Aristotle's essentialism that many forms of categorisation of the world are possible, depending on one's point of view. There is not *one* essential, exclusively just way of categorising. A sociologist, a psychologist and a jurist would, for example, conceptualise the same act of theft in completely different ways. Such categorisations are human constructions which are based on a selection from a specific point of view. These critics regard a non-observable, but nevertheless objective order of 'essences' behind the empirical appearances as indemonstrable. It is then self-evidently also impossible to derive an ethics and a legal philosophy from such an indemonstrable metaphysical order. It is no longer possible to equate, as Aristotle did, the 'natural' with the 'good', because empirical nature also contains irrational and asocial phenomena.

2.6 The Stoics

The origins of Stoicism lie in the fourth century BC in Athens, when Zeno of Citium (Cyprus) started spreading his doctrine and established a school. No books have been handed down to us of any of the Greek Stoic thinkers. We know about them only from the summaries and quotations of others, written often long after they had lived. We know much more of the Roman Stoics, who came to bloom much later. Important Roman representatives were Seneca, emperor Marcus Aurelius, and the slave Epictetus. Stoicism arose in the period after Alexander the Great had replaced Greek democracy with an authoritarian regime. Because participation in political deliberation was no longer possible, philosophy turned inward: henceforth philosophy aimed specifically at attaining inner spiritual balance.

The Stoics elaborated on Aristotle's natural-law doctrine. They likewise based their natural-law doctrine on a rational ontology. The movement presupposed the existence of a rational *logos* in the role of a providence which predetermines all events. *Logos* is the general, reasonable law which permeates the whole of the cosmos: nature, as well as man and his ethics and law. For this reason, *logos* is the norm by which man must let himself be guided. Man himself is capable of this, because by means of his reason he shares in the rational world principle. Everyone can, therefore, in his own reason find the ethical prescriptions of natural law. The central command is 'to live according to nature'. Every person must, therefore, live in accordance with his reasonable essential nature.

This sounds very abstract. Let us concretise it somewhat. When one asks someone what makes life worth living, he would typically point to a satisfying relationship, good health, a long life, sufficient means of subsistence, and having a say regarding his own existence. Bad would be a boring life, sickness, a premature death, poverty, and powerlessness. The good things, people however mostly do not have in their power; because of a happy coincidence we may obtain a share in this; an unhappy coincidence can take it away. When, in efforts to attain happiness, one attaches oneself to things over which one has no control, disaster will follow. When this happens, one should not curse one's destiny but oneself: blinded by one's own immoderate desires, one caused one's own unhappiness. Seneca conveys in this regard, in his *Letters to Lucilius*, the answer Panaetius gave to a young man who asked whether a wise person could be in love:

> As to the wise man, we shall see later; but you and I, who are as yet far removed from wisdom, should not trust ourselves to fall into a state that is disordered, uncontrolled, enslaved to another, contemptible to itself. If our love be not spurned, we are excited by its kindness; if it be scorned, we are kindled by our pride. An easily won love hurts us as much as one which is difficult to win; we are captured by that which is compliant, and we struggle with that which is hard. Therefore, knowing our weakness, let us remain quiet. Let us not expose this unstable spirit to the temptations of drink, or beauty, or flattery, or anything that coaxes and allures (Seneca *Epistles* Volume 3 CXVI).

Matters which we cannot control can, therefore, according to the Stoic doctrine, not be called good or bad; because their goodness or badness depends on our own desires. For this reason a satisfying relationship, good health, a long life, sufficient means of subsistence, and having a say in one's own existence, are in themselves as indifferent as a boring life, sickness, a premature death, poverty, and powerlessness. These become bad only when we allow our peace of mind to become dependent upon them. Good, on the other hand, are virtues, such as courage and moderation, by means of which we can control our desires. Wisdom is true health, and philosophy is the art of controlling what happens to one. According to Marcus Aurelius in his *Meditations*:

> [I]n external happenings either chance or providence is at work, and one should not blame chance or indict providence (2006, p. 120).

We can from this extract the ideal of freedom of the Stoics. One is free when one is unhampered by one's desire for 'indifferent things', which are external to one, and over which one does not have power; and likewise if one desires and comes into possession of the 'good things', which one has in one's power because they belong intimately to one. One is, on the other hand, unfree when one is in the grip of one's desire for indifferent things, and because of this cannot obtain enjoyment of the good things.

This ideal of freedom thus emphasises especially 'internal hindrances' and relativises 'external hindrances' about which people mostly complain when they feel unfree. One is, according to the Stoics, not simply free when one can do what one wants to do (for example, one wants to become rich, and finds a treasure in one's garden), but when one has control over one's desires. Whoever laments that he is

poor or that he is politically suppressed, must not strive for any economic or political change, but must withdraw himself to that domain which he can control: the management of his own passions.[7]

Epictetus expresses this idea as follows:

> Of things some are in our power, and others are not. In our power are opinion, movement toward a thing, desire, aversion (turning from a thing); and in a word, whatever are our own acts: not in our power are the body, property, reputation, offices (magisterial power), and in a word, whatever are not our own acts. And the things in our power are by nature free (Epictetus 1955, p. 11).

You are really free (in the sense of the *essential freedom* of Section 1.4) when you do not allow yourself to be dragged along by stupid, impossible, immoral, short-lived and addictive desires, but know how to eliminate them. This results in *apathy* (indifference) and *ataraxy* (being undisturbed): a state of supreme happiness.

In their ability to participate in the *logos* by means of apathy and ataraxy, all people are, in principle, equal to each other. By comparison, the other more specific characteristics they have, and the specific relations they bring about, lose importance. The Stoics draw no distinction between Romans (Greeks) and barbarians, and no distinction between those who are free and those who are slaves. They were the first to propagate with these ideas a universal human equality in the moral sense. This is well-illustrated by the fact that two of the most important Stoics, Marcus Aurelius and Epictetus, were, respectively, an emperor and a slave. When all accidental and conventional differences fall away, the human community encompasses the whole world. People are not locked up in their own accidental *polis*, but are spiritually part of a *cosmo-polis*.[8] The essence of people is to be citizens of a rational empire, in which the limitations and distinctions which exist in the observable world have no meaning. By relativising these conventions, the Stoics propagate a *natural law*.

The Stoic natural law is nonetheless not completely satisfactory. The fact that people are in principle equal, irrespective of the circumstances in which they find themselves, relieves them of the duty of bringing about social and political changes in reality. That the emperor and the slave as human beings are equal to each other is a nice idea, but it would be even nicer were one to derive the consequence from this idea that such demeaning distinctions should be done away with in reality. However, to want to do this does of course not attest to apathy and ataraxy. The Stoic doctrine is in principle apolitical, whereas politics, as the art of the possible, does not avoid the taking of action, and thus of risks.

Epicurus, who was not a Stoic, realised this all too well. His recommendations do not impose passivity, but even less incite one to engage in disastrous activism:

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[7]Isaiah Berlin in his *Two concepts of liberty* (1958) calls this the 'withdrawal to the inner citadel'. When a country has long and unsafe boundaries, the ruler must concentrate on a smaller area which he can keep in his grip; ultimately he digs himself into an impregnable fortress.

[8]Alexander the Great, in the meantime, established a world empire; one can view the Stoic philosophy as a reaction to this.

> We must remember that the future is neither wholly ours nor wholly not ours, so that neither must we count upon it as quite certain to come nor despair of it as quite certain not to come (Epicurus 1994–2009).

The Roman Cicero (106–43 BC), who sympathised with the Stoics, applied their philosophy to law. This is not an inevitable consequence, for the Stoics are basically apolitical. However, a radical aversion to politics is not sustainable, just as it cannot be maintained that we have absolutely no control over external hindrances, but that we do have such control over internal hindrances. Concerning the latter: how can we ever know for sure that we will not be swept away by our desires? If one wants to exclude completely the chance that this will happen, one should commit suicide. Concerning the former: a sensible evaluation of given possibilities and impossibilities, of chances and dangers, as Epicurus suggests to us, is to be commended. This entails some Stoicism: one should not complain about completely unavoidable impediments. One can of course evaluate one's chances incorrectly, but then it is again commendable to react in a stoical way to this. When one wants to exclude the possibility of becoming the victim of circumstances in evaluating one's chances, one should (again) commit suicide.

Cicero assumes that an 'eternal law' exists irrespective of human agency. This eternal law expresses how wisdom rules the world. It governs both non-reasonable (inanimate and animal) nature and reasonable nature: man. Man is governed by means of 'moral laws' and (positive) law, that is, on the basis of intentional law-giving. Man is capable of this owing to his rational abilities. Knowledge of the normative is, however, made difficult for man because of his physical desires. Moral virtue consists in the complete realisation of reason, as well as an understanding of moral law and law itself. To achieve this, man must, also according to Plato and Aristotle, free himself from his desires and from all interests which are connected to his tangible, physical existence. This can only happen in a community, ruled by positive laws which are derived from nature.

The content of natural law is summed up by Cicero in two main rules. The first rule prohibits disturbing the order of a community; the second prescribes active participation in communal life. The first rule implies respect for existing positive laws. The second rule compels one to contribute as much as possible to the well-being of the human community and to strengthen the bonds of the community through benevolence, generosity, goodness, and justice (these are typical 'republican virtues'). Man is by nature a communal being, so that such actions serve an interest which is shared by all. The first rule is subject to the second, when positive law conflicts too greatly with the common good. Cicero, thus, rejects absolute obedience to law. There is no duty to obey a tyrant who harms the common good of the people.

The scope of human society extends itself increasingly, in the course of history, from the community between man and woman to the family unit (partners and children), from the family unit to the broader family of blood relations, from families to the tribe, from tribes to the state, from the state to the language community. Citizens of a state have many religious, economic, legal and other institutions and customs in common. Language, according to Cicero, however, binds people in the strongest

way. The highest community is the *societas humana*, which includes the whole of humanity: the cosmopolitan element in the philosophy of the Stoics.

Cicero's natural-law doctrine had a great influence on classical Roman jurists such as Gaius (130–180 AD) and Ulpianus (ca. 170–228 AD). The first statement of the *Institutes* of Gaius, for example, reads as follows:

> Concerning Civil Law and Natural Law: All peoples who are ruled by laws and customs partly make use of their own laws, and partly have recourse to those which are common to all men; for what every people establishes as law for itself is peculiar to itself, and is called the Civil Law, as being that peculiar to the State; and what natural reason establishes among all men and is observed by all peoples alike, is called the Law of Nations [*ius gentium*], as being the law which all nations employ (Gaius *Institutes* Part 1).

Cicero maintains that all people partake in reason, and that the positive legal rules which appear universally in all legal systems, the *ius gentium*, must, therefore, give expression to natural law.

2.7 The Middle Ages

2.7.1 Introduction

The Greek-Roman civilisation disappeared for the most part in Western Europe with the fall of the Western Roman Empire in the fourth century AD, as a result of attacks from war-mongering Germanic and Slavic tribes. The Middle Ages lasted from 500 to 1500. The Roman state organisation and legal order which had expanded across the whole of the Mediterranean, from the Middle East and North Africa up to England and through the Netherlands, occupied by the Batavians (the Rhine for a long time formed the northern border), fell apart. In the place of the Roman Empire came much more simply organised local national bonds, regulated in terms of customary law.

According to tradition, a kind of direct democracy of free adult men was to be found among a number of Germanic peoples. It would, however, take a long time before an institutionalised democracy, as had existed in classical Athens, would recur in Europe. The latter was, incidentally, already destroyed seven centuries earlier, and replaced by the absolute monarchy of Alexander the Great and his successors. The ethics of the Stoics which was aimed at an inner balance can be explained historically as the result of the impossibility of getting involved in public life in a dictatorship: the exercise of Aristotle's essential freedom in the form of active participation in political life had become perilous. The Roman Empire, after an intervening period as republican class-based state, since the beginning of the Christian era likewise developed into a dictatorial empire. It adopted the highly developed culture of the Greeks, but not the democratic tradition of Athens. On the contrary, the Roman philosopher Cicero remarks scornfully that the Greek democracies were ruled by untrained, impulsive laymen, who knew nothing of matters of

state, threw themselves into futile wars, nominated accident-prone persons to government, and banned worthy citizens. The excessive political equality amongst the Greeks, Cicero wrote, led to the total collapse of all the power, wealth and glory they had once possessed. They were, thus, not a good example to the Romans. As indicated already, the Stoics certainly regarded all people as equal from the point of view of supra-sensible universal Reason, but did not attach any political consequences to this. The Stoic Roman emperor Marcus Aurelius, for example, wrote the following:

> *First*. How do I regard my relation to them, and the fact that we were all born for each other: and, turning the argument, that I was born to be their leader, as the ram leads his flock and the bull his herd? (Marcus Aurelius 2006, p. 110)

Even slavery was accepted. On the one hand, the Roman Stoic Seneca contended that 'a slave is a human being and a member of the household':

> Kindly remember that he whom you call your slave sprang from the same stock, is smiled upon by the same skies, and on equal terms with yourself breathes, lives, and dies. It is just as possible for you to see in him a free-born man as for him to see in you a slave (Seneca *Epistles* Volume I XLVII).

Seneca nonetheless does not encourage the master to immediately release his slaves. One must simply treat them in a humane way: do not hit him, allow him to sit with you at the table once in a while.

During the Middle Ages the Roman Catholic Church was the only institution which, from papal Rome, still preserved a general European culture and maintained parts of the classical traditions, including Latin as the European cultural language. Christianity itself was such a tradition: in 313 it was recognised by Emperor Constantine as the official Roman religion. The Christian church based its doctrine on the Old and, especially, the New Testaments. The New Testament describes the life of the legendary Jesus Christ, whence 'Christianity'. Christians believe that he was the son of God who, during the time of the Roman Emperor Augustine, came to free humanity, even though this has not as yet succeeded completely. Like Stoicism, Christianity has a universal tenor: it sees all people equally as creatures of God, and, therefore, as subjects of Christian neighbourly love. For this reason it also fired itself up with missionary zeal in an attempt to convert all non-Christians. Its success appears from the Western way of counting years. Recent estimates indicate that approximately one third of the world population is nominally Christian.

Like Plato, Christians are of the view that the life of people on earth in a mortal body is an inferior intermediate stage in comparison with an eternal existence as immortal pure soul. Christianity, however, does not believe that one's soul returns after one's death to an abstract philosophical realm of Ideas. One is reunited with the divine love of one's Creator, a divinity thought of in a personal sense with an omnipotent will – an inheritance of the individual Jewish God of the Old Testament.

For this reason the Christian worldview is referred to as *voluntaristic*,[9] in contradistinction to classical *rationalism*. God created everyone, to Him one will return. That is, as long as one behaves oneself in the meantime in accordance with His Will: *love your neighbour as you love yourself*; otherwise eternal punishment awaits. It is now one's own responsibility to firmly prepare oneself for heaven. Thus, the human will, too, is regarded as more important than his reason.

In addition, the Roman Church let itself be inspired by classical philosophy. Particularly Aristotle had an important impact on Christian thinking: people attempted to bring faith in line with Aristotle's rational arguments. Important parts of the classical documents found their way back into the West via the Islamic-Arabic civilisation.

The monotheistic religion of Islam was established to the East of the Mediterranean after 616 AD under the leadership of the prophet Muhammad, and is currently, like Christianity, spread around the world. In the Islamic world, 622 AD counts as the year 0. Moses and Jesus are viewed as predecessors of Muhammad. Islam is based on the Qur'an, written by Muhammad, inspired by the Islamic God, Allah. It has an elaborate doctrine of duties.

Two neighbouring gods with a claim to monopoly led to enmity. During the Middle Ages a battle lasting for centuries took place between the Christian West and Islamic East (711: the Arabs attack Spain; 1219: William I of the Netherlands captures the port town of Damiate (on the Nile); 1291: Christians vacate the Holy Land). Initially Arabic culture was much more developed than medieval Western culture; for instance, in the fields of mathematics, medicine and philosophy (Ibn Sina, or Avicenna, 980–1037; Ibn Rushd, or Averroes, 1126–1198). This was due partly to the Greek-Roman heritage, especially Aristotle, as well as its contacts with the Far East. In 1453 Islamic Turks (of non-Arabic, Mongolian origin) conquered Constantinople and with that the East Roman Empire, after which those inhabitants who fled brought a new flood of classical culture which had been preserved to the West. However, whereas Western thinking and life, after the Middle Ages, started to develop freely by separating itself from religion, the free development of thinking in the Arab world, after initially flourishing in Baghdad and Spain, was restrained by religious dogmatism. When the Europeans around 1500 found their own seaway to the Far East, the political battle was won. Since then the West has dominated worldwide. With this we, however, already stand at the beginning of the Modern Era (Chapter 3).

Before it came to this, the Christian church ruled under the leadership of the Pope in the spiritual domain, while local rulers and nobility under the nominal leadership of the German emperor reigned over the secular world. An agriculturally based society was established with a social stratification which reminds one of Plato's class-based state. A hierarchy of clergy, with an exclusive claim to higher wisdom, wielded spiritual power, knights whiled away their time by being brave, and agricultural workers provided for the subsistence of the higher estates. In the feudal

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[9]Latin: *voluntas* = will.

system, nobility and the church were the big landowners, while most labourers were as serfs tied to the land. Constitutional law and private law were entangled: rulers and nobility saw their political and judicial powers as a personal, hereditary possession. Frederick II (1194–1250, Holy Roman Emperor and German King) called himself 'Father and Son of Justice', and regarded himself as an independent legal source in addition to customary law. Via a feudal system, relationships of dependency extended from the emperor to the kings and higher nobility, downwards to the lower nobility and their subordinates. The bond between ruler and subordinate was based on personal loyalty. These were mutual, but at the same time asymmetrical, relationships: an exchange of protection from the higher level with services rendered by the lower level. Unconditional obedience was thus out of the question. In the course of time trading towns were established, with artisans and traders. With the urban population as ally, the kings of England and France, as well as other rulers, gradually obtained more central power for themselves at the cost of the nobility. The cities acquired, in return for their support, independent rights, as a result of which they became freed from the feudal system (but the princes would attempt to take the city rights back again once they had acquired power, so that the citizenry also sought support from the nobility): 'city air makes free'.

Individual freedom and equality were, however, still far off. In accordance with the hierarchical division of estates, unequal rights and duties obtained. The individual person was, moreover, not regarded as an autonomous individual, but acquired his identity from his status within an estate or city community. The individual outside the city was bound with his whole person to the duties of the feudal system, which prescribed mutual loyalty and protection. The freedom rights of the Middle Ages were, therefore, not individual rights, but group rights: traditional privileges of an estate or city which were protected against the rising central power of the king. Early collectivist versions of the social contract were used against the absolutist claims of the kings. In contrast with the later philosophical versions of Hobbes and Locke (Chapter 4) these were not philosophical constructions, but real accords. The English *Magna Charta* of 1215, for example, attempted to protect the privileges of the nobility and the cities against the claims of the king. The *Joyeuse Entrée*, granted to Brabant in 1356 and still in operation in 1792, required, among other things, that every duke, when taking office, must confirm the existing privileges, ask the permission of the estates in matters of war and peace, and guarantee an orderly legal process. The Act of Abjuration (*Plakkaat van Verlatinge*) of 1581, which justified the Dutch battle for freedom against Philip II, invoked a right of resistance because Philip had breached the existing group privileges.

On the spiritual level, controlled by the Roman Catholic Church, equal individual freedom rights were similarly out of the question. To be sure, one assumed that all people were created in God's image, and were, therefore, equal in his eyes; in earthly life inequality was, however, justified by means of an appeal to the divine creative order. Hence, Thomas Aquinas defended natural slavery, and saw women simply as an aid to reproduction. He, furthermore, rejected freedom in the sexual domain because God meant sex to be practised exclusively for reproduction, and, moreover, requires monogamous marriage for the sake of the education of future generations.

In this and other areas a battle for the highest authority took place between the spiritual and earthly powers: according to church law, a marriage could not be terminated; the nobility, however, wanted to remarry when a marriage remained childless. Slowly the church realised that it was better to impose its law in a somewhat more diluted form in public life. All non-monogamous, non-heterosexual forms of sex, such as 'sodomy', in accordance with Aquinas's perfectionist legal view, nevertheless had to be prohibited as being *against nature*. Suicide was likewise prohibited, because the individual did not have the right to dispose freely of the life that God had bestowed on him. Freedom of religion was, moreover, rejected. If necessary, people had, in their own interest, to be forced to adopt the proper faith. As Luke 14:15–24 teaches:

> When one of those at the table with him heard this, he said to Jesus, "Blessed is the man who will eat at the feast in the kingdom of God." Jesus replied: "A certain man was preparing a great banquet and invited many guests. . . . But they all alike began to make excuses. . . ." Then the master told his servant, "Go out to the roads and country lanes and make them come in, so that my house will be full. . . ." (*New International Version* 1984)

Aquinas consequently argued for the death penalty for heresy.

2.7.2 Thomas Aquinas

Since the Middle Ages the whole of Western thinking had been partly controlled by Christianity. Many texts from classical antiquity in addition continued to exercise a great influence. Between the classical and the Christian worldviews a great tension exists, which can be referred to as an opposition between *rationalism* and *voluntarism*. Whereas in the classical worldview the gods were bound to the rational basic order, Christianity emphasised the will of the omnipotent Creator. He could also have created the world differently. Christianity, moreover, placed great emphasis on the individual free will: it is dependent upon the free will of the individual whether or not he conducts himself in accordance with God's will. At the Last Judgment he must personally account for this. Christianity, therefore, emphasised the value of the individual person more strongly than classical rationalism, where the individual was rather regarded as a specimen of a general kind. Herein lies, at the same time, the origin of the modern problem of freedom of will in relation to moral and legal accountability (Section 3.1).

The philosophers of the Middle Ages attempted to reconcile the opposition between the rationalism of the inherited classical texts and Jewish-Christian voluntarism, and emphasised, in one instance, the rational, and, in another, the element of will. This finds expression in the discussion during the Middle Ages about the question whether the good is good because God wills it thus, or whether God cannot will anything other than the good.

Thomas Aquinas (1225–1274) was the greatest of the theologians and philosophers of the Middle Ages. Against the wishes of his noble family he entered the young mendicant order of the Dominicans. He studied theology and philosophy in Naples

and Paris, where he went to lecture in 1252. His fame spread quickly, with the consequence that the Pope called him to work at his court, which Aquinas combined with a professoriate at the Dominican college in Rome. In 1258 he again went to Paris, where he became involved in many complex polemics with other theologians and philosophers, but equally with opponents of the mendicant orders. On his way to Lyon, where he would have participated in a council, he was overcome by a sickness of which he died soon after.

Aquinas attempted, like other philosophers of the Middle Ages, to formulate a synthesis between classical (specifically Aristotelian) and Christian thinking. His synthesis boils down to adopting the idea of a rational, purposive and hierarchical foundational order of nature, but views this as a creation out of nothing in accordance with the will of the Christian God.

One of the elements of Aristotle's philosophy which similarly takes a central place with Aquinas, is the notion of purposiveness or teleology. Everything that exists is, according to Aquinas, of its inner essential nature purposive. The natural purpose of everything is the preservation and perfection of its own potentiality. By striving for this purpose, everything that exists fulfils the commands of God. Contrary to animals, which follow their instincts, man must become aware of his purpose and resolutely aspire towards it. Man is created in God's image and thus ultimately oriented towards God.

The teleological element of Aquinas's thinking appears clearly from the following passage in *Summa Theologica*, where he develops his sexual morality:

> Wherefore just as the use of food can be without sin, if it be taken in due manner and order, as required for the welfare of the body, so also the use of venereal acts can be without sin, provided they be performed in due manner and order, in keeping with the end of human procreation.... [T]he sin of lust consists in seeking venereal pleasure not in accordance with right reason. This may happen in two ways.... First, because it is inconsistent with the end of the venereal act. On this way, as hindering the begetting of children, there is the "vice against nature," which attaches to every venereal act from which generation cannot follow; and, as hindering the due upbringing and advancement of the child when born, there is "simple fornication," which is the union of an unmarried man with an unmarried woman. Secondly, the matter wherein the venereal act is consummated may be discordant with right reason in relation to other persons; and this in two ways. First, with regard to the woman, with whom a man has connection, by reason of due honor not being paid to her; and thus there is "incest," which consists in the misuse of a woman who is related by consanguinity or affinity. Secondly, with regard to the person under whose authority the woman is placed: and if she be under the authority of a husband, it is "adultery," if under the authority of her father, it is "seduction," in the absence of violence, and "rape" if violence be employed.... Now it is evident that the upbringing of a human child requires not only the mother's care for his nourishment, but much more the care of his father as guide and guardian, and under whom he progresses in goods both internal and external. Hence human nature rebels against an indeterminate union of the sexes and demands that a man should be united to a determinate woman and should abide with her a long time or even for a whole lifetime.... This union with a certain definite woman is called matrimony; which for the above reason is said to belong to the natural law. Since, however, the union of the sexes is directed to the common good of the whole human race, and common goods depend on the law for their determination... it follows that this union of man and woman, which is called matrimony, is determined by some law (Thomas Aquinas 2008, *Summa Theologica*, Second Part of the Second Part, questions 153 and 154).

The order within which human striving plays itself out is that of the *lex aeterna* (eternal law), the order of creation. Included in this, as part of the eternal law, are the *lex naturalis* (natural law) and the *lex humana* (human law). The eternal law consists of divine wisdom, by which everything is determined. Man is not capable of understanding this completely. To be sure, man can have an understanding of the universally valid natural law which is derived from it. By means of this he has a limited knowledge of good and evil. This understanding does not consist in concrete commands and prohibitions, but in the aims of the natural inclinations. The first natural inclination is self-preservation; the second is the inclination to procreate and bring up children; the third, through which man distinguishes himself from the animal, is what is accorded by reason, such as the inclination to attain knowledge of God and of communal life. From the first inclination, Aquinas derives a right to self-defence, from the third, a duty to strive for knowledge and to not hurt others. Natural law commands love for God and love for man. From this the Ten Commandments can subsequently be derived. All moral commandments and prohibitions are, according to Aquinas, taken up in the Ten Commandments, or implied therein. Human law rests on natural law. Positive law is, in a certain sense, nothing more than an adaptation of natural law to time and place.

The legal thinking of Thomas Aquinas found its expression in the *prima pars secundae partis* (the first part of the second part) of *Summa Theologica*, in the *quaestiones* 90–97. There he defines law as –

> nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated (Thomas Aquinas 2008).

Regarding the elements of this description, we add some comments. What does it mean that human laws have something to do with reason? It means that human laws draw inferences from divine reason, as this makes itself known to human reason via natural law. Without the hint of divine reason, people would arrive at different and mutually conflicting laws, derived from different and mutually conflicting judgments about what is required. Onto human beings as reasonable creatures something, however, radiates from divine reason, and by way of natural law these creatures participate in eternal law. This natural law in broad terms emerges in everyone in the same manner; it cannot change and it cannot be erased from people's hearts. Of course, not all human laws can be derived in detail from natural law and divine law, but this can be said mainly of less important laws, which then at least should not be in conflict with natural law. These less important laws are then not 'inferences' drawn from natural law and divine law, but 'stipulations' of these laws. Reason is here likewise at work, but in a negative sense: it determines what may be entrusted to human law, and what not.

What does it mean when one says that human laws are aimed at the *bonum commune*, the common good? The common good is not simply the sum total of the good of separate individuals. It is the good which is common to all members of a community: valuable matters which are useful and necessary to all, and which can be secured only by way of the community. By means of the common good, individual interest is at the same time advanced, because without the community,

people would not have been able to realise their individual goals. Although man does not completely disappear into the community, he is certainly required to sacrifice his property, and eventually even his life, should circumstances demand this. As Aquinas said, the individual person relates himself to the community in the same way in which the imperfect relates itself to the perfect. For this reason law's central function is making people virtuous (for example, moderate and true), so that they subject their passions and sinful inclinations to the perfect community. Criminal law as a result acquires a pedagogical role. With that Thomas Aquinas does not, however, go to the extreme: human law must not attempt to prohibit all possible wickedness, but adapt itself to a certain extent to people's situation. The requirement that human laws be aimed at the common good, places a limit on state power: laws lose their validity and degenerate into false law when they are in conflict with the common good, or when the burdens are not fairly shared across the members of the community. This does not, however, mean that one can then simply cast them aside. In one's inner self one is not bound by such laws, but in one's external conduct one should not give offence and harm the *bonum commune*; and this often requires that one must respect existing laws, even when they are actually 'violations', rather than 'laws', in which case the enforcement of laws is not legal, but an illegitimate act of violence.

Finally, what does it mean that human laws can be promulgated 'by him who has care of the community'? Regarding the nature of the promulgation, Aquinas is terse; he says more about the caring institution. From *Summa Theologica* it is not completely clear whether Aquinas is in favour of a mixed form of government or of the monarchy. The *opusculum* (small work) *De regimine principum ad regem Cypri* (concerning the dominion of the nobles, for the king of Cyprus) provides more certainty in this regard.[10] From the *opusculum* it appears that Aquinas prefers by far the monarchy over other forms of government. One comes across a number of comparisons from which the excellence of the monarchy appears: a king is like the captain of a ship, or like the king (sic) of a bee colony, or like the soul in the body. Monarchical rule deserves preference, because the authority of the king is derived from the authority of God, whose leadership is likewise monarchical. Therefore, the king, too, must adhere to divine law and natural law. This, of course, requires that he must be a virtuous human being in all respects; he must, among other things, excel in prudence and justice. In the case of a king a great power must thus be accompanied by a perfect character. The latter is not without good reason emphasised by Aquinas: a king must certainly be very virtuous, wise, etc, for his regime not to turn into tyranny. A tyrant is someone who does not rule on behalf of the common good, but suppresses others on behalf of himself, consequently exceeding the limits of his own authority. In order to contribute his part in avoiding that rule degenerates

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[10]This is an example of a 'mirror for princes', which were popular in the Middle Ages and the Renaissance. A comparison with Machiavelli's *Il Principe* is obvious here. When the prince of Machiavelli rules on behalf of the community, this is simply because he serves his own interest best in the maintenance of his dominion; in most instances repression is an appropriate means. See with regard to Machiavelli Section 3.3.

into tyranny, Aquinas addresses himself in his *De regimine principum* to the king of Cyprus. When he discusses the question, which attitude the subject must adopt in relation to a tyrant, he says expressly that the toleration of a tyrannical regime is mostly to be by far preferred to its overthrow, because then a still greater evil often comes about. In *Summa* he is somewhat less rigid: one may overthrow a tyranny, but one must proceed with the greatest caution.

Aquinas's philosophy has had a major influence. Until today, Catholic thinkers are inspired by him, as well as contemporary popes. In his encyclical letter *Veritatis Splendor* (The Shining of Truth, 1993), John Paul II opposes relativistic pluralism which relies upon subjective conscience or which abides by the diversity of social and cultural contexts. In opposing this he states that every human being in his inner-most heart always nostalgically desires absolute truth. Absolute truth points back to God, who provided human beings with an ultimate purpose. Because of original sin human beings are not by their own efforts capable of achieving this true purpose; they must be advised, specifically by the Church, which gives an 'authentic interpretation' of the true purpose in God's sense of human existence. The core of morality can, therefore, not be subjected to the autonomous choice of free human beings, and as little to the rules and forms of democratic decision-making; freedom is subject to truth. The true purpose of human beings has something to do with their nature, which transcends all cultures; it consists in the direction of human action towards God. Certain actions (such as contraception and abortion,[11] euthanasia and suicide) are radically in conflict with the orientation towards God; these actions are absolutely forbidden, irrespective of the eventual good purpose they are stated to serve.[12]

From a legal-philosophical perspective the thinking of Thomas Aquinas is particularly interesting as an example of what we referred to as *naturalistic* natural law (Section 1.2.2.2, where Aristotle's doctrine is announced under this heading). From Aquinas's thinking we can see clearly that naturalism has something ambiguous about it. It can point to all kinds of 'natural inclinations' which man is assumed to share with animals (such as an instinct for survival and a heterosexual orientation). It can likewise point to the reasonable 'nature' of man, by means of which he is to be distinguished from animals (naturalistic and classical-rationalistic natural law

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[11]Compare this with the above passage on Aquinas's sexual morality.

[12]In comparison with Locke, who will be discussed in Section 4.2, the Pope allows little space for individual conscience. In his encyclic he contends in some places that the authority of the church does not affect the freedom of conscience of Christians: after all, the doctrinal authority points to the truths which the Christian conscience '*should* already possess by developing them out of the original act of faith'. The word italicised by us raises suspicion. The Pope says that he does not infringe upon the freedom of conscience, because right-thinking Christians *would* agree with the Papal view thereof. But if they do not? Then every form of force can be justified: a variant of: 'forcing them to be free'. The Pope was not an adherent of political liberalism (Section 10.4), although the traditional catholic doctrine of the erring conscience which deserves consideration, could in principle be developed in this direction.

agree with this interpretation, unlike the other naturalistic thinkers who are mentioned in Section 1.2.2.2). That people are 'by nature' aimed at the good, is equally ambiguous: their nature does not prevent them from turning away from their (biological or rational) nature by virtue of their freedom. A natural law, such as that of Thomas Aquinas, calls upon people to 'become' what they already 'are' in essence, and thus shows perfectionistic characteristics. In this respect, too, Aquinas's thinking is interesting: it represents a form of natural-law doctrine with a perfectionistic streak.

2.7.3 End of the Middle Ages

The end of the Middle Ages was announced when Thomist philosophy in terms of cosmic order was overturned. With Aquinas, reason and faith mutually complemented each other. From Aristotle he adopted the idea that reality is organised in a purposive and hierarchical manner, and that this organisation can be recovered via human reason; he, however, views this organisation as created by the will of the Christian God. He consequently describes theology as faith that endeavours to arrive at reason, so that theology and philosophy are complementary. Politics and law have to dwell within the limits drawn by faith and reason.

Duns Scotus (ca. 1266–1308) brought about a breach in this system. He was a very discerning thinker who published much in his short life. He was of the view that Thomas Aquinas had handed theology over to heathen philosophy. Aquinas viewed the supernatural too much as an extension of the natural. The teleological proof of God's existence is, for example, based on this: from the splendid order of nature we can conclude that there is an ordering Creator. But, according to Duns Scotus, with such proof we only demonstrate our own desire for order; we do not step out of nature, and do not approach God. We can only reach God when we open ourselves humbly to his revelation in the Bible, and in the tradition of faith. Beyond that God cannot be known, all the more since God is not an intelligible being, but reveals himself to human beings as absolute freedom.

William of Ockham drew radical theological and epistemological consequences from these ideas, whereas Marsilius of Padua formulated their equally radical legal-philosophical and political consequences.

2.7.3.1 William of Ockham

William of Ockham (ca. 1300 – ca. 1350) was born in Ockham in Southern England. He entered the order of the Franciscans, and studied at Oxford. In 1324 he was called to Avignon by Pope John XXII to account for certain theological statements he had made, and which were denounced by the Pope. In a conflict between the pope and a large section of the Franciscans, he chose the side of the latter, and fled in 1328 from Avignon. He joined emperor Ludwig of Bavaria, with whom Pope John XXII was similarly in conflict. Until his death William of Ockham participated in the dispute about the demarcation between the authority of the emperor and that of the Pope.

The Pope claimed that all power came from God, and that he, as substitute of Christ on earth, therefore, likewise had authority over the emperor. The emperor wanted to see the papal power restricted to spiritual matters. In this he was supported by spiritually inclined monks, such as William of Ockham, who turned himself against a church which concerned itself with worldly matters, surrounding itself with princely beauty and splendour.[13]

Whereas Duns Scotus was still a metaphysical thinker, who regarded reason as capable of penetrating the rational structure of reality (only before God's omnipotence had reason to give way), William of Ockham points to the limits of reason. We can think about everything, but thoughts often do not represent reality. The only knowledge which provides certainty is empirical knowledge, which is related to demonstrable, existing objects. These objects are singular and contingent, so that every attempt to arrive at absolute knowledge is illusory. The general and necessary concepts which, according to the philosophical tradition from Plato via Aristotle to Thomas Aquinas, have truth value are, according to William of Ockham, nothing more than uncertain human constructions. His thinking is, for this reason, referred to as *nominalism*: in so far as human knowledge exceeds the domain of empiricism, it simply contains 'names'; pure mental constructions without truth value; nominalism is opposed to *realism*.[14]

Of God no empirical knowledge is possible, whereas philosophical and theological thought structures can similarly (and obviously) not reach God. Only faith, which stands apart from reason, can approach God, at least when God wants to reveal himself. This is because God is not what the theologians and philosophers have made of him: an authority who manages everything in an orderly way, and who can be known from his organisation of things. God has at his disposal an absolute power, which withdraws itself from every natural theology. All characteristics which were formerly attributed to God (just, good, etc.) melt away in the fire of his inscrutable omnipotence. For morality this has far-reaching consequences. Actions are not good because they are aimed at their natural purposes, as Aristotle and Aquinas supposed. God in his absolute freedom determines what is good, and what bad. What is good today may tomorrow be evil. There is likewise no certainty at all concerning the ultimate destiny of people. Perhaps God will reward the sinners and punish the pious. The believer must humbly bow his head before the unfathomable decrees of God. The omnipotent God is unknowable: voluntarism takes the place of rationalism.

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[13]William of Baskerville, the main actor in *The Name of the Rose* of Umberto Eco, is the alter ego of William of Ockham; the novel is set in 1327.

[14]'Realism' is here an answer to the question regarding the reality value of our concepts (Plato is a conceptual realist). This is something different from 'Scandinavian realism', which is discussed in Sections 8.1 and 8.3: law is reduced to the empirical conduct of judges in social reality.

2.7.3.2 Marsilius of Padua

Marsilius of Padua (ca. 1290 – ca. 1343) studied philosophy in Padua, and medicine and theology in Paris. As happened in the case of Ockham, statements of Marsilius were condemned by Pope John XXII. He was even excommunicated. He regularly accompanied the roaming armed forces of the German emperor in Italy, and, a year before Ockham chose this option, found refuge with Ludwig of Bavaria whose personal physician he became. Marsilius wrote only one book, entitled *Defensor pacis* (Defender of peace, 1324). People no doubt thought that Ludwig of Bavaria was to be understood as the defender of peace, but Marsilius's political philosophy had a much wider import: he investigates how an all-powerful state based on the sovereignty of the nation could bring about peace; he regards the pope as one of the most important disturbers of peace, who does not restrict himself to the spiritual (as he should), but (without warrant) concerns himself with the secular as well.

In the domain of theology, Marsilius took the ideas of William of Ockham to their extreme. Faith has nothing to do with reason. The truths which faith contains have for reason an unfathomable, supernatural character. When people follow the divine law, they are rewarded for this in the hereafter. For the contemporary existing world, faith has no meaning at all. In consequence, the actual world becomes the exclusive domain of activity of politics and positive law.

Marsilius gave a thoroughly naturalistic interpretation to the political thought of Aristotle, whom he came to know by way of Ibn Rushd (Averroës). He regarded the state as a living being where all the parts make a unique contribution to the flourishing of the whole. This living being is autonomous, not subject to any external power (such as the pope). On the contrary, in so far as pope and church do not limit themselves to the supernatural, but concern themselves with the natural, they fall completely under the jurisdiction of state authority. The nation as living being must of course be ruled by a legislature which represents the sovereign will of the nation. Human laws have no other origin than the will of the legislature which functions in the name of everyone. Offenders are punished, not because they were immoral or had sinned, but because they had defied the will of the legislature, and by doing so had disturbed the social order. The omnipotent state is the defender of peace.

The thinking of Marsilius was worked out in more detail and in more depth by later thinkers. Both theoreticians of the social contract and adherents of an absolute state authority could rely on him.

2.8 Conclusion

Thus medieval philosophy came to an end. With William of Ockham, rationalism was in the domain of theology replaced by voluntarism; and in the domain of epistemology, realism was replaced by nominalism. Marsilius of Padua completed the demolition work by subjecting the legal-philosophical and political domains to the

autonomous will of the sovereign. With him classical natural law was knocked off its pedestal, and the doctrine that would later be called legal positivism, took its place. From what was said above, it appears clearly that the Reformation, which is often viewed as a radical and unexpected breach with the Middle Ages, was prepared for in a number of ways. Luther and Calvin did not fall out of the air.