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Law, Order and Freedom

A Historical Introduction to Legal Philosophy

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Chapter 7
Nineteenth Century

7.1 Introduction

7.1.1 General Developments

In the 19th century the tendency towards the scientification and objectification of social life, as well as towards moral emancipation in a liberal direction, continued under the influence of two revolutions, the French and the Industrial. The political changes at the end of the 18th century were ushered in by the *French Revolution* with its principles of freedom, equality and brotherhood (moral emancipation), and the ensuing dictatorial regime of Napoleon with its efficient organisation of the central state (objectification). By the end of the 19th century, Western European societies had taken the political form of national constitutional states founded on liberal ideas. Furthermore, an *Industrial Revolution* took place on the economic terrain: applied science led to technical innovations, such as the steam engine, which in the second half of the 18th century resulted in England in large-scale industrial production concentrated in factory cities, which were populated by large numbers of labourers. After 1815 the Industrial Revolution caught on in continental Europe. This was coupled with market expansion through an increasingly drastic colonisation of the non-Western world, which reached its peak at the end of the 19th century. Traditionally isolated countries like China and Japan, too, were by military intervention forced to open their borders to Western trade (in China, especially for the importation of opium). This enormous colonial expansion was, apart from economic motives, also stimulated by a political race for world domination between the European national states. In philosophy these fast-changing social and economic relationships were reflected in a more detailed elaboration, as well as fundamental criticism, of liberal principles.

The political changes in the different Western European countries showed greater parallels than in preceding periods. The development since the 16th century did show general trends, but it still took on very divergent forms. Almost everywhere central monarchies were established (in Germany and Italy incidentally only in the form of small principalities). As a result the nobility of the Middle Ages partly lost their power. The kings obtained absolute power. Unrestricted by any constitution,

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they stood above the law. The nobility still enjoyed extensive privileges compared to the upcoming class of shop-keeping and trading citizens in the cities and peasants in rural areas. The central state protected its own economy by means of import duties, import bans and export subsidies (mercantilism). The Republic of the United Netherlands was a notable exception: its structure was that of a decentralised federation which was ruled by the urban patricians in a relatively un-authoritarian way. In England a liberalising process commenced at an early stage: in 1689, under the influence of Locke's liberalism, individual freedom rights and a modest form of parliamentary legislation were introduced. Thanks to these relatively peaceful reforms a stable society with a free market was established, which provided fertile soil for personal initiative and economic growth. It was for these reasons that the industrial revolution started here. The economist Adam Smith advocated the withdrawal of the state from the market and international free trade: when one leaves economic interchange to the free play of supply and demand and to individual initiative, this would lead to an increase in general welfare. In continental Europe political liberalisation still had to wait another century. A radicalised version of the English (unwritten) constitution was nonetheless propagated by the French Enlightenment philosophers as an alternative to the ruling absolute monarchy and aristocratic privileges.

Inspired by Locke, as well as economic self-interest, England's American colonies, after a revolt in 1783, separated themselves from the motherland, as the United States of America. The American *Declaration of Independence*, cited in Chapter 1, granted citizens inalienable fundamental rights: the right to life, freedom and to the pursuit of happiness. In France, the ideal of the liberal state was after the Revolution of 1789 translated into positive law. The French then attempted to export their revolutionary achievements by conquering the surrounding non-liberal countries, meanwhile seeking the support of local revolutionaries. The Dutchman Van der Capellen tot den Pol wrote in 1781 in *Aan het volk van Nederland. Het democratisch manifest* (To the People of the Netherlands. The Democratic Manifesto), that the Dutch had to regain their original democratic freedom rights as they were practised in the old days by the Batavians: 'Take up your weapons, elect those you must obey.' In consequence, in 1795 the Netherlands was under French leadership transformed into the constitutional Batavian Republic. The ancient noble privileges were abolished.

The French Revolution, however, devoured its own children and ended in terror. Dogmatic revolutionaries executed competing revolutionaries with deviating views, until they themselves lost their heads on the guillotine. The foreign wars subsequently brought a general onto the political stage, Napoleon, who, after a coup d'état in 1799, crowned himself as emperor in 1804 and set aside the liberal constitution. Napoleon specialised in large scale wars of conquest against the rest of Europe: England, Austria and Russia. Local representatives of the bourgeoisie, in Germany, among others, Goethe and Hegel, praised Napoleon's victories in the hope that this would lead to the modernisation of society. In order to wage his wars

efficiently Napoleon indeed brought about modernisation, but in a different way than was hoped for by liberals. The institutions of the central state were developed to great heights. In the interest of his army, based on conscription, the whole nation was provided with family names and registered. In this way taxes could be levied more efficiently too. The state bureaucracy increased proportionally. The diverse legal fields were each unified by the first national codifications, which served as models for codification in other European states. These codifications, furthermore, promoted an increasing differentiation of law into separate areas, such as private law, constitutional law, and criminal law.

Of the liberal principles in the Code Civil of 1804 two elements were safeguarded that were of particular importance for modern economic interaction: all citizens were equal before the law, and their right to property was inviolable. In the sphere of private law, codification thus increased legal certainty. This relative independence of law from political power was a major step forward, as the codifier Portalis (2004) wrote in the *Preliminary Address on the first draft of the Civil Code* (21 January 1801):

> In despotic States, where the prince is owner of all the land, where all commerce is carried out on behalf of the head of State and for his profit, where individuals have neither freedom, nor will, nor property, there are more judges and hangmen than laws. But wherever citizens have property to protect and defend, wherever they have political and civil rights, wherever honour counts for something, a certain number of laws are needed to confront all situations.

However, apart from the freedom to promote one's interest in the market place, no liberties were granted during Napoleon's dictatorship. Individual freedom in private law did not coincide with constitutional political freedoms.

Codification of criminal law similarly provided the citizen with some protection against the state, in particular, against arbitrary arrest and conviction: in the future, prosecution should take place only on the basis of a pre-determined, public specification of criminal offences. For a liberal this is not sufficient. In the first place, nothing is yet said about the content of criminal offences: criminal laws can be politically tainted, for example, by prohibiting free expression. Liberals, therefore, advocate additional constitutional protection against the legislature by means of constitutional freedom rights. Moreover, making criminal law uniform can further a more efficient exercise of governmental power, at the expense of individual freedom. Napoleon's government thus posited the two tendencies of the modernisation process in opposition to each other. It promoted rational control by the central government at the cost of moral emancipation: in political respect citizens were no longer free and equal individuals, but instruments of the national state in its pursuit of power.

After Napoleon had met his Waterloo in 1815, the victorious monarchical states decided at the Congress of Vienna in favour of a *Restoration* of the pre-revolutionary monarchies. From this moment onwards political developments in large parts of Western Europe proceeded along parallel lines for a long time. The Netherlands,

too, turned into a kingdom under the Oranges, who were previously only stadtholders. William I ruled as an enlightened despot. The Constitution of 1815 nonetheless granted a number of basic rights: freedom of the press, protection of property, and the right of petition. The powerful bourgeoisie, however, did not let themselves be held back for long. In 1848 everywhere in Europe new revolts broke out, after which little by little increasingly liberal constitutions were introduced. In the Netherlands, William II of necessity became a liberal within 24 hours. The class privileges were abolished for the second time. The constitutional amendment of 1848 introduced suffrage for the Second Chamber to all citizens who pay taxes, thereby granting voting rights to all well-off male citizens, approximately 2.5% of the population. The argument in favour of granting political power exclusively to the rich was that persons who were economically independent have experience in running their affairs in a rational way. All others did not possess the independence and capacity for oversight required in matters of state. The people's representatives acquired the right of amendment, and the executive power, under the leadership of the king, would in future be accountable to them. Furthermore, the right of association and assembly, freedom of education, and secrecy of the post, were introduced as new basic rights.

The *Industrial Revolution* was made possible by technical applications of modern science. Newton's mechanics and thermodynamics led to the invention of the steam engine: thanks to the artificial generation of energy, textile and steel could be mechanically produced on a large scale. Moreover, raw materials and the new mass products could be transferred over much greater distances due to the steam-powered trains and ships. Farm labour and industry diminished in importance; peasants and manual workers joined the growing masses of factory workers in the new factory cities.

Because of these developments the landed gentry finally lost their social importance as well. Their remaining privileges appeared increasingly arbitrary, and were for the most part abolished. In the second half of the 19th century, capitalist citizens, by means of an appeal to freedom and equality, took over the leading position on all fronts. The freedom of property and contract in the 19th-century minimal state allowed them to increase their market share. Thanks to tax-based suffrage they acquired influence in government.

However, from the point of view of the new 'fourth class' – the poor workers – these rights of the third class appeared like new arbitrary privileges, which were difficult to reconcile with the principle of *equal* freedom. Owing to the industrial revolution the production and national income of countries, such as England, had indeed increased significantly, but this progress was to a great extent cancelled out by the population explosion (which again tied in with the improved ability of producing essential food, storing it, and transporting it to places where it was needed). The oversupply of labour led to very low wages, especially in the first half of the century. In such circumstances labourers had little profit from the formal legal freedoms: in their case the free market of supply and demand of labour implied that from their childhood onwards they had to put themselves out for hire for a hunger

wage. Without any labour protection, they had to survive lengthy working days, in extremely unhealthy circumstances, as bolts in a numbing factory device. They lived in miserable circumstances. When they could not look after themselves, they were dependent on charity; the government did not provide for social legislation. As a result, life expectancy and quality of life were initially very low. Only after 1840 did wages and living conditions improve.

Slave labour in the colonies was even more miserable. There workers were not persons, but things: legal property of the exploiters, who often subjected them to cruel corporal punishments. Slaves did not even have formal freedom rights: they could not move about freely, say what they thought, or get married.

During this period, progress in technical and economic rationality was, therefore, only very partially accompanied by moral emancipation: the principles of freedom and equality were interpreted one-sidedly in the interests of the new wealthy. Moral ideas, however, have a logic of their own which rises above partial interests. Once one has publicly declared that all people are free and equal, one finds oneself in a compromising position if one subsequently grants rights exclusively to one particular group. The middle class attempted to justify their privileges by asserting that the reasoning abilities of women, workers and non-Europeans were not sufficiently developed to live an autonomous life. As in the case of children, such immature people as a matter of course did not deserve full rights. A similar argument is to be found with Kant (Chapter 6). However, this reasoning cannot be maintained once it, for example, appears that women can actually study just as well as men, and that it is precisely *because of* their exclusion from academic studies that they are kept ignorant. With such objections, strong protests were immediately raised against the one-sided interpretation of liberalism. In 1791, a non-official *Declaration of the Rights of Woman and the Female Citizen* criticised the domination by men, with the argument that women possess the same intellectual abilities. Article 1: 'Woman is born free and lives equal to man in her rights. Social distinctions can be based only on the common utility.' In 1793, in France, a constitution was drafted which included socio-economic rights, such as the right to work, to benefits in the case of labour disability, and to education, which, however, never came into effect. The *Encyclopédie* had already condemned slavery as incompatible with the equal freedom that all people have by nature. After the French Revolution, the *Société des Amis des Noirs* (the Association of Friends of Blacks) advocated the abolition of colonial slavery, but this ran into economic objections. After a slave revolt in 1791 the first black state was established in Haiti. The revolutionary government only in 1794 abolished slavery in the *Code Noir*, but shortly thereafter all liberal rights were repealed.

In the course of the 19th and 20th centuries these inconsistencies were slowly but surely remedied, for both humanitarian and opportunistic reasons. At the start of the 18th century, European countries first abolished slave trade, and by the middle of the century slavery itself, as well. The Netherlands followed in the rear, proceeding to free slaves only in the 1860s: *keti koti!* (as the Surinamese say: chains broken). In the United States a civil war against the Southern States was necessary to make this

happen (1861–1865). The European powers nonetheless strictly maintained political power in their colonies. Through the vast expansion of colonial empires the indigenous inequality and lack of freedom were replaced worldwide by colonial domination, as appears from the *Max Havelaar* conflict with which this book commences. Only deep into the 20th century, after the Second World War, did colonial oppression come to an end. Meanwhile in Europe, partly under pressure of labour movements, a start had been made with social legislation. In England child labour under the age of nine was already prohibited in 1833; in the Netherlands a law against child labour was enacted in 1874. Voting rights were gradually expanded, too. In the Netherlands general suffrage was introduced in 1917, so that women and labourers also attained a political voice.

7.1.2 Liberalism and Utilitarianism

In philosophy these political and socio-economic changes evoked divergent responses. Liberalism was further elaborated upon by philosophers such as John Stuart Mill (1806–1873). In *On Liberty* (1859) Mill formulated the famous *harm principle*:

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right (Mill 1982, p. 68).

Briefly summarised: freedom, unless harm to others. Mill defines freedom as the ability of the individual to strive towards his own good in his own manner. The government should refrain from *moralism* (forcing citizens to act or refrain from acting because it regards this as morally just) and *paternalism* (forcing citizens to act or refrain from acting because it regards this to be in their own interest, thus to prevent them from harming themselves).

Mill bases this liberal principle on a mixture of liberal and utilitarian grounds. Liberal is his emphasis on the value of individual autonomy and self-development. Every individual must, therefore, be free in his thinking and feelings, in the expression of his thoughts, in living in accordance with his own objectives, and in entering into agreements with other individuals. In addition Mill argues, in accordance with the utilitarian principle that something is good when it leads to optimal general welfare, that individual freedom promotes the welfare of the individual, and of society as a whole. In the first place, freedom increases the happiness of the individual himself, because it allows him to live according to his own preferences. Conformism, on the other hand, disfigures you; your life is bound like the feet of a Chinese woman. On the social level individual freedom promotes new initiatives and an increase in knowledge. Non-conformist geniuses must, therefore, be given as much space as possible. Mill does not advocate asocial individualism or selfish indifference

towards others either, because no one lives in isolation. Yet, social virtues must be instilled by means of education, not force. Liberalism simply wants to enable everyone to establish his own views in the face of traditions and social morality.

In Mill's view, political decision-making also requires freedom of thought and of opinion. Public policy requires an open critical debate, because every government is fallible. Without open public deliberation a government cannot know whether its view is the right one: even if it is right, it would not know why. Political participation in a representative democracy furthermore promotes personal growth. However, according to Mill, democracy works only when citizens are well-informed and educated, and when they are tolerant of deviating views and modes of life. Mill, moreover, wanted to tie the democratic legislature to fundamental freedom rights, in order to prevent tyranny of the majority over non-conformist individuals. Mill also opposed the subordination of women. Although initially a supporter of the free market and the corresponding minimal state, towards the end of his life he advocated the adoption of social legislation. Nevertheless, Mill argued, everyone should, in as far as possible, remain responsible for his own fate.

Mill thus combined liberalism with *utilitarianism*, which was mentioned earlier in the chapter on Kant (Section 6.3.2). It is discussed in more detail in Section 7.2, where on closer inspection it turns out to hardly be reconcilable with liberalism.

Utilitarian ethics has, after Mill, remained prominent in the English-speaking world. But here, too, it has in the last few decades been harshly criticised because its consequences can crush the liberal ideal of individual autonomy and freedom. In its intention, utilitarianism nonetheless tallies with the Enlightenment: it wants to improve the world by a rational, scientific approach to society and law. In ethics the utilitarians reject the traditional Aristotelian and Christian metaphysics: there are no invisible higher ends or values in nature. Therefore, it is irrational to sacrifice your life for a Christian ethics that deludes you with the promise of an illusory life in heaven after death. One should emancipate oneself from such superstitions.

From the perspective of man the only remaining value that can be empirically established is his earthly pursuit of a happy life – Hobbes started from a similar empirical basis.[1] Good is then what makes man's happiness as great as possible. Besides *happiness*, utilitarians also speak of *utility*.[2] How to find happiness is a personal matter that one can establish only for oneself; the objective criterion to judge different ways of life is the result and ultimate purpose of all human activities, the experience of happiness.[3] According to the founder of utilitarianism, Jeremy Bentham (1748–1832), one can quantify the happiness that an action brings about: by calculating the number of those who are happy as well as the duration and intensity of their feelings of happiness. An act is good when

[1] See Chapter 4; see also the minimal natural law of Hart, Chapter 1.

[2] Latin: *utilitas* = utility; from there the name Utilitarianism.

[3] Nietzsche (Section 7.5) in this regard famously remarked in *The Twilight of the Idols* (2004, p. 4): 'Man does not strive after happiness; the Englishman only does so.'

it optimises the total happiness of all people involved. This emphasis on quantity instead of quality corresponds with the approach in natural science, which deals with mathematically calculable relations between phenomena, and which rejects pre-scientific assumptions of *qualities* in nature as one finds in Aristotelian metaphysics.

A problem, however, now arises: my happiness can conflict with your happiness; what is useful for society as a whole can clash with what is useful for me. In the event of scarcity, what I acquire is subtracted from what others have. My happiness increases when I steal your money, whereas your happiness decreases. The utilitarian solution: since the world is not harmonious, you must unfortunately choose the least bad, *the greatest happiness of the greatest number*. When you want to bake an egg you have to break the shell: one sometimes has to sacrifice the happiness of an individual or of a minority in order to increase the total happiness. Bentham expected that this quantifying approach would lead to a rationalisation of social life so that the general welfare would increase. For this purpose the capricious and unpredictable English judge-made law had to be replaced by codification.

Evidently this utilitarian approach respects no essential private sphere within which the citizen is free from the interference of others: when it comes down to it, the individual has to adapt himself to what general utility requires. The total happiness of the majority may even benefit from the slave labour of a minority. Because of this totalitarian emphasis on general utility, on closer inspection utilitarianism fits in better with the tendency towards rational efficiency of modern science, than with the moral emancipation which the liberal Enlightenment thinkers had in mind. Mill's utilitarian justification of liberal freedom appears to rest on an unhappy marriage between two irreconcilable ideas. In certain circumstances censorship may promote general happiness better than freedom of speech; or extensive social discipline may have greater utility than nonconformist freedom. Mill attempts to escape from this dilemma by giving a *qualitative* definition of happiness: intellectual and moral pleasures are superior to physical pleasures. However, when one replaces quantity with quality one takes the heart out of the utilitarian approach (see Section 7.2). The utilitarian sacrifice of the individual person to an anonymous overall utility is the most severe point of criticism. In line with this, the liberal legal philosopher Dworkin has pointed out that utilitarianism is actually an ill-considered elaboration of the equality principle. The assumption is after all that everyone's happiness has the same weight (different from under feudalism). However, then one may not cancel out the happiness of an individual for the sake of the majority on the basis of considerations of efficiency. On the contrary, the individual should be protected by fundamental rights against measures that promote the general welfare. To speak with Kant: every individual human being is an end in himself.

7.1.3 German Historical School

In its turn, liberalism has been subjected to severe criticism, precisely because of its emphasis on individual freedom. Critics from the left and the right oppose liberal individualism, because they regard man, following Rousseau, as a communal being.

According to them, the community precedes the individual, both in time and in value. For this reason the individual has duties to, rather than rights against, his society, and such duties do not follow from his free choice. Left and right, however, advocate different ideals of community. Conservatives hanker for the good old times of the pre-revolutionary hierarchical society. In contrast, communists, such as Karl Marx, yearn for a much more radical social egalitarianism: the French revolution did not bring about the socio-economic equality which brotherly cooperation requires.

Conservatives point warningly to the terror in which the French revolution had ended. This would prove that one cannot reform society according to a rationalistic blueprint. Liberals like Locke would unjustifiably adhere to an abstract view of human beings: a fictitious rational individual who, detached from social relations, arranges his life in a completely independent way. Taking such atomistic individuals for real, liberal philosophers consequently construct an ideal society via the model of a social contract which is just as fictive. In reality each man is born in a society; he develops his ideals and views of reality within traditions which are passed on to him by society. On his own he would hardly be able to develop above the level of an animal. Liberal philosophy overestimates the rationality of man: the realisation of abstract schemes leads in practice to all kinds of unanticipated and undesirable consequences. Hence, the pursuit of freedom of the French revolution undermined the traditional associations which are necessary to keep a society together, with unbridled egoism and abuse of power as consequences. It is better to adhere to ancient traditions in which the life experience of generations is stored up, according to the conservative critique (which is in recent times continued by *communitarians*, such as MacIntyre: see Section 9.1.2).

This applies to law as well. The English conservative Edmund Burke opposed the French *Declaration of the Rights of Man and of the Citizen* in his *Reflections on the Revolution in France* (1790). Such so-called universal human rights explode in one blow all the legal customs which have developed through the ages, with societal normlessness as a consequence. In the same conservative spirit, the *Historical Legal School*, under the leadership of Friedrich Karl von Savigny (1799–1861), opposed the proposals to codify German private law using as model the recent civil codes of France and Austria, which held themselves to be realisations of natural law. According to the Historical School, the idea of an eternally valid rational natural law is an illusion. You cannot in the abstract construe an ideal legal system that would accord with human nature as such, independent of all historical development. The true living law, according to Savigny, one does not find in law books: the only authentic legal source is the organically grown customary law that differs in keeping with the needs of each society.

With this relativistic legal doctrine the Historical School comes close to the view of Montesquieu. According to Savigny, however, the content of law does not depend on natural causes, such as climate, but on cultural factors: law is an expression of the character of a people. To be sure, in more complex legal societies law is developed further by legal specialists, but they are ultimately the technical mouthpiece of the *spirit of the people*. If you want to proceed towards codification, then this should be done not by the importation of legal systems which are foreign to the people, but by

starting from a thorough knowledge of one's own legal history. Against codification as such it is contended that this would place a brake on the spontaneous development of the living law. Partly because of this criticism, a general civil code was introduced in Germany only in 1900.

In the spirit of Savigny, German historicists threw themselves into the study of old Germanic law.[4] The more dogmatic movement of *Begriffsjurisprudenz* concentrated on the analytical effect of legal concepts that supposedly had their source in people's customary law. Under the influence of attacks on natural-law doctrine other legal scholars arrived at the equally relativistic *legal positivism* that, however, accorded an independent, and even decisive, role to the central state: law is what the government enacts as such (see Section 1.2.3). In the 19th century this movement initially assumed the form of *legislative positivism* or *legalism*: the judge must be guided by law, as Montesquieu had already prescribed. With this the legalists did not, however, mean that the judge may not at all interpret the words of the law. He must indeed only interpret the *legislation*, because in accordance with the ideal of separation of powers, creation of law is reserved for the legislature. As codifications aged, this respect for legislation declined, with the consequence that in the 20th century, legal positivism acknowledges judicial decisions as an independent legal source.

7.1.4 Hegel

In philosophy too, there was criticism of rationalism and the liberal ideal of equal individual freedom of the Enlightenment, as well as its undesirable consequences for law. In this chapter three critics will be discussed in detail: the German philosophers Hegel (Section 7.3), Marx (Section 7.4) and Nietzsche (Section 7.5).

Unlike Locke and Mill, George Friedrich Wilhelm Hegel (1770–1831; *Grundlinien der Philosophie des Rechts* (Elements of the Philosophy of Right, 1821)) did not see the state as an agent in the service of the free development of individual citizens. He regarded the state, more in line with the view of Rousseau, as an institution in which all partial interests are raised to a higher level, as a supra-partial legal and moral entity. This is not to say that states always have this form in reality, but in Hegel's view it ideally is their purpose.

Hegel, moreover, opposes the abstract rationalism that is characteristic of Enlightenment philosophers, such as Kant. Kant attempted to overcome Hume's scepticism with his thesis that the human faculty of cognition organises reality by means of a fixed rational structure. Hegel, in opposition to this, contends that human

[4]From the same romantic anti-rationalist idealising of a unique people's spirit, the legal historian and language expert Grimm collected traditional fairy tales that had been handed down orally through the generations. Strangely, Savigny himself saw Roman law as an ideal model, which stirred a conflict among German legal scholars between the Romanists and Germanists.

reason does not stand outside of changing reality, but that it partakes in it: it develops itself through interaction with its changing environment. Hegel emphasises, like the Historical School, the historical development in which society, law, state and human thinking continually take on new forms. Every nation develops its own social and moral character, although Hegel nonetheless detects in the course of history an increasing rationality. Via successive generations, human thinking, step by step, comes increasingly to greater insight, which is reflected in the form of society. Hegel calls this the *objective spirit*: just like a novel or a law forms a meaningful entity which rises above the subjective intention of the author, individual ideas are objectified and institutionalised by subsequent generations: they are elevated into larger thought patterns, interpreted anew, and developed further. In this way great cultural traditions and social institutions in the fields of morality, art, religion and philosophy are established, by means of which man puts his spiritual stamp on the world. Cultural institutions have an independent development consistent with their own rules ('objective spirit'): they form the human individual, rather than the individual forming them.

This also applies to legal evolution: law is a cultural product, which slowly and falteringly in the course of time assumes a rational character. With this view Hegel opposes, on the one hand, the rationalistic expectation of Enlightenment philosophers that one can, through the codification of an abstract reasonable natural law, construct a completely new ideal society. Look, for example, at the way in which the French revolution ended in terror. On the other hand, Hegel likewise opposed the radical historical relativism of the Historical School: according to the Historical School, particular legal traditions are all we have. Hegel adopts a dynamic position between historical relativism and rationalistic universalism.

Legal evolution commenced with unwritten customary law, in accordance with the view of the Historical School. The first human societies were held together by informal rules and solidarity, as in a family. In a later phase of human evolution, customary law is gradually codified into law books. In modern civil society with its extensive division of labour, citizens interact with each other in a more impersonal, more economically-oriented way than in less commercialised societies. By means of general rules modern law must regulate economic exchange, the mutual satisfaction of needs and labour relations. For this purpose legislation focuses on subjective rights which guarantee that individuals can live their lives as independent persons: property and contract law, as well as the protection of these rights by criminal law. The central legal principle reads thus: be a person and respect others as persons as well. The modern legal order, then, on the one hand, is the product of a historical social development. On the other hand, however, one can reconstruct it retroactively as a rational system of rights and duties which is necessary in the given circumstances, as Hobbes, Locke and Kant did with their theories of the social contract.

The liberal contract doctrine of Locke and Kant leads to a separation between the public domain, ruled by the narrow morality of law, and the private domain, where the individual is responsible for his perfection as a moral person. According to Kant, the legal order wants to prevent the infringement of legal interests, whereas

morality requires much more, specifically a pure intention. Therefore, the domains of *legality* (law) and of perfectionist *morality* stand apart. This liberal ideal of negative freedom for public life is described as follows by Kant: a general law should guarantee that the caprice of one can coincide with the caprice of another. Hegel rejects this, arguing that the consequences of negative freedom without positive realisation are shown by the derailment of the French Revolution into terror and chaos. True freedom is not subjective freedom of choice but identification with one's reasonable person: rational organisation of one's feelings and emotions. An individual can impossibly achieve this on his own, without the guidance of state and law. Hegel opposes the liberal ideal of the autonomous individual. When he posits freedom as a central principle, he refers to metaphysical *essential freedom*: one is free when one identifies oneself with the rational course of history.

Thanks to the emergence of the state, the initial separation between law and morality, between the just and the good, can, in Hegel's view, be overcome: they are assembled in a higher moral community in which individual life has been absorbed. The state provides an amalgamation of the solidarity of family life and the objectivity of economic exchange, now extended to all legal subjects. All specific interests acquire a balanced place in a greater organic whole. In this way man finds his higher reasonable destiny and his true freedom. Therefore, each individual has the duty to act as a subject of the state community.

Hegel's approach thus corresponds far more with the *volonté générale* (general will) of Rousseau than with the individualistic negative liberty rights and political participation rights of liberalism. In order to contain the arbitrariness of individual negative freedom, in constitutional law Hegel advocates a mixture of a constitutional monarchy and a corporative estate system. In this arrangement, king, nobility and guilds play a supra-partial role in the interests of everyone. Hegel's ideal state does not entail liberal political participation rights. Hegelian freedom means that the individual voluntarily accepts the rational decisions of state organs. The state is not at the service of its citizens, as the liberal doctrine of the social contract presupposes. Citizens are at the service of the state, a supra-personal moral power in which not the individual, but humanity, attains perfection.

In Hegel's view, this development towards rationality is guided by a metaphysical Absolute Spirit, a dynamised rational God-figure or Platonic Idea. The rational development of the Absolute Spirit involves a kind of spiritual self-therapy in which human thinking serves as sounding board. Hegel depicts this dynamic development of the Spirit as *dialectical*, that is, in the form of a dialogue of statement and counter-statement. Every human position is one-sided, because thinking attempts to grasp the changing and flowing reality by means of fixed concepts. However, because of the human desire for perfection, such an imperfect thesis leads to an anti-thesis, which, however, mirrors the one-sidedness of the thesis. From this clash between thesis and anti-thesis a deeper insight subsequently arises, which yet again involves a new one-sidedness, after which history repeats itself on a higher level. Hence thinking, via a three-fold succession of thesis, anti-thesis and synthesis, becomes increasingly reasonable, until it ultimately arrives at perfect (self-)consciousness. According to Hegel, the ideal state is a manifestation of this Absolute Spirit.

7.1.5 Marx

Karl Marx (1818–1883) turned Hegel upside down. He adopted Hegel's historical model of development via oppositions. According to Marx, however, not intellectual oppositions are decisive, but economic ones. Man primarily survives by cultivating nature in cooperation with his fellow men. Unlike animals that merely react to their natural environment, man uses his labour to construct his own environment. Human thinking stands in the service of these communal productive activities. The manner in which labour is divided is decisive for social relations and cultural institutions, such as law, morality, religion and philosophy. Even Hegel's 'Absolute Spirit' is, therefore, man's handiwork. Philosophy does not have a theoretical significance, but primarily a practical one. In this vein Marx's own philosophy does not primarily want to interpret the world, but rather change it. In his *Manifesto of the Communist Party* (1848) he calls for an overthrow of the capitalist order.

Human relations are, according to Marx, inherently discordant because of an unequal division of labour. In classical antiquity, physical labour was performed by slaves, whereas the proceeds flowed to the free citizens. The Middle Ages showed a similar kind of opposition between the peasantry and noble landed gentry. In his own time a *class conflict* was taking place between factory workers and capitalist owners, described by Marx in *Das Kapital* (*Capital*, 1867). The economic position someone occupies in such a conflict of interests determines his preference of legal rules. The ruling classes transform the legal and moral ideology which serves their interests best into positive law. They attempt to instil their ideology in others as if it presents objective universal values. However, changes in the *forces of production*, raw materials, implements and labour techniques can catch up with such social hierarchies, or rather, asymmetrical *production relations*.

Marx regards the idea that the liberal legal order is based on a universal rational human nature as misleading. In reality liberalism is simply an expression of the self-interest of the bourgeoisie. The absolute right to property, for instance, does not provide any guarantee against anti-social abuse of this right at the expense of others. On closer inspection it is simply the right of the strongest in disguise. This inhuman legal order can be abolished only through a revolution of the proletariat, who form the large majority and who have nothing to lose. Just as the bourgeoisie abolished the feudal estates, the workers must in their turn abolish the capitalist class society. Marx's writings intend to bring the working class to this liberating revolutionary insight. The proletariat, who are already used to not owning anything and surviving in solidarity, will after the communist revolution abolish all private property. In future everyone works happily ever after in the fraternal community of a classless society. Everyone contributes according to ability and receives according to need. Law now only has the task of co-ordinating the labour process. More is not necessary, because all social conflicts finally belong to the past. Therefore, unlike Hegel's contention, a truly human society can get along quite well without the state.

Marx attempts in his communist philosophy to combine the two main ideals of the Enlightenment: scientific objectivity and moral emancipation. He does not present communist society as a moral utopia, but as an objective scientific fact:

as the necessary endpoint of a historical process of economic conflicts. At the same time this end of history coincides with an emancipated, truly human society. Marx's communist ideal, however, dismisses the individualistic liberal interpretation of the Enlightenment principles: emancipation leads to equality and fraternity rather than to freedom and equality. Like Hegel, he defines freedom as *essential freedom*: only in the community can one find one's true destiny as a human being.

Marx's scientific predictions did not come true. In industrialised Western Europe, the revolutions of 1848 resulted in gradual reforms in a liberal direction. In agrarian Eastern Europe no factory proletariat was present. It was there, against Marx's expectations, that in the decades after the Russian Revolution of 1917 communist societies were established, but these did not result in moral emancipation in Marx's sense. Instead, the 'dictatorship of the proletariat', that Marx thought necessary during a stage of transition, turned into a lasting dictatorship of the communist parties. The communist experiment ended some 70 years later when its production forces were outmatched in a competition with the liberal Western world. Marx's criticism of 19th-century capitalism indeed contributed to improving the position of Western European workers, thanks to social legislation. Liberalism thus appears to be more elastic and less class-bound than Marx thought, partly through an incorporation of Marx's critique. Stated differently, the internal contradiction which Marx pointed to in bourgeois liberals – between the ideal of equality and factual exploitation – liberalism itself partly cancelled out, without destroying itself. According to neo-Marxists this accommodation, however, does not go far enough. It simply entails *repressive tolerance* on the part of the ruling classes: concessions are made to those who are suppressed, in order to all the better sustain the suppression.

7.1.6 Nietzsche

On the contrary, in the view of Friedrich Nietzsche (1844–1900), such concessions go much too far: the social democracies of the 20th century, Nietzsche would likely have said, lead to extreme equalisation which prevents all human development. Nietzsche reacts not only against liberalism, but also against communism, as well as against Enlightenment philosophy and the whole of rationalistic Western thinking since Plato. You must not think but *live*, Nietzsche thought, filled with romantic passion.

Like Hegel and Marx, Nietzsche does not view man as a rational being, but rather as a creative actor who, in his struggle for life, makes a mark on his environment. In Nietzsche's view, however, the subject of these creative activities is not the human community, but an individual genius, the 'superman' (*Übermensch* – with which Nietzsche does not refer to the blond noble German which the Nazis would glorify in the following century). Such unique geniuses constitute the apex of human culture. The masses, on the other hand, show only a blank conformism. Out of jealousy they attempt to pull down everyone who stands out above them. Communism represents

such an attempt at stultifying equalisation. Nietzsche likewise condemns the equal freedom rights of liberalism, since people are not at all equally rational autonomous beings. Far from being *rational*, they are driven by a tempestuous amoral *will to power*. They are not *autonomous*, because the majority consists of a fearful herd. Only the superman is capable of self-legislation, of creating his own unique mode of life. Overflowing with energy, he deploys his abundant will to power; the masses attempt to acquire power in a negative manner by hiding in a safe collective, in order, from this position, to belittle those who are great.

In line with this elitist division of humanity, Nietzsche distinguishes between a *master morality* and a *slave morality*. The slavish majority seeks protection against the powerful through weak values, such as neighbourly love, compassion and equality. Nietzsche rejects this slave morality as being hostile to life, because it attempts to restrain the aggressive vitality of the strongest. The supermen stand above such inferior values; they are after all their own legislators. With them virtues, such as a strong will, bravery and creative power, constitute the basis for the subjection of the world to their will to power.

Nietzsche's political philosophy shows great similarity with Plato's totalitarian class-state. The masses must through diligent labour provide the material conditions for the full development of the supermen, who as artist-tyrants subject society to their will. The hell of Marx is thus the paradise of Nietzsche.

Nietzsche voiced a romantic, artistic protest against the tendency to uniformity and social discipline. Just like Marx, Darwin and Freud, he shattered the human pretension of rationality: so-called reasonable arguments conceal an underlying power play. Nietzsche still exercises a great influence, specifically on *postmodernism* (Section 9.1.4) and on *deconstruction* (Sections 9.1.7 and 9.5). As political philosophy, however, his views are not plausible. The modern state and legal order require complex bureaucratic organisations that do not match the vitality of creative geniuses.

7.2 Utilitarianism

7.2.1 Introduction

Utilitarianism has been of great importance for legal philosophy. It measures the rightness of human action against its useful consequences. More specifically, 'the greatest happiness of the greatest number of people' constitutes the criterion for just action. A number of variants of utilitarianism have been invented. We limit ourselves to the two variants which were elaborated in more detail by Jeremy Bentham and John Stuart Mill. Bentham regards happiness, the final goal of human action, only in quantitative terms. Mill gives it a qualitative turn. The first is non-perfectionist: in order to compare one action with another, it suffices to see which produces the most pleasure. One of the remarkable aspects of Mill's ethics is that he appears to make a switchover from a non-perfectionist to a perfectionist form of utilitarianism.

As a consequence it shows some correspondence with Aristotle's ideal of human perfection.

Although Mill came after Hegel, we discuss his utilitarianism in relation to that of Bentham, who preceded Hegel.

7.2.2 Jeremy Bentham

Utilitarianism was founded by Jeremy Bentham (1748–1832). Bentham studied law, but he was very critical of the legal system of his time. Therefore, he did not want to become a legal professional. He preferred to transform society by means of the reform and rationalisation of law. As such he was at the centre of a socio-political movement, known as the 'Philosophical Radicals'. Bentham's criticism of the *common law* related specifically to the unpredictability of the judgments of judges, who followed their middle-class prejudices. As a consequence, conduct which hardly caused any harm (for instance 'immoral' sexual behaviour) was punished harshly, whereas conduct with detrimental consequences was often barely punished or not at all. Whoever allows himself to be led by his prejudices as if they were eternal moral laws, disregards the consequences of his conduct. According to Bentham, this is an irrational way of proceeding. Therefore, the legal system should be codified on the basis of an uncontroversial and clearly applicable moral principle that sees to the consequences of actions. In *An Introduction to the Principles of Morals and Legislation* (written and printed in 1780, but only published in 1789), he presented the principle of utility, which he described as follows:

> By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness (Bentham 2005, p. 2).

The principle of utility evaluates *actions* in relation to their consequences. Motives and intentions (so much emphasised by Kant, see Section 6.3) are only of an indirect interest: these are evaluated with reference to their consequences for conduct. The emphasis does not lie on a ('liberal') fencing off of everyone's free domain of action. Bentham's utilitarianism makes individual freedom subject to social utility. Actions are either *approved* of or *disapproved* of, in relation to their *tendency*: do they, or do they not, promote happiness? This can actually be established only afterwards; nonetheless, it must be estimated beforehand what chance an action has to promote happiness; this is its 'tendency'. *Happiness* is, for Bentham, equated with 'pleasure' and opposed to 'pain', and is understood in quantitative terms. By taking account of factors, such as intensity, duration, (un-)certainty and 'extension' (in other words, the number of persons whose interests are at stake), one can determine the 'value' of each act. An easy sum (the 'hedonic calculus')[5] then determines which conduct is commanded.

[5] Greek: *hèdonè* = pleasure.

By means of this criterion for good conduct, utilitarian ethics raises itself above egoism: from an impartial point of view, and recognising that everyone's happiness has equal value, it provides a supra-personal criterion with which to solve conflicts of interest. It thus requires of the individual to take due account of others. People do not automatically tend to adopt the best utilitarian action. According to Bentham, people are after all by nature egoistic. Therefore, a system of rewards and punishments ('political sanction') must bring them on the right track. For criminal law, Bentham designed the model of the modern panopticon.[6] The prisoners, locked up in cells on the inside of a circular building, are under continuous surveillance from a central point in the middle of the building. The criminal then internalises the all-seeing, punishing look of the state in his own consciousness, so that this asocial personality is transformed into a disciplined citizen. As a consequence, the general welfare increases.

Bentham exercised a significant influence on the father of the most famous utilitarian, John Stuart Mill, and actively participated in the education of the young John Stuart.

7.2.3 John Stuart Mill

John Stuart Mill lived from 1806 to 1873. He never went to school, but obtained an extraordinarily multi-faceted and intensive education from his father, James Mill, which he later supplemented with self-study and contacts with scholars of his time. He was active in many fields, writing about the economy, the emancipation of women, and especially about philosophy. As a philosopher he acquired fame because of his ethics and his social philosophy, but proved his abilities as well as a logical thinker, as a metaphysician and (in spite of his atheism) as a philosopher of religion. From 1823 he worked at the East Indian Company. Because certain of his ideas about the Company were badly received, he resigned in 1858. In 1865 he was elected as Member of Parliament, but in the election of 1868 again defeated. After having lost his office, he still lived for a few years, a period during which many people, mostly without success, tried to approach him for advice. Of significant influence on his person and his work was Harriet Taylor, whom he met in 1831. He maintained a relationship with her for many years, until, after the death of her husband in 1852, they got married. Their relationship resulted in many joint activities, including matters of a scientific nature and of public interest. Harriet died in 1855, when she was staying with Mill in Avignon. So as to be able to often visit her grave, he bought a house in Avignon, and for the rest of his life stayed alternately in Avignon and London.

Mill was confronted with the utilitarianism of Bentham ever since he was young, and he embraced it enthusiastically. In 1826 he, however, suffered from severe depression for months on end, which he recounted in detail in his *Autobiography*

[6] Greek: *panopticon* = all-seeing

(1873). The experience made clear to him that, although he was intellectually attracted to Bentham's thinking, his emotional life remained untouched; he had become 'a sheer reasoning machine'. He, therefore, started with a revision of Bentham's utilitarianism, so as to correct its one-sided emphasis on the quantitative. This ultimately resulted in his *Utilitarianism* (1861). His relationship with Harriet Taylor contributed significantly to his critique of Bentham's utilitarianism. He regarded her as a genius, as the inspiration of all his ideas. Under her influence Mill developed an emancipatory outlook on women, which made him years ahead of his time. The inspiration of Harriet Taylor, according to Mill himself, manifests itself strongly in *On Liberty* (1859; see Section 7.1.2 for more about this book), which he moreover dedicated to her. Even more clearly than in *Utilitarianism*, he distanced himself here from the utilitarianism of Bentham. *On Liberty*, together with Locke's *Two Treatises on Government*, laid the foundation of political liberalism; it can be regarded as one of the classical works on ethics and political philosophy.

7.2.4 Mill's Utilitarianism

Mill in his *Utilitarianism* agrees with Bentham that the various forms of pleasure show many differences. It, for example, makes a difference whether one experiences pleasure by listening to music or by the exercise of power. However, Mill adds to Bentham by saying that pleasures can not only quantitatively but also qualitatively be compared with each other. It is even very well possible that a quantitatively smaller pleasure may be chosen above a quantitatively greater pleasure, because it is qualitatively better. Mill consequently speaks about 'low' and 'contemptuous' goals, which, for example, compare unfavourably with the 'loftiness of spiritual pleasure'. In sharp contrast to the statement of Bentham that poetry is of the same value as a silly children's game when they produce the same pleasure, Mill contends: 'It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.'

This is a significant turn, although Mill makes it appear as if the introduction of qualitative differences simply involves an improvement on Bentham's calculus. However, Bentham introduced his calculus precisely to establish objectively what the value is of 'pleasure' and 'pain'; for this purpose he distinguishes between its divergent quantifiable 'dimensions'. It is only *quantification*, according to him, which makes it possible to escape from the arbitrariness of qualifications. And now Mill appears on the scene to propose an improvement on Bentham's utilitarianism: one must not only take account of quantities, but even more so of qualities. This correction in fact explodes the whole calculus.

If the calculus is in fact done away with, how does one determine which forms of pleasure are to be chosen above other forms? Mill adopts a practical solution: he introduces an imaginary tribunal, consisting of experienced people, who have to determine which forms of pleasure deserve preference. It is not surprising that

this tribunal would prefer 'spiritual' and 'moral' pleasures above sheer 'animal' pleasures (which Mill preferred personally too: the tribunal, evidently, is himself).

Mill regards altruism as one of the greatest human pleasures. People experience the happiness of the community to which they belong as their own pleasure. They have a psychological disposition to have empathy for other people's fortune and misfortune. This natural feeling constitutes the psychological condition for the acceptance of the principle of utility. The 'political sanction' which is central for Bentham, thus takes a subordinate position with Mill. This is easy to understand. Because Mill is of the view that people are by nature socially motivated (a disposition which is developed especially through education), everyone would gladly accept the judgment of the competent judges, who accurately give expression to the general interest.

One can imagine that in a perfect world complete harmony exists between 'individual interest' and 'general interest': motivated by his communal feeling, everyone makes a contribution to the happiness of others, so that ultimately everyone benefits and no one lacks anything. In such happy circumstances the maximising of total happiness means, at the same time, the maximising of everyone's individual happiness. There is hardly any difference between 'egoism' and 'social consciousness': someone who finds pleasure in belonging to a group and in making his co-members happy, does no wrong to himself. On the contrary, here morality and rational self-interest coincide.

How are things, however, in less favourable circumstances? It may occur that maximising of total happiness is possible only if some *sacrifice* their interests for the sake of the interests of the group. Mill has great respect for the virtue and self-sacrifice that a hero or martyr displays in such circumstances. In his view, no one is happier than the martyr when he sacrifices his life in the interests of the group. Jesus of Nazareth is the perfect incarnation of this utilitarian morality.

This sounds very nice. To understand its import we should note that utilitarianism is not primarily about the personal domain, but a social morality with political consequences. A social morality furnishes the rules which people must adhere to in their mutual interaction, and which they may, if necessary, enforce against each other. A personal morality is something to which people can, and must, commit *themselves*; it does not contain any instructions as to the claims that people can make on each other.[7]

Before we evaluate the strength of utilitarianism as a social and political doctrine, we should first view the story of the competent judge and his value scale from the perspective of a personal morality. One can imagine an individual contemplating how he will arrange his life. He goes for advice to someone who is regarded as competent. This person advises the following: you must suppress your animal inclinations and cultivate yourself; and you must especially develop your 'social

[7]With Kant we encountered both: his doctrine of virtue entails a personal morality, his legal doctrine a social morality.

feelings': in extreme circumstances you must be prepared to sacrifice your own interests for the interests of the group.

Who can be regarded as 'competent'? Mill says: those persons with a 'noble character' and a 'cultured mind' who from their own experience know the different forms of pleasure between which a choice has to be made. Here, however, a problem arises. How can a person with a 'noble character' and a 'cultured mind' from his own experience know the perspective of a 'pig'? Such a person views a pig in advance from a noble perspective, so that the judgment has already been made; and the pig does not even have the possibility of challenging the decision. It is a mystery what Mill *means* when he writes:

> And if the fool, or the pig, is of a different opinion, it is because they only know their own side of the question. The other party to the comparison knows both sides (Mill 2002, p. 10).

Perhaps Mill would acknowledge that a comparison between 'lower' and 'higher' forms of pleasure in advance benefits the higher forms. From the perspective of the personal sphere of life, this is unproblematic. The experience of the adviser taught him that he can recommend the passage from lower to higher forms of pleasure to everyone, because it shows that people who travel along a difficult road, look back on their life with greater satisfaction than when they simply chase after their own pleasures. If the student wants to follow him on this road, he can himself test the value of his advice. If needs be, he can always fall back on his enjoyable pig's life.

Things change when one relates Mill's text to a social-political doctrine; when the judging agency is not simply an *adviser* whom one has chosen oneself, but a *judge* who contributes his share to a social scheme which ensures general happiness. Mill aims at something like this with his social ethics. When the 'sum total of happiness' requires this, individual happiness must, if needs be, be sacrificed to the happiness of the group, or even of humanity. Political authorities protect the general interest, and they have 'political sanctions' at their disposal to see that the subjects who lack insight into what the general interest requires and may overestimate their partial interests, toe the line. Mill might regret this application of the 'political sanction', for it would have been much nicer if people, thanks to their education, voluntarily learn to subject their individual interests to the group interest. However, if it cannot be otherwise, the maximizing of everyone's happiness must be enforced legally and politically.

Who appoints the competent judges, the persons who, in the name of everyone, must establish the content of real happiness? How does one select them? General elections would not really achieve much; at least 'pigs' should have no right to vote. Only those who are good themselves can appoint the judges. The self-aware elite, then, choose in the name of everyone how social life will be organised. Everyone is, under certain circumstances, encouraged to sacrifice their own lower happiness to the higher happiness of their group, or even of humanity. Mill's theory consequently has an immanent tendency towards moral tyranny.

By now it should be clear that utilitarianism is an example of a *teleological* ethics.[8] A teleological ethics defines the morally 'just' as what promotes the 'good'. Under 'good' is to be understood matters of intrinsic value, which, therefore, could be the *goal* of human conduct. Utilitarianism is *consequentialist*, too: it judges actions according to their consequences. Utilitarianism more specifically judges actions by their 'utility', defined as the ability of maximizing the happiness of everyone concerned. It is, therefore, eudemonistic (aimed at happiness) and maximalist (as much happiness as possible for as many people as possible). The equation which teleological theories make between the 'good' and the 'just' are rejected by *deontological* theories,[9] of which Kant is the great spokesperson (Chapter 6). There the 'just' constitutes an absolute pre-condition for the 'good', for the goals people may set for themselves. One's duty to act justly is unconditional: one *should* not lie, irrespective of the consequences.

7.2.5 Mill's Liberalism

To find a tendency towards moral tyranny with Mill, even if it is unintentional, is astonishing, since Mill was one of the primary advocates of political liberalism. The government should protect the freedom of citizens, while keeping itself aloof from their ways of life. Likewise, Mill in his *On Liberty* discusses the question of the extent to which state and society may coerce an individual. He applies this question specifically to a democratic society. At first sight one would tend to say that, once tyranny has given way to democracy, the exercise of state coercion is no longer problematic: in a democracy the people themselves, after all, impose coercive measures, and this is unproblematic. Mill, however, contends in direct contrast to this, that in a democracy, too, unfair coercion can be imposed by majorities violating the freedom of minorities or individuals. This can occur, at the level of politics, in the establishment of laws and the accompanying formal sanctions. It can likewise occur at the level of society, when individuals are placed under social pressure to conform to what the majority finds appropriate. According to Mill, the social coercion of informal sanctions is often worse than coercion via laws. In order to protect freedom, formal and informal coercive measures must be kept within limits. The limits must, furthermore, be independent of the accidental preferences of the majority: even a friendly majority still constitutes a potential danger. Mill then proposes a principle that indicates the limits within which people may meddle with other people's affairs. This is the *harm principle* (see Section 7.1.2).

We will not attempt here to answer the question how Mill could reconcile utilitarianism with political liberalism. Perhaps this can be explained psychologically. Viewed objectively, it remains somewhat of a mystery.

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[8] Greek: *telos* = purpose.

[9] Greek: *deon* = what one should do.

7.2.6 Commentary

Until the 1960s, utilitarianism was prevalent in political ethics in the English-speaking world. Afterwards it was increasingly subjected to criticism, specifically by theories that reject its maximalism (we must strive for the greatest happiness) and its universalism (we must strive toward the happiness of all). In so far as these theories posit individual freedom and the right to assume special obligations (for example in relation to friends and family members), they maintain that such freedom and obligations may not be sacrificed to enforced social responsibility. In this respect the Mill of *On Liberty* was often played off against the Mill of *Utilitarianism*. However, frequently the liberal-utilitarian thought-complex as a whole was exposed. The 'communitarians', in opposition to the utilitarian combination of individualism and universalism, advocate the traditional values of specific communities from which people derive their identities (see Section 9.1.2). Here, we discuss only *one* essential question which everyone must pose to himself, who, on the one hand, incorporates social interests into his ethical theory, but, on the other hand, recognises its differential division of costs and benefits among those concerned. This question concerns the problematic relation between *collective* goods and *individual* rights. Directed at utilitarianism, it reads as follows: can an aggregate principle (where only the sum total of all enjoyments is relevant)[10] do justice to the distributive principle of justice (where the division among the relevant persons is relevant)?

This question is, for example, contained in the criticism that the liberal John Rawls in *A Theory of Justice* (1971) levels against utilitarianism.[11] Rawls states that utilitarianism extends the principle of rational choice (where one individual divides the means available to him in an optimal way among the goals established by him) to society as a whole: how can the scarce means for the satisfaction of needs be distributed in such a way that the total level of satisfaction is maximised? Consequently, many persons are fused into one person. In the same way in which one individual, in order to maximise his happiness, can decide to suffer pain today in the dentist's chair so as not to have to suffer much worse toothache tomorrow, the utilitarian legislature can decide to sacrifice the happiness of a few for the sake of the many, so that the total happiness can be maximised. According to Rawls, utilitarianism, therefore, does not take seriously the distinction between persons, or to express it in a Kantian way: some are merely treated as means at the service of others.[12]

What this can lead to was spelt out by the English philosopher John Harris in his book *Violence and Responsibility* (1980) with the notion of a *survival lottery*. In a hospital Y and Z are close to death; Y can be saved only if he gets a new heart, and

[10] An aggregate is the addition or collection of units.

[11] For more about Rawls, see Sections 10.5 and 10.6.

[12] In this criticism of Rawls one recognises the critique formulated in Section 6.3.2 regarding utilitarianism from the point of view of a deontological ethics.

Z, if he obtains new lungs. But no donor is available. Y and Z, however, point to B, a healthy person who has a good heart and excellent lungs. Should B be killed, and his heart transplanted into Y and his lungs into Z, only *one* person dies and not two. What are we waiting for? Someone who thinks in a utilitarian way has no choice but to support Y and Z.[13] The fact that most people recoil at this conclusion demonstrates that they do not think in a utilitarian way, or at least not in a purely utilitarian way. They are not simply after the maximization of happiness, where the chosen means in principle justify the ends. This goal may be strived for only if a number of other moral pre-conditions are complied with, such as that no one may merely be used as means for the advancement of the happiness of others. This leads to a rejection of the *survival lottery*, as well as of other practices, such as slavery.

This criticism was worked out in a different way by the English philosopher Bernard Williams, in his *A Critique of Utilitarianism* (1973). He puts on the stage a certain Jim who somewhere in a South American town encounters a group of twenty Indians standing against a wall. A white person is on the point of having them shot dead. However, in honour of the unexpected visitor, he makes him an offer: if Jim shoots one Indian of his choice, the other nineteen will be spared. If Jim were a utilitarian, he would accept the offer. Many would, however, hesitate and say: if I do not accept, twenty Indians would indeed be killed, but this is not my responsibility, but that of the guy over there. I am not prepared to stain my hands in the way he wants. A utilitarian, who takes account only of the total happiness that is produced by human action, would not understand this at all. Such a non-consequential motive (where the expected consequences are not decisive, but the way in which responsibilities are allocated) would to him appear irrational.

The events sketched by Harris and Williams can be viewed from the perspective of both the 'perpetrators' and the 'victims'. The first occupy centre stage in the expositions of Harris and Williams: here the utilitarian is a kind of director of total happiness. The second would come to the fore when B would ask himself if he has the duty to give his heart and lungs to X and Y, or when one of the twenty Indians steps forward and offers to be shot by Jim. In the first case, a non-utilitarianist would say: people do not have the *right* to treat others as mere means for the sake of total happiness. In the second case: people do not have the *duty* to allow themselves to be treated as mere means for the sake of total happiness. Of course, we would all admire B and the one Indian, but we do so because they would be doing more than can be morally expected of them. Whoever requires that others must regard themselves as mere producers of the happiness of everyone, does not take seriously the distinction between persons (to quote Rawls). He denies them the right to give shape to their own lives in their own way (within limits which are determined by the equal rights of others to an autonomous life). Within the limits of justice everyone may do what he wants, even live a life which is regarded as 'immoral' by others.

[13] In order to prevent people from diddling each other out of bodyparts in an *ad hoc* fashion, Harris consequently develops an ingenious lottery which determines whose turn it is to give up bodyparts, the *survival lottery*.

It will not have escaped the reader that the criticism of utilitarianism as just formulated is partly inspired by the other work of Mill that we briefly discussed, *On Liberty*. This work is a landmark in the history of liberalism. Liberalism can be summarised in line with the last phrase of the previous section: within the limits drawn by justice, everyone may do what he wants, even living a life that others regard as 'immoral'. Mill's version of this reads as follows: everyone may do as he wants, provided he does not *harm* others.

7.3 Hegel

7.3.1 Introduction

George Friedrich Wilhelm Hegel (1770–1831) was, as a young student of theology at the Tübinger Stift, friends with the poet Hölderlin and the somewhat younger Schelling, who would later be a famous philosopher himself, and, to a greater or lesser extent, Hegel's rival. This group was taken with the ideas of the Enlightenment, and hoped that the spirit of ancient Greece would revive in the Christian Germany, but now at a higher level. Hegel had a somewhat difficult career. In 1806, when Napoleon was doing battle at Jena, Hegel was an unpaid university lecturer there. He could only just leave the city in time, taking with him the manuscript of his first major work: the *Phänomenologie des Geistes* (Phenomenology of Spirit), which was published soon thereafter. Despite the misery of war, Hegel was very impressed with Napoleon who brought a modern order to Germany. In a letter he said that he saw at Jena the *Weltseele zu Pferde* (the World Soul on horseback). Alexander the Great, Caesar and Napoleon are for Hegel individuals whose passions are used by Reason to achieve a great objective in history. They themselves were probably pursuing other goals, but Reason often works behind the backs of individuals. After the battle at Jena, Hegel worked as editor of a newspaper, and as rector of a gymnasium. During this period he wrote his *Wissenschaft der Logik* (The Science of Logic) and acquired great fame as a philosopher. He got married in 1811 and had two sons. In 1816 he became professor of philosophy in Heidelberg and in 1818 in Berlin where he died in 1831, presumably because of cholera. In Berlin Hegel became very influential because of the way in which he connected his philosophical system, history of philosophy and state theory into a coherent whole. After his death an ideological struggle commenced between right-Hegelians, who emphasised the importance of state and religion, and left-Hegelians, who increasingly converted their religious criticism into societal criticism. From the circle of the latter came Feuerbach and Marx (Section 7.4).

7.3.2 Hegel and Liberalism

Hegel was convinced that the principle of the Modern Age was the realisation of freedom. In Hegel's view, the insight that freedom and rationality in essence are

the same, and that the generality of the moral law could merge with the absolute value of individual subjectivity, already found expression in an abstract manner in the Kantian concept of autonomy. Hegel wanted to establish, in modern concepts, a synthesis of the fundamental principles of the Greek and German-Christian spirit. Yet, he also had an eye for the negative dimensions of this process of the 'coming to itself of reason'. Negativity had to be understood as a necessary moment in the development of freedom as a whole: without resistance and conflict the subjective side of freedom cannot realise itself. In order to understand the positivity of the negative, particular events had to be viewed from the broad perspective of the whole process. Hegel built his entire life on a philosophical system which claimed to understand reality in its totality as the development of a reasonable principle. In 1817 he published his *Enzyklopädie der philosophischen Wissenschaften* (Encyclopedia of the Philosophical Sciences), in which he set out the whole of his philosophy as a dialectical, conceptually constructed system. The legal philosophy of Hegel was, as philosophy of 'the objective spirit', already present in concise form in the *Enzyklopädie*.

In 1818 the liberal Minister of Education, Altenstein, managed to procure Hegel for the Berlin University. In the busy period of 1819 Hegel's *Grundlinien der Philosophie des Rechts* (Elements of the Philosophy of Right) was finalised. In the 18th century, Prussia became one of the most powerful German principalities with a strongly centralised form of government. This kingdom relied, on the one hand, on a large army, consisting of countrymen, for the most part serfs of great landowners (the *Junkers*), but in political respect it was managed by a class of officials who directly served the king. In the Napoleonic period those in favour of reform gained great influence. This led to the abolition of serfdom and servitude, as well as the establishment of the University. After the Congress of Vienna the kingdom found itself in more restorative waters, but officials favouring reform continued to exercise an influence within government. Measured against Prussian standards Hegel clearly belonged to the reformers, and he was certainly not called to Berlin as philosopher of the restoration. In so far as the political principles of liberalism implied the freedom and emancipation of the individual, Hegel continued to endorse and defend these. He was, however, a strong opponent of the idea that society consists simply of individuals. Only by being part of an ethical community which through its traditions, laws and institutions is the expression and representation of a supra-individual will, can the freedom of individuals acquire an ethical substance, according to Hegel.

Radical-liberal ideas were widespread among German students, and were frequently connected with strong feelings of nationalism. With his criticism of liberal individualism and by emphasising that the state is not founded on emotion but on reason, Hegel for the most part had a moderating influence on his students. After the murder of the conservative writer Kotzebue by a student (Karl Ludwig Sand) in 1819, and on the instigation of Metternich, the German government imposed strict limitations on freedom at universities, including censorship. A Berlin professor of law was, for instance, dismissed because he had expressed himself in positive terms about the student in a letter of condolence to his mother. Hegel persistently defended these measures. In the Preface to the *Elements* he strongly criticised the 'coarseness'

of the views of his former colleague, Fries, from Jena. The latter was dismissed in 1819 because he had a few years earlier, at the politically turbulent 'Wartburg festival' of nationalist student associations, enthusiastically argued in favour of the voice of the people, and for something which we might in today's terms call 'grassroots democracy'. However, in the *Burschenschaften* (student fraternities) radical-liberal thinking went hand in hand with fanatical nationalism and anti-Semitism. Hegel's criticism appears rather to have been aimed at this fanaticism than at the liberal notions that they invoked. Hegel incidentally, in turn, experienced a great deal of criticism because of his attitude. He reacted to this by requesting the government to keep the criticism of his person out of the public sphere through censorship – he was after all a state official.

Because of this it does not come as a surprise that the generation after Hegel viewed his political philosophy as a legitimation of the Prussian state. This point of view, in turn, had the consequence that some regarded the *Elements of the Philosophy of Right* as a conservative turn in which Hegel would have abandoned his more liberal principles. Hegel, indeed, very expressly states that philosophy has to develop the concept of the state in conformity with how it *really* is. The state is, in his view, in itself a reasonable reality; it is the highest manifestation of the 'objective spirit'. The concept of the state can, therefore, not lie *outside* of it as a normative ideal which philosophy presents from an external perspective. If philosophy adopts such an attitude towards the state, it does not rise above the viewpoint of subjective views, feelings and an invocation of morality without substantial content. Philosophy is concerned with reality because – as Hegel dares to express it in his Preface – 'What is rational is real; and what is real is rational.' It would, however, be incorrect to conclude that Hegel in the *Elements* posits the concept of the *Prussian* state. According to Hegel, such a limitation to *one* specific state would be philosophically impossible.

7.3.3 Legal Philosophy as Philosophy of the Spirit

Hegel regretted the fact that he did not have the time to publish his legal philosophy completely in the dialectical form of the philosophical idea. He was of the view that the philosophical structure and argumentation would be clear enough to those who knew his *Logic*. In this he was somewhat mistaken, because there are major interpretive problems, specifically in so far as its completeness is concerned, as well as the way in which this publication has to be fitted into the whole system. Therefore, something more must be said about the content of the philosophical system as a whole in order to understand the purport of Hegel's legal philosophy.

Hegel's system consists broadly of three parts: logic, natural philosophy and the philosophy of the spirit. In the *logic*, Hegel clarifies the meaning of the fundamental (philosophical) concepts, as these evolve systematically out of each other and in opposition to each other (thus dialectically). In the *natural philosophy*, he shows that nature must ultimately be understood as something external, which is not capable

of bringing forth the inner unity and reality of the spirit. We consequently cannot understand the spirit on the basis of concepts which are derived from natural science. (In legal philosophy this insight leads to criticism of all forms of natural-law philosophy which try to derive law from a supposed natural state of man, or from his natural desires.)

The philosophy of the *spirit* consists of the philosophy of the subjective, the objective, and the absolute spirit. The *absolute spirit* is religion as well as art and philosophy, because they bring to expression and conceptualise the essence of religion. Legal philosophy belongs to the domain of the objective spirit. The *objective spirit* can be described as the objective reality to which the spirit relates itself as 'its own world'; and which, therefore, does not, like nature, belong to a 'different order of being' than the spirit. Considered concretely, it is the human world, to which man as bodily spirit belongs with other people, and which, moreover, exists only because of people and their history. One can similarly describe the 'objective spirit' with the modern terminology of 'cultural and social environment', provided that one understands these as the objective reality within which man lives and by which he is defined, and not as an object of his consciousness; the subjective 'world of experience' would, with Hegel, belong to the sphere of the *subjective spirit*.

In Hegel's view, the philosophy of the objective spirit, to which the state belongs, has, like the philosophy of the subjective spirit, to do with the spirit in its transient manner of existence. The subjective spirit can be described as the spirit in so far as it comes to 'awakening' and development in the actions and consciousness of individual subjects. The subjective spirit is the domain of philosophical anthropology and psychology. In human individuals the spirit can realise itself only in a limited way. In their way of living individuals are still subject to natural necessities and contingencies of time and place. During his lifetime, each individual evolves increasingly into a unique subject, but he can do this only by sharing in communal life. One cannot say either that each individual has to exist as such. To be sure, the multitude of particular individuals belong essentially to the spirit, but none of these individuals are, as specimen of the human species, an essential manifestation of the spirit. The individual as such, disconnected from his concrete relations with others and society, is, for Hegel, merely numerically to be distinguished from others. Such individuality hardly has any meaning for the spirit. Something similar applies to the objective spirit. The manifestations of the objective spirit are families, social institutions, states. According to Hegel, these particular manifestations are ways of being of the spirit, which are to be understood from the idea of the spirit itself and in this sense have a necessary existence. They exist as law and as freedom of the spirit. However, here, too, the spirit exists as a variety of families, states, and the like. Every family and every state does have a right of existence, but their individuality – as simply one of the many – is nonetheless external to the concept of their being, that is, of none of them can it be said that they necessarily have to be there. Philosophy attempts to understand what is necessary, and cannot, therefore, have the essence of a particular, historically existing state as its object, nor can it legitimise or found an individual state. States affirm themselves in reality,

in their conduct towards their citizens, and in the battles and agreements with each other. The 'last judgment' regarding a specific state does not accrue to philosophy, but completes itself in history: the *Weltgeschichte* (world history) is the *Weltgericht* (world court).

7.3.4 Law, Morality and Ethics

Legal philosophy with Hegel consists of three parts:

A. abstract law
B. morality
C. ethics.

The originality and complexity of this division can be explained by means of a comparison with the *Metaphysik der Sitten* (Metaphysics of Morals) of Immanuel Kant, which covers the same field, and which is split into two parts, that is, legal doctrine, on the one hand, and the doctrine of virtue or morality, on the other (Sections 6.3 and 6.4). In legal doctrine, Kant attempts to derive from purely reasonable principles the rules and duties which should apply to all human interaction. The central idea is that individuals, for the sake of their own freedom, have the right to limit each other's freedom if this occurs in terms of a general law which equally applies to everyone. A reasonable natural law is, in Kant's view, based on this principle, which for the sake of its own efficiency requires state authority. Both the existence of the state and of the constitution ought to be based solely and exclusively on the principles of law, which can regulate only the external relations between human individuals. The state and legislation should, therefore, not concern themselves with the *forum internum* or the inner motivations of individuals. The human character, individual life plans, and the convictions of people belong to their private domain. The norms and values which apply here are a matter of conscience and inner inspiration. Legislation which would prescribe moral values or which would attempt to make society good and happy in keeping with moral standards, would degenerate into despotism.

In this Kantian concept of *morality*, according to Hegel, the ideas of subjectivity and of the moral autonomy of the individual come to the fore, which were acknowledged for the first time in Christianity, but only came to full realisation in modern society. Alongside this principle Kant posited the law as an external sphere for individuals, the sphere of *legality* within which they only figure as abstract individuals, and within which only the formal generality of law counts. According to Hegel, concrete individuals do not, however, only as abstract persons form part of a family, a state, and the other institutions of society. The legal relationships of Kant's concept of law are not relationships of concrete subjects with each other, but relations concerning property and mutual relations with regard to things, as they are laid down in agreements (treaties). Hegel is, therefore, a harsh critic of Kant in so far as the latter specifically views marriage, family relations, and the state, simply as institutions of

'abstract' law. Every view which bases marriage or the state on a contract robs these communities of their specific ethical content, and reduces the fullness of the concrete and living human community within which individuals can, for the first time, realise a true subjectivity, to relations of abstract legal persons. For these reasons Hegel makes the philosophy of the human community into an autonomous part of legal philosophy, under the title of *ethics*.

Legal philosophy as a whole is thus supplemented with a socio-political philosophy which ties in with the classical philosophical tradition of Plato, and especially Aristotle. The modern distinction between legality and morality is recognised by Hegel as a fundamental principle. In abstract law the essence of the legal concept as well as the generality of law, which belong to everyone without distinction, are of central importance. As a person every man has a right to *property*, to distinguish him as owner from the things that can be possessed. Slavery denies the universal character of this distinction between person and object, and is, therefore, in conflict with the idea of law itself. However, the abstract general principles of law cannot solve the problems which arise from the fact that people appropriate for themselves specific things, and thus exclude others and end up in legal conflicts with them. In the absence of a positive legal order the abstract legal principles necessarily turn into injustice, because the 'individual will', at the end of the day, posits itself as the law. The extent to which an individual will can be a good will, is the problem of morality. In morality the core of the problem is the subjectivity and singularity of individual persons, as well as the relation between the particularity of the subject, on the one hand, and the generality of 'the law' and 'the good', on the other. However, only in a concrete, ethical community can an objective legal order come into existence, in which a higher authority counts as law. In themselves legality and morality are, therefore, simply abstract principles, on which *real* law cannot be founded. Hegel continues by reproaching the individualistic liberalism of his contemporaries who do not understand that these principles attain reality only in a living community. The philosophy of 'ethics' must consequently return to modern society the idea of a true community, which it risks losing under liberalism.

In so far as abstract law can be described as 'the law of the person' and morality as 'the law of subjectivity', ethics can be described as 'the law of the community'. Law should not be understood here only in the sense of legality, but also as 'the good of the community'. Ethical communities are, for Hegel, a goal in themselves, and have as such a right in relation to the individual. Here the subject is for the first time confronted with substantial rights and duties, and only here can the individual arrive at a concrete, worthy, life plan. Ethics is 'in accordance with the necessity of the concept' to be distinguished on three levels of communal life, that is, the family, (civil) society, and the state.

7.3.5 State and Society

Only in the Modern Age have state and society, each for itself and in distinction from each other, acquired a separate mode of existence. The distinction between

the political and the socio-economical is, according to Hegel, the work of the Idea, the self-realisation of the concept. The emancipation of civil society, with its individualism, its emphasis on self-interest and economic profit, its oppositions between public and private, and between legality and morality, appears as the phase of dissension. Civil society would more likely be a Hobbesian war of all against all, should it be isolated from ethics as a whole. In such social relations, abstract right would not be able to establish a legal community. It is, therefore, a misconception to regard society simply as a contract between individuals for a better co-ordination of their interests. Because society factually nonetheless functions as a unity, Hegel attempts to show that the narrow idea of the rule of law – as it is conceived of in liberal political philosophy and economy as *civil society* and *bürgerliche Gesellschaft* – is not the true successor to the classical state. Modern society, ruled by economic interests, can continue to exist and be understood as something good and legal only because it is supported by a greater inner unity. The diversity within civil society must be understood as an element of freedom within a modern state form, which brings about a *unity* of the will by means of (higher) principles of essential freedom. Without the state, civil society would, according to Hegel, simply amount to the *loss* of ethics.

Hegel regards civil society as the layer of society into which family relations have been dissolved, and in which individuals interact with each other, everyone for himself, as an autonomous entity of needs and aspirations. It is, on the one hand, the system of individual entrepreneurship; on the other, it is also of universal dependence, because individuals, in order to realise their own goals, must take account of the goals of others, and in this way are dependent on each other's support. This calculation-based interdependence of interests, familiar to us especially in the economic sphere, forms its own institutions. It furthermore, thanks to law and morality, brings about a more or less *external* unity of association, as it is specifically expressed in theoretical, liberal views of the state. Hegel calls this the 'external state', or the 'state of need and of the understanding' (a state that is rationally instrumental to human needs); the latter can at most be an *abstract* state, thought completely from the perspective of the principles of legality. If this were, however, the only principle that holds the state together, the latter would long ago have dissolved. According to Hegel, the strength of the modern state lies precisely in the fact that it gives complete scope to the principle of individuality, and nonetheless does not destroy itself due to self-interest. The actual state exists on the basis of an 'inner' tie between the citizen and the state, which because of this unites them into an inner unity. The constitutional monarchy is, for Hegel, the modern form of government in which this highly developed unity of generality and individuality is realised.

7.3.6 Constitutional Law

According to Hegel, the modern state must reasonably – 'in accordance with the necessity of the concept' – be segmented into three distinct powers, that is,

legislative power, governmental power, and monarchical (or sovereign) power. Hegel, with this move, distinguishes himself from the classical liberal theory of the *trias politica* or separation of powers. In accordance with the latter doctrine, the state consists of three powers: the legislative power or sovereignty, the executive power or government, and the judicial power. Hegel retains the legislative and executive powers, but he replaces the judicial power with monarchical power, which he also identifies as sovereign power. The general views of the legislature can never in the final instance establish what has to happen here and now. The judiciary and the administration of justice are, according to Hegel, not political state organs, but institutions of civil society. Monarchical power takes the position of the conclusion, the final act of will, but simultaneously is as such the embodiment of the unity and autonomy of the state as a whole. For this reason Hegel allocates sovereignty to the monarchical power.

Another important distinction in relation to the *trias politica* doctrine is that Hegel does not emphasise the *separation* of powers, but the organic unity of the three powers. The notion of separation of powers is, in his view, inspired by the citizens' fear of state power, whereas the principle of inner differentiation expresses the rationality of the constitution. None of the powers, therefore, operates, according to Hegel, independently of the others. And it is precisely in monarchical power that the three powers combine themselves into a unity. The monarchical power does not only have the particular constitutional function of final decision-making organ, but also guarantees that the decision-making procedure completes itself as a unity. In this sense it, moreover, encompasses the legislative and executive powers and combines the three powers in itself.

As distinctive power, monarchical power is, by Hegel, thought of in terms of a constitutional monarchy, where the monarch in fact just 'puts the dot on the i' or the signature underneath political decisions, after all segments of society have had the chance of extensively deliberating and bringing to the fore their interests and diverse points of view. In monarchical power all the emphasis lies on the *individual* character of the last moment of choice, of the will which prevails as such, the moment of decision, which, according to Hegel, must at the same time exist as an individual act of will. General decision-making procedures cannot deprive man of this highest moment of personal and responsible choice. In the state, however, only *one* person can bring the final moment to actuality. The French revolution ended in a reign of terror because it propagated too abstract a concept of autonomy, in which every individual will in principle had to count as sovereign will. In that case, the autonomy of the one is the destruction of that of the other.

In the chapter on civil society Hegel advances that civil society necessarily – 'in accordance with the nature of the concept' – is segmented into three estates, that is, (1) of farm labourers and landowners, (2) of industry, and (3) of those who serve the general interest, that is, the bureaucracy, magistracy, and the like. Individuals belong, partly by accident (inherited estate and inherited nobility, for example) and partly by own choice, to one of those estates, and develop only because of this a certain particularity. Citizens should, according to Hegel, by virtue of this *particularity* be involved in state activities; thus not like the monarch by virtue of their person

as such, but by virtue of more specific capacities, their 'role in society'. Unlike citizens, who according to their particular place and capacity make a contribution to the state community, the head of state simply exercises the functions of the human being as such, and in that way represents everyone. One actually does not have to have any specific qualities for such a function. This is one of the reasons why Hegel wants to withdraw the choice of head of state from competitive conflict, and has no problems with a hereditary monarchy.

The third estate, also referred to by Hegel as the 'middle estate' and 'general estate', is characterised by its intellectual education and cultural formation (*Bildung*). In order to dedicate themselves to 'general matters' the members of this estate must, by means of their wealth or a state income, be relieved of the need for direct work. The administration of justice, police (which specifically includes welfare) and corporations are controlled by officials who are appointed partly by some form of election and partly by directions of the government. In this way the middle class 'mediates' between the particular interests of civil society and its organisations, on the one hand, and the government, on the other. The government itself is likewise constituted by officials. In principle everyone who has the qualities required is eligible for such functions. In this respect, too, one can speak of a 'general' class. From the many suitable candidates the monarchical power makes its appointments, by virtue of its own insight and pleasure. In this way, according to Hegel, the citizens in the bureaucracy are directly, and yet through the monarch, involved in government. This prevents the formation of a more or less independent aristocracy in state matters.

Because the third estate already has a share in government, it does not have to be represented more specifically at the level of the legislative power. Hegel was not in favour of democratic elections because this would again scatter the people into separate individuals. The traditional division of constitutions into monarchy, aristocracy and democracy, Hegel (like Kant) incidentally finds to be of little philosophical importance. The division simply says something about the number of individuals who are directly involved in decision-making, but nothing about the internal structure of the state, and about the way in which citizens are involved with the community as a whole and with the general interest. It is, therefore, not appropriate for characterising the constitution of states. Just like Aristotle, Hegel emphasises that monarchical, aristocratic and democratic aspects must in different places within the state organisation be given their due. The third estate, or the bureaucracy, represents as it were the democratic principle of equality within Hegel's view of the state. In the second estate, a kind of apolitical idea of democratic freedom is moreover at work, which we currently associate with individual property rights, free entrepreneurship, pluralism, advancing one's own interests, and freedom of contract and of association. These kinds of democratic freedoms must, according to Hegel, be embedded, supported and structured by the interests of family and state, and cannot be privatised or constitute the basic principles of a free, sovereign state. Posited in an absolute sense and disconnected from communal life, they would undermine every form of ethical life. Hegel is not a real opponent of the idea of the sovereignty of

the people, although the people without a head of state and without government are simply an amorphous mass of atoms and thus no real nation.

Monarchical power and government, according to Hegel, constitute part of the legislative power, but the first two estates are also represented. Hegel again sees the representatives of the estates as fulfilling a mediating role, now between the government and the 'people dissolved into individuals', to which the third estate can, therefore, not belong. The representation of the estates is divided into two houses. The one is for the 'estate whose ethicality is natural, and whose basis is family life and the possession of land'; the members sit there because of their birth. The second house is for the 'private sector', as the class of industry, consisting of artisans, manufacturers and traders, is called. Their representation must be based on the corporative organisations. Hegel stands here at the cradle of the corporatist view of the state.

Hegel does not want a right to vote for individuals, because the organic structure, which civil society has acquired precisely as a kind of foreshadowing of the state, would get lost, and individuals would in their abstract capacity come to stand in opposition to the state. The corporations are already partially controlled by the government, and now the representatives of the corporations must with the government via deliberation and decision-making about the most general matters (legislation in its most general sense) bring the people and government to a unity. The bureaucracy already does this in its own way, and so too the monarch, as representative of the personality principle. By virtue of the bond between the first house and the monarch (in accordance with natural principle and birth) and of the second house with the government, Hegel again ascribes a mediating function to the separation of the two houses.

7.3.7 Commentary

The range of thought of Hegel's political philosophy has had an enormous influence on the political thinking of the 19th and 20th centuries, especially, but not only, via Marx. Because Hegel has often been defended against Marx's criticism, and passes as authority in the refutation of both socialism and liberalism, Hegelianism has acquired somewhat conservative connotations. Some advocates of liberalism, such as Karl Popper (Section 8.4), view Hegel as a forerunner of fascism. Fascism, however, strives toward an identity of state and society, whereas Hegel favours the distinction between them in modern society as an essential condition for preventing state absolutism and totalitarianism, and for preventing individualism from turning into terror.

Hegel's criticism of the liberal idea that the ideal state is the result of a contract between free individuals is still highly current. According to the critics, it is inconceivable that such a contract can create a legal order which has adequate force and authority. Hegel rejects the Hobbesian legal order as a form of law which is based merely on power and fear of the violence of the state of nature or of the power

of the monarch. This submission of subjective freedom to unrestricted monarchical caprice can turn into the highest injustice. In this sense Hegel agrees with Locke's criticism of Hobbes. However, in Hegel's view, Locke's contract theory is philosophically untenable as well. By regarding the relation between monarch and the people as a contractual relation, no state or political unity can be constituted: the sovereignty of the will of the state is instead suspended. Hegel was nonetheless too quick to regard all social-contract theorists as the same. He was consequently not fully alive to Rousseau's distinction between 'the will of all' and 'the general will', and with this the entirely unique character of Rousseau's idea of the *Contrat Social*. Nonetheless, Hegel's criticism of the abstract and individualistic character of Rousseau's concept of will, remains important. For Hegel, as was pointed out, individuality has meaning only in so far as it actualises itself as subjective spirit in an objective form. The unique and subjective character of the individual can and must not be negated. The interests of the individual can, therefore, not so straightforwardly be turned into the single will of 'the' community. The absolutist character of Rousseau's direct democracy, which does not leave any space for personal views, shows that a truly general will cannot be established in the form of an ahistorical and totally unfettered contract. Not the idea of a community, but only the concrete historical community in which the individual participates from the time of his birth, can guarantee the rights of the individual. Philosophy must not desire to construct a state, but, in the concrete state, attempt to extract its legal principles.

Because of his criticism of diverse forms of individualistic liberalism, Hegel remains an important source of inspiration for communitarians (Section 9.1.2). It is, moreover, clear that he is one of the most radical defenders of freedom, understood as *essential freedom*. Essential freedom does not apply only to the private domain, but is a form of *Ethics*, a shared and public form of life; the only way in which individual happiness, family and social welfare as well as the political autonomy of a people combine into an actual possibility. Hegel realised that philosophers who conceive the realisation of freedom, likewise are children of their times. However, the idea that essential freedom had to be realised in a strongly corporatist manner at the political level was even in Hegel's time not self-evident. Corporatism[14] is itself only a specific point of view on what is the best way in politics to deal with social conflicts. It, for example, denies the importance of the class struggle at the level of the constitution, attempts to reconcile class oppositions via socio-political structures, and, therefore, opposes the formation of parties which would lead to political polarisation.

One can have objections against corporatism from different points of view, none of which are imperative philosophically either. Socialism and liberalism appear to be political ideologies which can be defended quite well, and which in democratic pluralism can, alongside corporatism, serve as the basis of party formation. The resistance against the corporatist elaboration of politics from a more rigorous

[14]Corporative state: the state is not organised on the basis of individual participation, but on the basis of corporations, bodies which represent functional groups, such as employers and employees.

liberal view on freedom, is, however, something different from the tendency of economic liberalism to reduce the state to a system of mere negative freedom rights. Against this reduction (of economic liberalism), Hegel's criticism of the *Not- und Verstandesstaat* (state of need and of the understanding) indeed provides meticulous and decisive arguments. A state like this does not give any due to the principles on which it is itself based, and that can be elucidated only through a more specific understanding of what the political order entails. The same argument can be levelled against Marx's criticism of Hegel's view of the state.

According to Marx, the development of modern society would in principle have made the political state superfluous, but the capitalist class would still have a need for the state as a veiled system of suppression. Hegel would, however, have revived the state as a political-ethical community. Hegel's attempts to reconcile and mediate the oppositions within the state in complex consultative structures, is interpreted by Marx as a contradiction in Hegel's view of the state. Thus, Marxism and economic liberalism coincide, albeit from completely different backgrounds, in the marginalisation of the state. In both approaches politics is essentially viewed as a mere form of socio-economic policy making, where the question of state interference or state abstinence becomes the central theme, and liberalism is increasingly identified with capitalism. In so far as the fundamental political significance of the distinction between state and society is not recognised, socialism and economic liberalism both have few political-philosophical arguments with which to defend the state against national-socialist ideas which would (similarly) want state and society to coincide.

Hegel's notion of the distinction between civil society and the political state makes it very clear that the state cannot be reduced to a means to realise specific social ends. The state must establish the ends. But how can it do this, how can a political will be established there, and whence does the state acquire the right to enforce its will? In Hegel's political philosophy this question is of central importance, and he makes it clear that an answer to these questions cannot be of a merely abstract-intellectual nature. A state is rooted in the history, as well as the specific traditions and societal structures, of a concrete human community. Hegel's notion of the ethical character of the community (*Sittlichkeit*) can make a substantial contribution in preventing democracy from becoming a kind of self-evident and merely abstract decision-making procedure, and from being reduced to a mere means for the regulation of socio-economic issues without further concerning itself with its own legitimacy.

To conclude, a brief remark about Hegel's idea of the 'general class'. The views which Hegel developed concerning officialdom, bureaucracy and government were undoubtedly modern for his time. The fact that modern parliaments and political parties are to a great degree bureaucratised fits in well with Hegel's description. The strong emphasis he places on the duty of the official to make the general interest his specific concern, and his idea that in the attitude of officials the corporate spirit and patriotism of the citizen is alive par excellence, today perhaps appears somewhat old-fashioned and moralising. One would nonetheless even today formally expect of both the official and the people's representative an attitude towards

the state which extends beyond that of the ordinary citizen. We do not expect from every citizen that he should continuously concern himself with matters of the public interest, or that he should participate in organs which are burdened with their formulation. A political elite in some or other way comes into existence, which concerns itself professionally with politics, and it is certainly of great importance that this group does not merely operate on the basis of self-interest and private opinions. Marx's criticism of the bureaucratic spirit is nonetheless itself still very modern. In almost cynical terminology he characterises the 'spiritualism' of the bureaucracy as a coarse materialism which continuously attempts to strengthen and increase its own power in society by legitimating itself through the general interest. Hegel did not take account of the fact that the emancipation of the bureaucracy into a kind of fourth power could impede the development of the democratic principle. The dualism of parliament and government, of which Hegel would certainly have been no supporter, constitutes an attempt to resist this danger.

7.4 Marx

7.4.1 Introduction

One of the most influential philosophers of the 19th century was Karl Marx (1818–1883), writer of, among other things, the *Manifest der Kommunistischen Partei* (Manifesto of the Communist Party, 1848, with Friedrich Engels) and *Das Kapital* (Capital, 1867). Marx attempted to bring about a unity between the two ideals of the Enlightenment: scientific progress and moral emancipation. His ideas not only had an influence on philosophy, but also a worldwide effect on political practice. This in accordance with Marx's statement, which likewise adorns his grave: 'Philosophers have only *interpreted* the world in various ways; the point, however, is to *change* it.' The French revolution of 1789, according to Marx, brought about too little change. Specifically, the working class was still suppressed. He, therefore, proposed a new, communist revolution which had to establish a truly human society.

Because of his radical political views, Marx did not have any prospect of an academic career at one of the German universities, where the local rulers applied strict censorship. To obtain a position as a purely interpreting philosopher he, therefore, did not stand much of a chance. Because of the reactions of the authorities against his revolutionary writings and political action, Marx thought it necessary to emigrate from Prussia to France and subsequently to London. He spent a great part of his life in the enormous library of the British Museum, working on his communist philosophy. As an intellectual coming from the middle class, he himself had little contact with the working class. Raddatz ends his Marx biography with the following account of a discussion Marx once had:

> 'I cannot imagine you in an equalising time, because your preferences and habits are after all entirely aristocratic' – 'I can't either', Marx answered. 'These times will come, but we must then be gone.' (Raddatz 1975, p. 56; our translation)

Although Marx aimed at intensifying the self-consciousness of workers, his writings were understandable only to fellow intellectuals. He had a preference for fierce polemics and was extremely intolerant towards dissidents. However, Marx was indeed a man of action in the sense that he led the International Labour Organisation, and showed up where revolutions were taking place. Shortly before the French February revolution of 1848 against the constitutional monarchy he published the *Manifesto of the Communist Party* with the ominous opening sentence: 'A spectre is haunting Europe – the spectre of communism' and the famous final sentence: 'Working Men of All Countries, Unite!' When this revolution took place Marx immediately returned to Paris, where the socialist provisional government made him an honorary citizen of France. As soon as the revolution spread to Germany in March, Marx settled in Cologne to propagate communism from there through publications and party formation. This was in vain. With the elections in France in April 1848 the socialist government was again voted out by the majority of voters from the rural areas. In the German principalities and in Austria democratic concessions were extracted, but the monarchs retained their authority over the army and the instruments of government. In 1849 the Prussian army restored the old order and Marx disappointedly withdrew to the British Library.

Marx thus actively pursued political change, but during his lifetime he did not experience any successful communist revolution. The revolutions of 1848 rather led to a gradual political evolution in a liberal direction. As workers' revolt they were, however, a failure. Marx spoke of a victory of the bourgeoisie over the proletariat. Socialist criticism of the one-sided nature of liberal freedom rights nonetheless eventually gained influence. In the last decades of the 19th century a start was made with social legislation in several European countries, which increasingly limited market freedom.

Only in 1917 did the Russian revolution bring about a radical upheaval in the name of Marx. In European countries, such as the Netherlands, general voting rights were then quickly introduced to prevent more radical changes. The question, however, is whether Marx would have been satisfied with the results of the communist revolution. The new Russian government carried out a simplified 'vulgar Marxism', and the 'real existing socialism' in Eastern Europe, Asia and South America made itself guilty of merciless abuse of authority which left little of the human dignity which Marx expected from communism.

7.4.2 Historical Materialism

The change which Marx's philosophy aspired towards was the emancipation of the fourth class, the workers, or the *proletariat*. When this last exploited group had obtained its rightful position, he expected that a harmonious, dignified society would come into being, governed by true freedom, equality and fraternity. In this respect Marx further elaborated on the emancipatory ideals of the Enlightenment. He, however, vehemently opposed the liberal interpretation of these ideals by most

Enlightenment philosophers, which after the French revolution were positivised in the *Declaration of the Rights of Man and of the Citizen*. He saw individual freedom rights as an expression of the self-interest of the third class, or bourgeoisie. He argued that the liberal freedom of the market led to the right of the economically strongest and to the exploitation of the economically weak groups in society, more specifically the working class. The Revolution, thus, did not fulfil its promise of equality and fraternity in the spirit of Rousseau. It simply abolished the privileges of the nobility in favour of the new wealthy, the merchant citizens.

During Marx's lifetime the working class increased greatly in number because of an economical-cultural upheaval which had taken place around the same period as the political French revolution. It is metaphorically referred to as the *industrial revolution*. In England this started in the second half of the 18th century, continental Europe followed somewhat later. Improved techniques made large-scale mechanical production possible, which stimulated the shift in working activity from rural areas to the city. Thanks to the steam engine, manufacturers were no longer dependent on natural energy resources; they established factory cities where great concentrations of industrial workers gathered, having moved away from the rural areas. Improved communication through steam trains, steam boats and the telegraph created a global market for the new mass products (through which all local cultures are swept away, Marx already warned). Liberal market freedom meant that labourers were paid in keeping with the law of supply and demand. In the case of an oversupply of labour, the wage was often too low to live on. Socialists challenged this as capitalist exploitation. They invoked Locke's statement that *labour* is the source of all value (Section 4.2). The profit which the capitalist bourgeoisie made was thus actually based on theft. In the same spirit, Marx appointed himself as champion of the exploited workers. Labour, he stated, is characteristic of man. Animals simply preserve themselves; a man does more: he makes the surrounding world his own by systematically cultivating it and in this way giving a human character to the non-human. As a consequence man finds his true destiny in work. This goal is, however, frustrated when the capitalist appropriates the products of the worker and sells them at a profit to third parties.

Unlike the idealistic 'utopian socialists' before him, Marx wanted to formulate a strictly *scientific* form of socialism. He, therefore, connected the emancipatory aspect of the Enlightenment with its other side, its scientific outlook. Marx specifically made a connection with economic science, developed in parallel with the industrial revolution by the Scottish philosopher Adam Smith in *The Wealth of Nations* of 1776. In this book Smith described the process of the division of labour and of specialisation, as well as the free market which, according to the author, would through a harmonious interaction of all individual interests lead to optimal general welfare. In line with the historical tendency of the 19th century, Marx added an evolutionary perspective to this, which he derived from Hegel: humanity has developed itself through a process of thousands of years, towards ever higher forms of civilization. Marx called his combination of historical and economic explanation *historical materialism*: the history of humanity is, in his view, determined by

material, and more specifically, economic factors.[15] Marx thus turned Hegel's philosophy on its head:

> In direct contrast to German philosophy which descends from heaven to earth, here it is a matter of ascending from earth to heaven. . .. It is not consciousness that determines life, but life that determines consciousness (Marx and Engels 1998, p. 42).

Whereas Hegel as philosophical 'idealist' saw the spiritual life in religion, art, and especially philosophy as the driving force behind human development, Marx contended that the material circumstances of life are decisive, also for human thinking. As the Marxist Bertold Brecht would later say: 'Food comes first, then morals.' The primary goals of man are to acquire sufficient food, drink, and shelter. When this is provided for, man in addition persistently acquires novel needs, and searches for the means with which to satisfy them.

However, in circumstances of scarcity, as Hobbes had already pointed out, this leads to a struggle for life. Marx sees society as fundamentally conflictual. In the initial phase of humanity (up to this point Marx agrees with Rousseau) man still lived in a natural community where everyone shared everything with the members of his group: a primitive kind of communism. Social development has, however, spoiled this state of nature: in a more complex society, people specialise in diverse branches of the labour process. One becomes a baker, the other a butcher, the third, a shopkeeper. This, moreover, means that they must acquire products which they do not produce themselves, through exchange with others. As a neutral means of exchange, money is introduced, which one can hoard more easily than natural products. In this way inequality comes about: henceforth groups of possessors and the powerless oppose each other in a bitter battle.

Alluding to Hegel's dialectic, Marx likewise speaks of *dialectic materialism*: pushed on by oppositions, humanity develops into increasingly higher levels of life. But, again, in Marxism the point is not a clash of ideas, but between groups with contrasting economic interests, such as the nobility, capitalists, and workers. Such groups do have conflicting ideas, but these are derived from their economic position. Capitalists consequently regard the doctrine of the free market with its individual rights as holy, whereas labourers highly estimate solidarity. The position someone adopts in such a conflict of interests, similarly determines which legal rules he would favour. In 19th-century England the landowning nobility

[15] As already said in Chapter 5, *materialism* in philosophy has a different meaning than in everyday communication. A philosophical materialist is not someone who always seeks material advantage, but an adherent of a specific ontology: he is of the view that reality is of a material nature. This in opposition to philosophical *idealists*, such as Plato and Thomas Aquinas, according to whom the essence of reality is of a spiritual nature. Materialists deny that the human mind is an immaterial substance. Consequently, according to Hobbes and the Enlightenment philosopher De La Mettrie, man, including his consciousness, consists of small material parts, atoms. In Marx's version of materialism, wholly lifeless matter is not central, but matter which undergoes active human cultivation. According to Marx, human thinking is not the expression of an independent spiritual sphere, but a reflection of the human mode of economic production.

advocated legal prohibitions on the importation of corn to protect their own corn production. The capitalist entrepreneurs were in favour of the free market because with the importation of cheap grain from abroad their labourers could survive on lower wages. Marx calls such subjective convictions, inspired by self-interest, but nonetheless experienced as objectively just: *ideology*. According to him the material *substructure* constitutes the basis of the spiritual *superstructure*: law, religion, art, philosophy are all by-products of economic development (although they, according to Marx, subsequently in their turn exercise an influence on the economy). Because the ruling classes hold political power, they can frequently through indoctrination impose on the powerless an ideology which justifies their position in universal moral and legal terms. 'The class which has the means of material production at its disposal, consequently also controls the means of mental production' (Marx and Engels 1998, p. 67). This is precisely what the third class attempted to do with its liberal morality. The suppressed class will nonetheless likewise develop its counter-ideology.

Marx's materialistic view thus subscribes to Montesquieu's thesis that human life is determined by material circumstances (Section 5.2). Montesquieu pointed, for example, to the influence of climate on the legal system: in warm countries, such as in Northern Africa, women become barren quickly, so that polygamy is common there; people there are more warm-blooded and hot-headed, too, so that a strong authoritarian government has to keep them under control; this in contradistinction to the phlegmatic English who, thanks to their cool climate and spirit, can allow themselves a democracy. Marx argues against this observation that it does not explain how dramatic social changes can occur while the climate stays the same. His version of materialism grants man a more active role vis-à-vis nature: the way in which people manufacture things out of nature is decisive. The different phases of human history are characterised by specific means of production, which are derived from what Marx calls *forces of production*: the existing natural raw materials, the available equipment and labour techniques. Such ways of production at the same time have repercussions for social relations, or for *relationships of production*. In this way the agrarian manner of production of the Middle Ages coincides with an opposition between the owners of land, the nobility, and agricultural labourers, often serfs who were bound to the land. When the forces of production change, for example, because of the invention of new equipment, such as the steam engine, social relations often lag behind. Hence, agriculture after the Middle Ages increasingly became of lesser importance because of the rise of industrial production and trade. The large landowners, the traditional nobility, nonetheless still hung on for a long time to their privileges and political power, although the middle class had in the meantime acquired economic power. Such a tension between forces of production and relations of production then leads to a crisis, such as the French revolution, where the third estate (or rather class) claimed the political and legal rights which coincided with their power over the means of production.

7.4.3 Class Struggle

Marx describes the history of humanity in terms of *class struggles*: all historical periods are characterised by a tension between a class of possessors of the forces of production and a class of persons who work in their service.[16] These social conflicts lead to more highly developed forms of society, but subsequently, on this higher level, similar conflicts appear with new groups being exploited. Hence a successive development of social systems occurs, that is, slavery (Greek and Roman period), feudal estate society (Middle Ages) and capitalism (in Marx's time). In the course of time, workers become more independent, in accordance with the greater skill which the more complex production techniques require of them. A 19th-century labourer is nonetheless, according to Marx, not freer than a Greek slave. He, after all, out of necessity has to hand over his labour and thus himself to the capitalist factory owner, who on his part contributes no labour, but only capital.

In the capitalist system of production of the 19th century the struggle is thus between the working class and the class of the owners of capital. Unlike the classical liberal economists, Marx did not see the merger between capital and labour in a factory as a functional, harmonious division of labour, but as a fundamental conflict. In the liberal view of economics, all economic players act on the basis of rational self-interest; but as if steered by an invisible hand, without anyone consciously striving for it, the mechanism of the free market ensures that the total result of all individual acts benefits everyone's interests. In order to make a profit, someone takes the initiative to invest his money in a new factory. In so doing, he at the same time creates new work opportunities, so that workers benefit from this as well. Under the strain of competition with other entrepreneurs who similarly strive to make a profit, the manufacturer attempts to improve his product and at the same time sell it as cheaply as possible. Hence his offer coincides exactly with social demand. Thanks to their wage, workers can also profit from the production. The pursuit of profit of the entrepreneur, in other words, creates economic growth, which would not have existed without the market, and at the same time brings gains for people around him.

However, Marx interpreted the relation between capital and labour in terms of conflicting interests: due to their superior strength, capitalist entrepreneurs can make their employees work for a hunger wage, under miserable working conditions, without time off, and without allowing them any share in the profit or any say in the operational management. And, to be sure, in the first decades of the Industrial Revolution, factory workers were captured in a merciless economic regime. The minimal state of that period protected only the rights to property and freedom, from which the working class derived very little profit.

[16] Marx describes the social stratification not in the traditional terminology of 'estates', but in terms of 'classes'. *Classes* are defined on the basis of their economic position. The traditional *estates*, in the Middle Ages, for example, the clergy, the nobility and the citizenry, are defined in accordance with their social function and status. Because money, in the period of capitalism, becomes decisive, the opposition between estates is explicitly defined as class oppositions.

Marx argued that workers had the fullest right to the product of their labour, whereas the capitalist can make no claim to it at all. He based this argument on a radicalisation of Locke's statement that property originally comes into being as a result of the cultivation by someone of a part of nature (Section 4.2): labour is, according to him, the only activity which creates value. Capital, on the other hand, Marx wrote in *Capital*, 'is dead labour which, vampire-like, lives only by sucking living labour' (Marx 1992, p. 342). The capitalist violates the natural relation between producer and product: he appropriates the product for himself, and sells it at a profit to a third party. This profit consists of the difference between the labour wage and the return on the product. The producing worker should actually have the right to the profit as he has, after all, performed the labour. The capitalist, however, pays him only what the working force is worth on the labour market: the total wage which is required to keep him alive. Because capitalists control the means of production, they can force workers to work the whole day for such a low wage – the English factory law of 1850 allowed a 6-day working week with an average working day of 10 hours, but the legal maximum was often exceeded by shortening the breaks; working life often already started in childhood. The factory owner puts what Marx calls *surplus value* in his own pocket without doing anything further to deserve it.

Following Rousseau and Hegel, Marx sees such social inequality not only as an injustice, but also as a fundamental violation of the workers' humanity. Capitalism brings about four forms of *alienation*. In the first place, the producer is not the owner of his own products; his product, which should be a reflection of himself, is foreign to him. More generally, products which are actually only meant to provide for the necessities of life, now lead a life of their own. Means, such as money and other consumer goods, become an aim in themselves – Marx speaks of 'commodity fetishism'. Instead of a truly human life, people now only pursue wealth and ever more goods. Secondly, man is alienated from the labour process: as a result of work segmentation he is now only a cog in the whole production process, so that, unlike the artisan in the Middle Ages, he cannot even envisage the end-product on which he is working. As a supplement of the machine, he now performs only stultifying, monotonous labour. Because each worker concerns himself only with a separate part of the production process, he, thirdly, becomes alienated from his co-workers. Finally, he is alienated from himself, because he cannot fully develop his abilities.

Marx expected that the class struggle between the proletariat and the capitalists would be the final one in human history. The proletariat would be victorious, after which the true humanity of original communism would return. This victory he describes as a historically necessary outcome of the dialectical course of history: capitalism, because of its inner contradictions, already contains the germs of its own destruction. Because of market competition, capitalists cannot mutually reach solidarity, although trade in the industrial period has become so complex that it requires central organisation. The complex production process requires the close cooperation of all participants, and thus appeals to the notion of communal property. In the contest between entrepreneurs the weakest drop out, so that capital is amassed by an increasingly smaller group. To keep ahead of their competitors, the entrepreneurs introduce new machines – because, if they should employ more workers, the price

of labour would rise and surplus value would decrease. However, only the largest businesses can permit themselves to do this, and consume the smaller ones. The small middle class becomes part of the proletariat. The growing working class, concentrated in factory cities, are, on the contrary, dependent on solidarity because they have to work under increasingly miserable conditions. Marx mentions here a newspaper report on 'death through overworking'. Because of mechanisation a part of the working force becomes superfluous, so that the supply of labour increases and wages drop. Pressured in this way, workers organise themselves in trade unions and political parties. They then form a well-disciplined majority. The proletarian majority thus actually already has the power in hand, if it was not for the liberal ideology of capitalism which prevents the workers from recognising this power as something which legitimately belongs to them. When the working class becomes conscious of this material and spiritual oppression under the influence of Marx's critical writings, they will through a revolution establish the classless society:

> Centralisation of the means of production and socialisation of labour at last reach a point at which they become incompatible with their capitalist integument. This integument is burst asunder. The knell of capitalist private property sounds. The expropriators are expropriated (Marx 1992, p. 929).

Things must, all the same, still at first be set right via a 'dictatorship of the proletariat', through progressive taxation, expropriation, abolition of the right of succession, as well as a state monopoly on the financing of capital, means of communication and transport, and education. But then humanity has arrived at its true destination.

Thanks to modern techniques of production, in the future communist society there would be no scarcity, and, after the disappearance of alienation, its members would no longer develop any insatiable artificial needs. Since all capitalistic division of labour has been suspended, everybody can develop himself to the full:

> For as soon as the division of labour comes into being, each man has a particular, exclusive sphere of activity, which is forced upon him and from which he cannot escape. He is a hunter, a fisherman, a shepherd, or a critical critic, and must remain so if he does not want to lose his means of livelihood; whereas in communist society, where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticise after dinner, just as I have a mind, without ever becoming hunter, fisherman, shepherd or critic (Marx and Engels 1998, p. 53).

Especially the possibility of rearing cattle at night appears enticing. One can now live together in harmony, property is in future communal. Everyone contributes according to ability and receives according to need. After the restoration of the original human solidarity, at the same time the necessity for a state and legal system to control social conflicts disappears. They retain only a co-ordinating function. The critical self-reflection of Marx's practical philosophy is, therefore, no longer necessary: 'philosophy's sublation by its realisation'.

7.4.4 Marx, Liberal Human Rights and the State

Marx explicitly turned against the liberal freedom rights of the French *Declaration of the Rights of Man and of the Citizen* because they brought about unjust material inequality and disruptive social conflicts. In *Zur Judenfrage* (On the Jewish Question, 1843) he argued that the so-called 'human rights' are actually not the rights of humanity as a whole at all, but exclusively favour the members of bourgeois society. They after all guarantee only equality in the formal-legal sense, and not material equality. What use does one have for equal freedom rights and the right to property when one has nothing to eat? From a political point of view, Marx did detect progress in comparison with feudal society: the political participation rights of the *Declaration* provided the prospect of joint state management by all people. However, in his view such political changes were not revolutionary enough: unaccompanied by *social* improvements, they did not do justice to the social nature of man.

Political rights had a disappointingly abstract character because the liberal view of the state consciously dissociates politics from social life. The liberal freedom rights after all imply a far-reaching separation between the public and the private domains: the state must withdraw so that everyone can establish for himself what to believe and how to use his property. According to Marx, however, extensive individual freedom has inhumane consequences. Modern society is no longer held together by the traditional bonds of feudalism (which did not as yet imply the separation between the private and public spheres). Since these traditional braking mechanisms on egoism have disappeared, only separate individuals remain who see their fellow human beings as mere means for their own goals. This results in an economic war of all against all, in which the powerful capitalist bourgeois can exploit the weaker working class. Equality in the field of politics thus does not entail socio-economic equality. In short, the political emancipation which the *Declaration* proclaims is inadequate for general human emancipation. (Vice versa, the liberal separation between the private and the public domains leads to alienation in politics: the state frees itself from everyday life, and appears to the individual as a strange external force.)

This one-sided individualistic character, Marx maintains, shows itself in the diverse 'human rights' of the *Declaration*. *Freedom of religion*, for example, implies that individuals in their private lives remain imprisoned by the chains of religion. Moreover, since everyone locks himself up in his own convictions, it leads to the spiritual separation of people. The *Declaration* furthermore defines *freedom* as: one may do everything which does not harm others. At stake is thus the selfish freedom of the isolated individual, who is separated from all others by a legal barrier. As a consequence one learns to see one's fellow man primarily as a bothersome limitation on one's own freedom. The *property right* is in the French Constitution of 1793 described as a right to enjoy one's possessions as one wishes. Here, too, we find a notion of freedom as individual arbitrariness, completely separate from the interests of others.

All these freedom rights in fact merely reflect the need of the greedy bourgeoisie for unrestricted economic trade, Marx argues. Nevertheless, many unjustifiably claim that they are *universal* human rights. Once bourgeois society has come into existence, one tends to liken the asocial bourgeois individual to the 'natural' man as he really is when one thinks away the state. This is, for example, shown in Locke's representation of man in the 'state of nature', with his individual 'natural rights'. But, in fact, only bourgeois individuals are portrayed, who are alienated from their true social nature as a consequence of capitalism.

Marx wants to counter this alienation by extending communal political authority to social life, specifically by abolishing private property. The bourgeois separation between the individual private sphere and the political sphere is then neutralised. According to Marx, this can be accomplished only by overthrowing the state, which is, after all, established to protect individual civil rights.

With these ideas Marx opposes Hegel's idealisation of the state, which he directly attacks in his *Zur Kritik der Hegelschen Rechtsphilosophie* (A Contribution to the Critique of Hegel's Philosophy of Right, 1843). Hegel saw civil society as the sphere where people can satisfy their conflicting material needs. In his view the state lifts civil society to a higher plane where all conflicting interests are reconciled with each other in a rational manner. The suppressive Prussian state was, in Marx's view, the model for Hegel's ideal impartial state: the desired impartiality is, Hegel argues, achieved via three state institutions which set themselves apart from the particular interests that control social life. In the first place, the king, who acquires his position on the basis of a right to succession and not because of any particular social bond. For this reason, according to Hegel, he stands above the parties. Secondly, the state bureaucracy, which forms an unattached 'general class' whose viewpoint coincides with the general interest. In the third place, the state assembly which, through its representation of the estates, provides a guarantee of neutrality: the higher chamber consists of aristocrats who are so wealthy that they do not represent any specific political interest; the lower chamber is constituted by guilds, which represent the tradesmen on the basis of an objectified professional interest. Consequently the state can guide the members of civil society via legislation to a higher level of general humanity.

Marx accuses Hegel of idealising the actual state by analysing it uncritically from the perspective of a metaphysical ideal of the state. Because of this, Hegel regards the real as rational, concealing all actual irrationalities of the state. Viewed incisively, Hegel's metaphysics is itself an ideological reflection of historical interests instead of objective truth: it legitimises the irrational Prussian state by representing it as reasonable. In reality the bureaucracy is not at all impartial, but an instrument of the powerful. The king represents the power of a single individual. The nobility and the guilds are interest groups with outmoded privileges dating back to the Middle Ages. Marx concluded that the representation of estates should be replaced by a democratic government, based on a general right to vote. A truly democratic government represents the whole of society, so that the liberal separation between the political life of the state and the individual lives of the citizens in society is dissolved. Then a true community would flourish: a Rousseau-like

harmonious society where all oppositions between community and individual have disappeared and everything is jointly owned. Because the general interest and particular interests coincide, the liberal defensive or negative freedom rights, including the right to property, are completely superfluous. The state plays no further role as a *political* institution, and restricts itself to the requisite central coordination of the labour process.

7.4.5 Marx and Freedom

Marx thus emphasises the last two of the three Enlightenment principles of freedom, equality and fraternity. He attaches a non-liberal meaning to the principle of freedom. This can be illustrated with reference to the formula of the freedom principle from Chapter 1:

X is free from Y to Z

Unlike the liberals, Marx does not regard the autonomous individual as the subject (X) of freedom, but man as member of a community. In so far as restrictions (Y) are concerned, he does not only think of positive restrictions like the classical liberals of his time do: the presence of something that stands in the way of achieving goal Z. The *absence* of means to achieve goal Z, such as the lack of food, income, education, and health, similarly qualify as restrictions of freedom. The later social-democratic liberalism adopted this criticism, contending that the state must accommodate such needs by means of social fundamental rights. Marx further argues that someone can suffer from *internal* restrictions, too, such as a 'false consciousness': as a consequence of ideological indoctrination by the powerful a person can be alienated from his true interests. The preferences which he himself expresses can thus hinder his free development as man. Classical liberals would, on the other hand, simply accept someone's actual preferences, at least in the political discussion. At stake is thus the freedom of each person to establish his own goals (Z). Marx, however, defines Z from the point of view of the true destiny of man, which does not have to coincide with someone's factual wishes. Only Marx's philosophy after all unveils what true humanity entails.

Marx, in short, is concerned with *essential freedom* rather than liberal freedom of choice. You are not free when you do what you want, but when you choose what befits your true nature. This essential nature is not autonomous individuality, as metaphysical liberals like Locke think, but fraternal, communal, creative labour with the other members of one's community. The image of the free, autonomous and rational individual is a metaphysical projection; in reality, in his thoughts and actions each individual is influenced by the membership of his socio-economic class (for as long as the class struggle continues) or of human society as a whole (in the future classless society).

The liberal state with its classical freedom rights is regarded as one of the obstacles in the achievement of Z. For this reason the proletariat, as actual bearer of Z,

must overthrow the state. Via a temporary dictatorship of the proletariat it must guide the rest of the population to Z: they must force them to be free. After that a spontaneous, total, and true freedom prevails once and for all.

7.4.6 Marx's Normative Views

7.4.6.1 Introduction

Marx had the pretence of designing a historical-scientific theory which (in keeping with the 19th-century ideal of value-free science) does not contain any normative elements. The proletariat, according to Marx, does not have morality on its side, but history. Morality is through and through a historically determined phenomenon which must itself be accounted for. He regards value judgments more specifically as ideological justifications of class interests. In the preceding elaboration of Marx's thinking we have, nonetheless, used many normatively laden terms. Marx does so regularly as well, but, because it does not fit in with his scientific ideal, he does not reflect on the various possible ways of providing normative criticism. In what follows we, therefore, want to systematise Marx's normative views. In the first place, capitalism is inefficient: because of specific relations of production not all forces of production can be fully developed. This we do not discuss any further. In the second place, capitalism is alienating. This is discussed in Section 7.4.6.2. In the third place, capitalism is unjust, in the sense that the distribution of money and goods does not occur here as it should. This will be discussed in Section 7.4.6.3.

7.4.6.2 Alienation

In one specific respect people are, in Marx's view, not alienated: even under capitalism they are still human beings. What does Marx's anthropology entail? He develops its constituents persistently within the framework of the man/animal distinction (which distinction he invariably exaggerates). Elements of this anthropology are the following: human beings possess self-consciousness; they do not act instinctively but intentionally; their language does not consist only of signals but also of abstract concepts; they make use of tools and produce these, too; on diverse levels they cooperate with each other.

In which respects are human beings then alienated from themselves in capitalism? Marx is more explicit in his criticism than in the depiction of his alternative: he more frequently explains what alienation entails than what the absence of alienation would consist of. Because he does not analyse the latter, he similarly does not concern himself with the question whether an unalienated humanity can exist in reality. In the rest of this section we will look, first, at what this state of alienation consists of (a), next, at what an unalienated humanity would entail (b), and, finally, we will ask whether this unalienated humanity can be realised (c).

(a) People are, in general, alienated from *themselves* and from *each other*, when their *needs* and *possibilities* become fixated, appear in isolation from each other, lead an independent existence, in short: are not integrated into the person as a whole, or if the needs and possibilities of one person bring him into conflict with those of other persons.

People are alienated from their *needs* when a lopsided need (for example, of material consumption or an obsessive need for money or status) dominates their whole life. What makes such a need lopsided? From the examples Marx gives we can reconstruct a variety of possibilities. The first possibility: a certain desire cannot be explained from the point of view of a fundamental need; for example, all kinds of artificial needs which arise from the fact that people want to imitate each other (fashion), or fetishism. Second possibility: certain needs cannot be satisfied and be subjected to the law of diminishing returns;[17] for example, the need for even more money, or for drugs, or the need for security. Third possibility: the pursuit of the satisfaction of a need frustrates itself; the need to make an impression results precisely in a rotten impression (macho conduct). Fourth possibility: there are needs which can be satisfied only if those of others are frustrated, such as the need for positional goods (goods which people want because, and for as long as, others do not have them – a very expensive and famous painting, for example). One can think here, too, of the need of capitalists to produce surplus value, which, according to Marx, must have the consequence that not only workers are alienated from their individual and social needs, but the capitalists themselves, too: their desire for even more money is, par excellence, an example of a lopsided need.

People are alienated from their *possibilities* when none, or only a small number, of their productive and creative abilities can be developed. This can again assume different forms. In the first place, no possibilities are developed: for example, work at a conveyor belt. In the second place: only certain possibilities are developed, as a result of which they hypertrophy (grow excessively), at the cost of others which atrophy; Marx gives the example of a painter who under capitalism only paints (compare, too, the fairy tale in which one woman has a large thumb, the other a large tongue, and the third, a large under-lip); division of labour is the general denominator of this. One can, thirdly, think here of the *cognitive alienation* from which people suffer in capitalism. They can harbour the illusion of what Marx characterises as 'fetishism': they wrongly think that commodities, money and capital have characteristics in themselves as a result of which they can be exchanged for other goods: that money entails real wealth, that capital has a kind of inherent capacity of producing more capital. (Fetishism conceals underlying social processes, some of an exploitative nature.) People can, in the fourth place, be *ideologically seized* by morality, religion, political ideas or philosophical theories. Reasoning in this vein, morality may suggest a unity of interests, and proclaim its values of freedom,

[17] The law of diminishing returns provides that output falls when a certain point is reached in relation to input. With some needs this point of equilibrium is, in other words, never reached, at least not in the eyes of the beholder.

equality and fraternity. These values are said to be embodied in laws and political institutions. However, nothing of this is to be encountered in actual social life, or in the sphere of labour, production and consumption. What morality preaches is, therefore, nothing more than an illusion. How can it then exist and have authority? Because actual social life requires illusions. Because the ideal is not realised in everyday life, one 'realises' it 'in the idea'. Because paradise is unattainable, people console themselves with the illusion of it. A danger hides in this contentment. The illusion replaces reality; it functions as an outlet for the energy of discontent. Ideologies, on the one hand, mirror existing alienation, and, on the other hand, thus consolidate themselves. This manifests itself in what may be called *moral alienation*, a form of ideological alienation: workers *and* capitalists think that workers receive, to be sure, a low, yet just, wage for the labour performed, because they are all of the view that the means of production are the rightful property of the capitalists, and as such deserve respect. (When one unmasks this moral alienation by ideology critique, this part of Marx's normative theory turns into a weapon in the class struggle.)

In his criticism of alienation Marx does not explicitly draw a distinction between 'objective' and 'subjective' alienation. In the case of objective alienation the feeling of meaninglessness is lacking. In the case of subjective alienation one specifically has a feeling of meaninglessness. This distinction is nonetheless of great importance for the question of how one can pass from capitalism to communism. One cannot say, as Marx indeed does, that the objective need for the removal of alienation as such will actually bring it about. It is very well possible that the existence of objective alienation without subjective alienation can make people *hold on* to capitalism. Someone who realises this can then force people toward communism, against their will but for their own good: here we have the germ of the vanguard function of the communist party, which harmed socialism so greatly. Only alienation which is experienced as such can motivate people towards social change. This experience must then be based on an anthropological theory which is accepted as true, which expounds the characteristics of an unalienated human existence, as the basis of a normative theory which criticises alienated forms of human existence. In short: Marx must, whether or not he wants to admit this, develop a normative theory which makes an essential contribution to the overthrow of capitalism and the establishment of communism.

(b) We can trace what, according to Marx, *unalienated human existence* entails when we look at the optimal relationship between human needs and human possibilities. Needs are at first physical needs. In their satisfaction, these give rise to new needs, both in 'depth' and in 'breadth': the fulfilled need for bread can raise the need for steak, and the fulfilled need for food can raise the need for a good book, etc. Human needs develop in depth and in breadth under the influence of the cognitive, creative and productive capacities of human beings (which are, after all, primarily aimed at making possible the satisfaction of needs). The dynamism of needs, however, at the same time takes possession of the evolution of the creative capacities themselves. Because of this, labour can, apart from an extrinsic good, become an

intrinsic good as well:[18] one can develop a need for labour as such. And this, too, can occur in breadth and in depth: one wants to refine one's creative activities, and start new activities, etc.[19] Here Marx's ideal of unalienated human existence comes to the fore: 'the development of the rich individuality which is as all-sided in its production as in its consumption' (Marx 1993, p. 325). Incidentally, according to many texts, the emphasis lies rather on the productive than on the consumptive side: Marx has a marked preference for active needs (such as the need for the creation of art, and the writing of a book) above passive needs (such as the need for the enjoyment of art, and the reading of a book). And, we can add to this: everyone's all-round and sophisticated production, concurrent with the active satisfaction of his needs, is not only good for himself, but for all other people, too, for humanity as a whole.

(c) Against Marx's optimism about the possibility of *realising* unalienated human existence, we want to raise a few points of criticism.

In the first place, Marx's excessive emphasis on the importance of production and active consumption is 'parasitical' of passive forms of consumption. The writing of books becomes senseless when there are no readers.

In the second place: creative people can indeed be appreciated by humanity as a whole (for example, Vincent van Gogh). However, the fact that creativity constitutes the highest value in communism can be frustrating for many individuals who lack these capacities. Moreover, there can be no successful philosophers when they have not been preceded by a great number of minor or even failed philosophers. That creativity is good for humanity as a whole, therefore, does not automatically imply that it is good for everyone individually: the frustration of failed individuals is a necessary condition for the full development of human talents. This can give rise to feelings of jealousy, and it cannot be expected that these will be absent under communism.

It can, thirdly, not be expected that people will achieve optimal self-fulfilment, for example as lawyers or philosophers, when they do not relinquish many other ways of improving themselves: growth 'in depth' cannot go together with growth 'in breadth' – however much Marx may think so ('to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticise after dinner'). Whoever wants to develop certain abilities, must allow them to hypertrophy. People may, in a certain sense, become obsessed with them, and one must allow others to atrophy: compromises are, therefore, necessary – something to which Marx is blind in his depiction of the ideal communist society.

This hypertrophying has, fourthly, as consequence that very creative people are often very displeased with their achievements – however much others praise them.

[18] Extrinsic good: something that serves only as a means; intrinsic good: something that constitutes a goal in itself.

[19] Marx's view on the place of work within communism is incidentally not that clear: on the one hand, he states that work is the primary need in life; on the other hand, work there becomes superfluous, and man realises himself beyond labour.

This is the counterpart of the earlier mentioned jealousy: those who are unproductive are jealous of the productive ones, those who can do so much; and those who are productive, of those who are unproductive, who need to do so little. Specifically those people who are supposed to be very happy, are in this sense very unhappy, both in their creative periods, and when with old age their creativity decreases. In this respect, too, Marx's ideal society is unrealistic.

In the fifth place: to this can be added that Marx actually has no eye for the finite nature of life: for the fact that people will die, that their abilities in the course of their lives decrease, that they can become sick or have accidents, etc.

Marx's ideal society is, all in all, based on psychological premises which are the outcome of *wishful thinking*.

7.4.6.3 Is Capitalism Unjust?

Concerning the question whether Marx has a normative theory of justice there are diverse views, and all these views can invoke Marx's texts in support.

According to some he has no theory of justice at all, in fidelity with his Hegelian conviction that nice ideals do not determine history: 'Communism is for us not a *state of affairs* which is to be established, an *ideal* to which reality [will] have to adjust itself. We call communism the *real* movement which abolishes the present state of things.' (Marx and Engels 1998, p. 57) A kind of objective necessity determines the course of history, and the only issue is to grasp it scientifically.

In the view of others, Marx has no theory of justice in the sense that there would be absolutely valid norms of justice. Yet, he does have such a theory in the sense that a certain conception of justice suits a specific mode of production. Justice is consequently something completely relative: if it is in general true that the ideas of the ruling class are the prevailing ideas, then a particular idea of justice prevails under capitalism, something like: property must be respected and contracts must be honoured; or perhaps: everyone contributes according to free choice and receives according to contribution. In socialism a second theory of justice would then be present, that is: everyone contributes according to capability and receives according to contribution; and in communism again a third: everyone contributes according to capability and receives according to need. See the following scheme.

		Receive according to	
		need	contribution
Contribute according to	capability	communism	socialism
	choice	utopianism	capitalism

(This, for example, means: in communism everyone receives according to need, and everyone contributes according to ability. In socialism everyone receives what he has contributed. The latter is for Marx a transitional situation, where goading still is required. In the ideal communist society everyone receives according to need.) Can these three ways of understanding Marx's theory of justice be brought into synthesis? Perhaps this is possible, without having to do too much violence to the texts.

According to still others, Marx is of the view that 'justice' in all its variants is something which suits the societal types which precede communism. As soon as people in communism can realise their full potential together with others, a conception of justice is no longer required; justice is transcended.

Let us enquire into the notion that 'Everyone contributes according to choice and receives according to contribution', which we just characterised as 'capitalist': in capitalism the capitalist is rewarded for the fact that he unites workers and makes their cooperation productive, whereas the workers are rewarded for the work they do. This is not, however, simply a neutral formulation of an objective fact. On the contrary, the class perspective of the *capitalist* finds expression here, the capitalist having an interest that the workers share this view. In opposition to this stands the viewpoint of the *working class*: the workers do not obtain what they deserve; they are denied their 'surplus value'; they are exploited. How must one view this dispute?

One can, in the first place, say that this is not a rational discussion, but simply a reflection of the real conflicts of interest of the participants. It, therefore, does not make any sense to approach the views of the capitalists and of the workers rationally, to discuss their respective pro's and con's; one must simply choose sides for the one or the other class, and in this way promote its interests; if one's party wins, new ideas will prevail. This is an application of the Hegelian model.

The social struggle is, nonetheless, waged under the banner of conceptions of justice. What does the fact that capitalists and workers believe that their interpretation of 'Everyone contributes according to choice and receives according to contribution' is the correct one, contribute to their cause? One could say: in so far as the parties have more confidence in the justice of their cause, they will actually mobilise more for the sake of it, and the chances become greater that their party will be victorious. Belief in a conception of justice is consequently likened to a force of nature, which strengthens already-existing natural forces. Some of Marx's texts support this interpretation. There is nonetheless something strange about it, as will appear from the subsequent discussion.

A Marxist is likely to say: 'It is in the interest of workers to believe that capitalism is unjust, because that belief strengthens their anti-capitalist struggle.' Is this a reason for workers to believe that capitalism is unjust? This is not the case, as an analogous example may show. It appears that men in general do better in society than women because they believe that their success depends on themselves, and that their failures are a result of their social environment, whereas women often believe the contrary: they attribute their failures to themselves and their successes to others. The 'male' belief makes one active: one mobilises against one's surroundings and

this increases one's social chances, whereas the 'female' belief makes one passive: one wants to toady to one's surroundings and this decreases one's social chances. Nonetheless, the fact that it is in one's interest to believe that success is attributed to oneself and failure to the environment, is not a reason to actually believe it. One must 'really' believe in it. Now, this may be a weak example, because it concerns purely psychological attitudes, which can be manipulated. (Stuttering is caused by the fear that you will stutter again; when you believe that you will not do it again, you will not; all kinds of training are based on the internalising of such beliefs.) A better example would be the following: an advocate who believes in the innocence of his client will defend him more vigorously; nonetheless, the insight that belief in the innocence of a client makes one more combative, is no reason to believe in this innocence; for that purpose, objective indications are required which are not easy to manipulate psychologically. Continuing the argument in the same vein, we could say that Marx not only had the conviction that belief in the justice of the proletarian struggle advances their cause, but certainly believed in its justice too.

This we indeed find in his *Kritik des Gothaer Programms* (Critique of the Gotha Programme). Here Marx discusses the principle that 'Everyone contributes according to ability and receives according to contribution', which in the socialist transitional society constitutes the guiding principle. He has rational objections against it, making it unsuitable as guiding principle for the communist society: not everyone has an equal ability to perform productive labour, which means that some would benefit and others be prejudiced in terms of this principle. In other words, the equal right to share according to an equal standard during this transitional phase, still amounts to inequality. Here Marx actually develops a non-relative conception of justice: if everyone had the same abilities, the above guiding principle would be defensible. This conception of justice at the same time gives Marx the possibility of criticising capitalism, specifically the principle that 'everyone contributes according to choice, and receives according to contribution'. This is actually unjust in a two-fold sense: in the first place, it assumes that everyone has the same possibilities of choice, whereas this is already contradicted by the unequal division of abilities; secondly, capitalism does not apply its guiding principle in a consistent manner, because the surplus value that capitalists appropriate for themselves, does not entail a reward for their contribution, but is based purely on the exploitation of workers.

In other words, Marx's relativistic conceptions of justice are based on a non-relativistic conception of justice.

Conceptions of justice are nonetheless of secondary importance in Marx's normative theory. A person who thinks in terms of justice, according to Marx, regards people as beings with different preferences and ideals. As a consequence, in a world of scarcity they enter into conflict with each other. A system of rights and duties must, therefore, be introduced, guaranteed by the state. Someone who thinks in terms of rights and duties regards people, then, as beings who are in competition with each other, or even as beings who are hostile to each other. However, scarcity is largely artificial: all kinds of preferences are imposed upon people. Essentially,

people have only a limited number of fundamental needs (more specifically, to realise their own potential through productive labour). This need they can satisfy only in cooperation with each other. Once the technological level is high enough, the essential needs *can* all be satisfied. From then on structural conflicts can be avoided. A society is possible in which the self-realising activity of each leads to the enrichment of the lives of all. Now it is no longer necessary to speak in terms of justice and morality. Speaking like this is a symptom of the fact that people in capitalism are alienated from each other. Similarly, human rights are no longer necessary. When one proclaims individual human rights, one has to concede that one individual must be protected against others. This is, however, only the case in an antagonistic society where the means of production are in the hands of individuals. In a socialised economy, human rights are superfluous, and the whole of law, and actually the state as well, lose their raison d'être.

This view of morality, then, is reconcilable with the fact that Marx, in the transitional period from capitalism to socialism and from socialism to communism, makes use of moral terminology. And thus we have indicated that the three notions of justice that one finds with Marx are reconcilable with each other.

The question then remains: is this normative theory of Marx plausible? More specifically, is Marx right when he says that capitalism is based on exploitation, and that it, therefore, does damage to its own conception of justice? And when he says that a form of society is conceivable in which individual interest and general interest are harmonised, so that no conception of justice is required any longer? We want to address both of these questions briefly.

(1) Is capitalism based on exploitation? We do not want to contend that this is *not* the case, but simply indicate that exploitation is more complex than Marx appears to think, and that further theorising is, therefore, necessary. Suppose that we live in a socialist society, where the means of production are socialised and everyone contributes according to ability and receives according to contribution. There are, therefore, differences in income because people differ in abilities. Suppose now, that one of the more capable people has in the course of time saved enough money to establish a small business, and suppose that this is not prohibited. Certain means of production thus belong to him and not to the community. He subsequently recruits workers and offers them a higher wage than they receive at state companies; he is capable of doing this because his business is run more efficiently than state companies. This wage does not, however, coincide exactly with the contribution of each person. In his company 'surplus value' is, therefore, produced in the strict sense of the term, and our socialist-capitalist puts this in his own pocket. Is this a form of exploitation? The answer is not self-evident. The workers in this capitalist island in the ocean of state companies receive a higher wage than any state company can offer. They are, therefore, not forced to sell their labour, or otherwise be punished with impoverishment. If all those involved agree to this arrangement, nothing much can be said against this form of 'exploitation'. In short: Marx's

statement that every form of production and unequal distribution of surplus value is unjust requires fine-tuning. This requires more normative theorising than Marx displayed.

(2) Can it ever be expected that individual interest and general interest are in harmony with each other, so that disputes and discussions about the just share of everyone become superfluous? We want to raise one argument against this here. In communism everyone contributes according to ability and receives according to need. This does not mean that everyone does the same and receives the same; uniform equality is no virtue of communist society, Marx warrants time after time. Everyone has the same chance to realise himself, and people do this in diverse ways. For this self-realisation material goods are often necessary, and indeed in different quantities. Somebody who wants to read poetry requires fewer goods than someone who wants to produce an action film: this latter preference is *more expensive* than the first. It cannot be expected that a society would ever have enough material means so that everyone attains the unlimited opportunity to satisfy his expensive preferences. Must one then assume that in communism, in direct contrast with capitalism and socialism, people will live together so harmoniously that such expensive preferences will not arise? This is unlikely. It would indeed be necessary to have social discussions about the question of who acquires what for which purpose: precisely the kind of question that is in need of a normative theory of justice.

To summarise: Marx has every reason to develop a theory of justice. In his texts, however, this only appears in a rudimentary and contestable form. Therefore Marx's views need to be developed in more detail.

7.4.7 Commentary

Marx's philosophy as a whole is currently regarded as one-sided. On the other hand, important parts of his theory have now become widely accepted. First the criticism.

Marx's combination of science and moral emancipation leads, as already indicated, to problems because of the pretence of science that it is value-free: it simply states how reality is; how reality should be, it can, on the other hand, not objectively establish; normative statements are in the empiricist view based on subjective assessment. According to this separation between values and facts, Marx himself regards moral statements as utterances of the subjective ideology of the group to whom the speaker belongs. However, what is then the status of his support for the struggle of the proletariat against capitalism: 'Working men of all countries, unite!'? Do workers win the class struggle because historical laws make this unavoidable? In that case, human history is nothing but a power struggle, so that, viewed morally, it does not matter who wins. Or does Marx, nonetheless, imply that the proletariat are fighting a *just* struggle?

On closer inspection the problem is even more complicated because Marx views human knowledge as such as an instrument with which man appropriates the world.

Science is then, just like other products of the human spirit, determined by the biased perspective that the scientist adopts in the production process. This relativising of the objectivity of science at the same time strikes back at Marx's own scientific work: it interprets the particular point of view of the proletariat, and can, therefore, make no claim to objective truth. Even more so because Marx himself belongs to the middle class.

From a scientific viewpoint the belief that Marx shares with Hegel is curious: that the historical process necessarily comes to rest at an optimal destination and that this End of History is imminent. This view reminds one rather of the teleological metaphysics of Aristotle (Section 2.5) than the aimless, amoral processes which are described in the natural science of Galileo and Newton (Section 3.4).

In fact, this teleological part of Marx's doctrine has in the meantime been falsified by history. The German revolution of 1848, which he himself witnessed, failed, and in the 1860s he waited in vain for the crisis of capitalism. During the First World War the proletariat of all countries fought against each other in their various national armies, instead of uniting themselves in an international labour movement against international capitalism, as Marx would have hoped. The reason for this is that Marx left out of account one function of the national state: the state is not only an internal means of the powerful class to keep down the powerless, but it at the same time constitutes a defensive unit against external attackers. Because of this the nationalistic feelings of the workers could gain the upper hand over their cosmopolitan class solidarity.

In the meantime, instead of less, increasingly more capitalists have emerged because workers themselves started participating in civil society and the democratic liberal constitutional state. Contrary to what Marx predicted, capitalism thus did not progressively marginalise itself into a state of misery. The American vehicle manufacturer Henry Ford, for example, realised that if he gave his workers higher wages, they, too, could buy his cars.

Communist revolutions mainly succeeded in pre-industrial, agrarian, feudal countries, such as Russia and China, precisely where Marx did not predict that they would occur. In these countries, 'actually existing socialism' led to the opposite of a humane society. The dictatorship of the proletariat became an excuse for merciless suppression of the population. The weak performance of the communist state economies at the same time showed that the free market and self-interest are indispensable motors of economic production, and should, therefore, at least not be completely eliminated. Communism is especially concerned with distribution, not with production. However, if nothing is produced, there is nothing to distribute. Where communist regimes have not already disappeared, they are not taken seriously by most people.

From the above a moral danger of Marx's doctrine also appears. Marx assumes that those who are suppressed are not aware of their own true interests as a consequence of indoctrination. An intellectual vanguard that does have this insight must inspire the exploited masses to participate in a violent upheaval and temporarily establish the dictatorship of the proletariat. As Popper (Section 8.4) later remarked,

after his experience with the dictatorships of Stalin and Hitler, this claim to vanguardism invites the same abuse that threatens in Plato's ideal state: everyone can claim that he represents true humanity and *essential freedom*, and then enforce his will with rhetoric and violence. This in fact happened in countries where communism was imported. Because, according to Marxist theory, no opposing interests any longer exist in post-revolutionary society, the internal control mechanisms which are built into Western democratic constitutional states were declared to be superfluous in these countries. The consequence was a totalitarian regime which prescribed in the smallest detail what everyone has to do and think. Popper, therefore, pleads for the more realistic view that power mostly corrupts. One must control the rulers through constitutional institutions, such as individual human rights and separation of powers, including an independent judicial power.

Marx unjustly debunked liberal human rights as merely a means of power of the bourgeoisie. They were indeed after the French revolution interpreted and positivised in a biased manner. However, the underlying ideal of equal freedom has a broader import: the lack of socio-economic means of existence can restrict one's freedom (negative restrictions), too. Consequently the very liberal ideal of freedom supplies the working class with an argument with which to claim social fundamental rights against the middle class on the basis of the latter's own liberal ideals. Marx would nonetheless have been justified in remarking that fraternity is then still not guaranteed.

Another contemporary moral reproach against Marx is that he views nature merely as an object of human cultivation. After the end of the class struggle, a new relation of exploitation would, therefore, come about, now between man and non-human nature, which people nowadays want to counteract by according rights to animals, plants, as well as rainforests.

Despite this criticism, parts of Marx's philosophy in a less radical form are incorporated into the received worldview. His undermining of the belief in human rationality has had a great influence: that material circumstances and social status exercise a great influence on human thinking is generally acknowledged (although Marx exaggerated its economic aspect). From a political perspective, his criticism of the exploitation of the weaker groups was one of the reasons for the establishment of social fundamental rights and of the welfare state. Consequently, Marx's prediction of the ruin of capitalism has perhaps not come true because of its influence as a self-denying prophecy.

In the course of the 20th century, workers, too, have through redistribution and democratisation become active participants in capitalism, although not quite in the way Marx would have wanted. Neo-Marxists see these developments as part of the strategy of capitalists to tame the final class struggle predicted by Marx by means of sweeteners. Workers, their criticism goes, have acquired only some say in their working conditions, but they still do not have any substantial say in their own products. Other social critics often do support Marx's Rousseau-like accusation against the one-dimensional urge of consumption which characterises contemporary society.

7.5 Nietzsche

7.5.1 Introduction

Friedrich Nietzsche (1844–1900) was an even more radical critic of his time than Marx. He wanted to 'philosophise with a hammer'. Nietzsche rejects the Enlightenment as such, and repudiates both its ideal of scientific progress and of moral emancipation. He even calls himself an 'immoralist'. His alternative has a heroic-aesthetic rather than a political import: the individual must live grandiosely and vigorously, against the stream of conformism. Equality and brotherhood à la Marx, Nietzsche finds despicable because of its equalising effect. Christianity and rationalistic Greek philosophy likewise do not pass muster because they want to place the whole of life into a straightjacket. It is not reason which characterises man, but his domineering *will to power*. Nietzsche looks for inspiration in pre-Socratic philosophy, with Heraclitus as exemplary hero: 'War is the father of all things.' Nietzsche: 'War and courage have achieved greater things than neighbourly love.' In addition, he was a great admirer of Wagner's theatrical operas. His philosophical style is similarly imbued with the dramatic:

> Of all writings I love only that which is written with blood. Write with blood: and you will discover that blood is spirit (Nietzsche 2003a, p. 67).

To Nietzsche's most famous works belong the poetic *Also sprach Zarathustra* (Thus spoke Zarathustra, 1883–1885) and *Jenseits von Gut und Böse* (Beyond Good and Evil, 1886) as well as *Genealogie der Moral* (Genealogy of Morals, 1887).

Nietzsche opposed everything which he absorbed during his education. His father was a church minister. He died when Nietzsche was 5 years old, and the young Nietzsche was thereafter brought up by his mother and sisters in accordance with protestant virtue. Hence Nietzsche grew up as a good-natured child dreaming of a courageous virile life detached from God and conventional virtue. His development progressed according to the three stages of the human spirit as he described them in *Zarathustra*. During childhood, one at first conforms to the authority of one's teachers: like a camel one is burdened with the values of another person. Then one acquires like a proud lion a distinct sphere of freedom *from* external authority. And, finally, one creates one's own identity by realising freedom as freedom *toward* self-constituted goals and values. After studying classical languages, Nietzsche, at only the age of 24, became a professor at Basel, but because of his bad health, retired just 10 years later. After this his writings became increasingly idiosyncratic. During his lifetime he received little attention. Nietzsche withdrew further into the loneliness of his own thoughts, becoming insane in 1889. He died in 1900. In the 20th century his fame became increasingly great, and at present, too, he is a much-read author. His work has a fragmentary character, but interpreters nonetheless detect coherence in them.

Nietzsche's first publication, *Die Geburt der Tragödie aus dem Geiste der Musik* (The Birth of Tragedy: Out of the Spirit of Music, 1871), is a study of Greek culture

which was strongly influenced by his own preoccupations. Nietzsche detects two contradictory tendencies in Greek culture. Classical architecture and sculpture are known for their balanced, symmetrical and rigid construction. This emphasis on measure and order is similarly characteristic of the rationalist philosophy of Plato. Nietzsche calls this tendency *Apollonian*, after the Greek sun god Apollo. However, in Nietzsche's view, this emphasis on harmonious order is so strong specifically to provide a counterweight to an opposing tendency which is as characteristic of the Greeks: a vital tendency towards ecstasy and intoxication which come to expression, above all, in dancing and music. Nietzsche baptises this tendency *Dionysian*, after Dionysus, the god of wine, chaos and fertility. Plato indeed presents his rational state order as a means to rein in the chaotic animal drives of the irrational masses (see Section 2.4). Platonic justice means that everything takes its right place in the cosmic order, so that reason rules over emotion. Art forms, such as tragedy and poetry, are forbidden in Plato's ideal state, because they have too much of an effect on the emotions. In the same spirit, Aristotle's ethics always opts for the balanced, golden mean between two irrational extremes (for example bravery between cowardice and recklessness). Nietzsche rejects this excessive emphasis of rationalism on controlling and moderating the drives as hostile to life, just like the rationalistic preference for the spirit over the body. He accords the primary role to the passionate Dionysian archaic drive, the motor of all life and creative power. Reality is not a rational order of eternal Ideas, but a stream of energy which in a process of coming into being and passing away, always creates new forms and then destroys them again. Only after this does Apollonian stylising come to the fore. In this way, Nietzsche writes, Greek tragedy is born from the spirit of Dionysian music. Wagner's music he sees as a contemporary example of such compelling art. In a similar way, all great individuals must give creative form to their life energy.

The way in which Nietzsche paints his historical study in keeping with his own view of life corresponds with his idea of the role of historiography. Nietzsche dismisses the historicist tendency of 19th-century philosophy, as it appears, among others, in Hegel and Marx. A man should not see himself as part of an inescapable historical process, because this hinders his own development. Instead of allowing oneself to be dictated to by the past, one must opt for the present. Historiography is allowed, but it must stand in the service of actual life. There is, therefore, nothing wrong with projecting one's own idea of life onto the past, as Nietzsche does in his historical study of Greek tragedy.

The same applies to all forms of knowledge: knowledge stands in the service of the development of one's life, or the *will to power*. Contrary to the rationalist view, objective truth does not exist. The rationalistic view of knowledge is based on a false idealisation of the human ability of obtaining knowledge, as if this is an independent reasonable institution which provides access to an objective reality. This philosophical self-deception derives from the human need for a safe, conveniently arranged world with an external standard which provides certainty. In reality, human conduct and knowledge is for the greatest part determined instinctively. Human consciousness is an instrument with which to control the environment: in the first place, to survive, and additionally, to arrange it according to one's own viewpoint.

One, therefore, always makes one's observations from a specific, interested point of view, and interprets the world from the perspective of one's own values. Insight into a higher metaphysical truth is, therefore, not possible. The same goes for objective, empirical knowledge: all one knows is that external stimuli touch one's senses, then awaken an image in one's consciousness, which one subsequently designates with abstract concepts. Whether human conceptual constructions correspond with an external world which caused the stimuli, one cannot possibly know. It is always from within the framework of one's own conceptual constructions that one organises the sensory impressions.

Like Kant, Nietzsche, therefore, does not see human knowledge as a faithful reflection of an external rational or material reality, but as a construction of human consciousness. However, whereas Kant regards the structures by means of which consciousness organises experience, as a fixed, rational order, in Nietzsche's view they change in keeping with the viewpoint of the observer.

Up to this point Nietzsche's perspectivist view of knowledge comes very close to Marx's relativism: according to both, knowledge is a changing product of human practices. However, according to Marx's political philosophy someone's perspective is determined by the position which his economic group occupies, whereas Nietzsche, more aesthetically orientated, sees knowledge as a highly personal creation. This fits in with his artistic view of human life: the point is to design one's own vital forces in an authentic manner. Nietzsche consequently expressed his philosophy in poetic images rather than with conclusive argumentative reasoning.

7.5.2 Beyond Good and Evil

Nietzsche's emphasis on self-determination only partly coincides with the emphasis of the Enlightenment on individual autonomy. The Enlightenment philosophers regard all people equally as self-legislators. Nietzsche, on the other hand, is radically elitist: in his view, only certain individuals possess sufficient independence and creative power to arrange their lives fully in keeping with their own standards. The masses stay behind like a camel weighed down by the burden of moral tradition. However, it is precisely creative individuals around whom everything turns. By way of evolution, all species have developed themselves into higher life forms, except for man. Now man, too, has to exceed himself by becoming a superman (*Übermensch*).

> What is the ape to men? A laughingstock or a painful embarrassment. And just so shall man be to the Superman: a laughingstock or a painful embarrassment (Nietzsche 2003a, pp. 41–42).

Nietzsche did not have biological or racial evolution in mind (like the Nazi's in the 20th century), but a cultural jump ahead of genial individuals. The Enlightenment ideal of equality simply amounts to an equalising brake on the creative individuals who strive toward Nietzsche's superman ideal.

In keeping with Nietzsche's phasing of the development of human thinking, he had to first free himself from the prevailing morality before he could design his own

ideal of life. The moral tradition, after all, constitutes a pressing burden for those who want to fully cultivate themselves. Christianity adopts a hostile attitude towards life: it condemns bodily sensuality and exchanges earthly life for a supposed eternal life in the hereafter. Plato's rationalistic ethics is similarly driven by the fear of fully surrendering to life. With their equalising trends Christian neighbourly love and the humanistic ideals of the Enlightenment turn themselves against unique individuals. Likewise, Kant's formal categorical imperative with its universalisability criterion treats individuals as equals. It is, therefore, high time for the re-valuation of all values.

Thanks to his criticism of metaphysics, Nietzsche can free himself from these moral chains: knowledge of a higher world of Platonic ideas or the Christian God appears to be impossible. In fact, such representations are simply human projections, inspired by the need for certainty. Thus: *God is dead*. With this all supra-sensuous moral values at the same time come to ruin, unmasked as human creations: it is man who has inserted values into the world.

The neighbourly love of Christianity and the principles of equality and brotherhood of the Enlightenment, Nietzsche rejects as inferior, vindictive fabrications of the weak masses, aimed at keeping the strong under their control: a 'slave morality'. Nietzsche points to the fact that the first Christians were Roman slaves: out of revenge they wanted to degrade their masters to their own despicable level. At present the mediocre majority, because of its fearful herd mentality, strives toward conformity and equalisation. In Nietzsche's view, Christian neighbourly love, therefore, does not represent an objective morality, but flows forth from the interests of the inferior masses.[20] What else is to be expected of a weakling than fearfully squeaking that one must turn the other cheek when hit? As soon as the strong recognises this precept he has lost his superior power: in future he will suffer from a paralysing bad conscience when he uses force. And indeed, since the 'all too many' thanks to such egalitarian principles rule modern society, it degenerates into impotent decadency and uniformity. Against this nauseating bourgeois mentality, Nietzsche turns his cultural criticism. His *genealogy of morals* (as one of his book titles reads) exposes the amoral origin of the prevailing morality, founded on vile group interests, thus undermining its claim to objective authority. Freed from this burden, one can then choose one's own life ideal, which does not have to be objective, universally valid, or impartial – such pretence is, after all, always false. Although Nietzsche calls himself an 'immoralist' he does formulate an alternative view of the good life. It is simply not a *morally* good life in the current sense, for Nietzsche's ideal of life finds itself *beyond good and evil* (the title of another of his books).

After God's death a world remains without unity, purpose or meaning. Individual existence itself takes place in a moral void, without any metaphysical connection with a cosmic order. At first this insight can lead to despair. However, strong spirits accept life as it is and make the best of it. Overflowing with the joy of life they

[20] See the analogous criticism of the Sophists in Section 2.3.2.

expand their vital forces, their will to power. Nietzsche refers to the heroic morality of the aristocratic warlords of the pre-classical Greek period who are described in Homer's *Iliad*. Full of pride the powerful then took what they could obtain. They did not pursue equality and neighbourly love; on the contrary, they wanted to distinguish themselves from others by courage and fame. They lived 'beyond good and evil': in their pre-moral egocentric world, that was called 'good' which served their personal development, and 'bad', what obstructed it. Modern decadent 'slave morality', on the other hand, restricts the individual lust for life by testing it against universal standards which would be good for everyone. In the post-moral world the issue is to proceed anew beyond good and evil, and to re-capture the 'master morality'. Now, as then, Nietzsche says, one must distinguish oneself by means of courage and willpower, which is set aside only for an elite of excelling individuals. He nonetheless gives a more cultural turn to the ancient martial chivalrous morality: heroes of the spirit, such as Goethe, can make their creative mark on the world, too.

One must 'become what one is', or fully develop one's personal possibilities. With this Nietzsche does not want to defend a purely individualistic ethics. He develops a perfectionistic moral viewpoint for personal life which is based on a hierarchical order between high and low lifestyles: one must develop a superhuman character. However, what exactly a perfect mode of life entails he leaves open, because this will depend on the specific individual. Every individual must, moreover, from out of all his contradictory impulses create his own unique form of life, so that one cannot in advance in general establish what human excellence entails. Nietzsche does indicate a few basic virtues of which every noble person is in need, to perfect his will to power. In the first place, one must overflow with a lust for life. One can allow others to share in this abundance, not because it is a duty of justice (because then one would recognise an objective value superior to oneself), but because one gives something of oneself to the world:

> But how could I be just from the very heart? How can I give everyone what is his? Let this suffice me: I give everyone what is mine (Nietzsche 2003a, p. 94).

Nietzsche calls this the 'giving virtue'. Due to this generous attitude the superman, too, can act justly and with mercy towards the weak, irrespective of whether they are useful or harmful to him. The will to power, therefore, does not per se lead to blood and mayhem. Other instrumental virtues are courage, willpower, harshness towards oneself and others, honesty in relation to oneself, and creativity. Proceeding from this basic personality one must find the mode of life which suits one best, so as to perfect one's personality in this specific manner. Consequently, 'one becomes who one is'.

7.5.3 The Nietzschean State: Artist-Tyrants

Which state ideal fits best with Nietzsche's superman ethics? Nietzsche does not concern himself much with political issues, and his cursory remarks in this domain

are ambiguous. As can be expected, Nietzsche revolts expressly against the Hegelian view that the state forms the highest goal of man: 'the state where universal slow suicide is called – life' (Nietzsche 2003a, p. 77). State control of universities, for example, creates cautious, subservient philosophers, like Kant, instead of free, creative spirits. Nietzsche regards culture as much more important than the state, and for the development of an elevated culture one needs creative supermen. One would then expect him to prefer an anarchic, Hobbesian state of nature in which the law of the strongest applies. And Nietzsche (2003a, p. 78) indeed expresses himself in this vein:

> There, where the state *ceases* – look there, my brothers. Do you not see it: the rainbow and the bridges to the Superman?

One could, however, likewise expect a Nietzschean state which is organised in such a way that it provides a fertile breeding ground for geniuses. This train of thought is also to be found with Nietzsche: a totalitarian state in which the masses of the 'all too many' slavishly serve the noble elite. As in the case of Plato, this state is hierarchically based on three classes. However, the elite does not govern in the best interests of all, in the name of an objective idea of justice as in Plato. It rather resembles the selfish tyranny which Plato rejects with abhorrence: the state exists merely in the interests of the rulers. Nietzsche's artist-tyrants each strive for their own perfection as supermen. The other two classes must create the conditions for this: the third class, consisting of the amorphous masses, performs all professional activities, and hence provides for the material needs of the nobility. A second class consisting of people who excel in physical strength ensures that this happens in an orderly manner, by maintaining the law. The masses do not only obey state authority because of coercion, but primarily on account of religious respect and custom. They, after all, have a greater need for the support of metaphysical and religious illusions than for freedom of thinking. In view of this, the elite will, therefore, uphold the traditions, which the supermen themselves realise are illusions. They benefit more from such a subservient state than from total chaos. The rulers therefore enact legislation to make the masses toe the line.

The rulers themselves, of course, are above the law. The superman after all is his own legislator:

> Are you a new strength and a new right? A first motion? A self-propelling wheel? Can you also compel stars to revolve about you? (Nietzsche 2003a, p. 88)

The tyrants are thus free *from* state power *to* self-legislation, and shape their subjects consistent with their will. Nietzsche rejects the doctrine of the social contract:

> He who can command, he who is a master by "nature," he who comes on the scene forceful in deed and gesture – what has he to do with contracts? (Nietzsche 2003b, p. 58)

Because of an exalted sense of dignity the master can nonetheless voluntarily keep his word. Nietzsche does think that it makes sense for the masters to agree among themselves, out of mutual respect for their equal power, that they will refrain from

violence and exploitation. However, this could never be a general foundational principle of society as a whole.[21] Elsewhere Nietzsche indeed suggests that the rulers have a positive duty to spare their subjects, that is, based on rational self-interest: otherwise these subjects cannot fulfil their serving function. Even then the relation between master and servant is utterly asymmetrical:

> The *inequality* of rights is the very condition of there being rights at all (Nietzsche 2004, p. 128).

So-called scientific theories which predict a future society without exploitation, such as that of Marx, are, therefore, without any foundation. It would entail a denial of life.

> [L]ife itself is *essentially* appropriation, injury, overpowering of what is alien and weaker; suppression, hardness, imposition of own forms, incorporation and at least, at its mildest, exploitation (Nietzsche 1989, p. 203).

Moreover, in Nietzsche's view, this suppressive class state can similarly be defended from the point of view of Aristotle's definition of distributive justice: does not Aristotle maintain that one must treat equal cases equally, and *un*equal cases unequally (see Section 2.5.3)?

7.5.4 Commentary

Nietzsche was a great critic of culture, an astute psychologist, and a compelling writer. He can be grouped together with the great 19th-century demolishers of the exalted human self-image. Just like Darwin, Marx and Freud, he showed that the self-understanding of man as a being who distinguishes himself fundamentally from the rest of nature through his rational or godlike essence, is based on arrogance. In fact, human rationality is nothing more than a thin veneer of civilization on a fundamentally irrational, instinctive foundation. Nietzsche's critical analysis of the traditional virtues exposed a great deal of hypocrisy. His romantic protest against conformism and social equalisation is still pertinent. His perspectivist view of knowledge has a significant influence on contemporary philosophy. Specifically the *postmodern* movement views in Nietzsche's footsteps claims to theoretical and moral knowledge as statements reflecting power (see Section 9.1.4).

Nietzsche shows an extreme possibility of what one can opt for in a world without higher values. His relativistic approach to knowledge and morality, however, bites its own tail: according to Nietzsche himself, it can be true only for him and his kindred spirits. (Viewed psychologically his ideal is, however, based on an inversion: Nietzsche wanted at all costs to become what he was *not*. He did not succeed

[21] Incidentally, Hobbes similarly teaches that the sovereign does not himself participate in the social contract, albeit that, in so far as his conscience is concerned, he is bound thereby; see Section 4.1.

in developing his life as a joyful manifestation of greatness. His own courage was restricted to the writing table where he attempted to drown his weakness on paper.)

Nietzsche's ideal of life is plausible, at least within a restricted domain. Highly personal creativity and a non-conformist mode of life are first and foremost suitable for the relatively free and elitist sphere of the arts and sciences. There conformism is the most annoying, and an experimental attitude the most fertile. This sphere not only constitutes a social niche for nonconformists, but also provides a useful sanctuary for experimentation to which the rest of society owes much of its dynamism and design.

However, for the rest, Nietzsche's heroism and praise of the strong individual fits in badly with the complexity of modern society where each individual is bound to others by many relations of dependence. The modern weapons of destruction strip physical warfare of all chivalry (if indeed there ever was anything like this). Because of occupational specialisation one can no longer expect cultural and physical excellence to go hand in hand, as it was still possible with Renaissance geniuses like Leon Battista Alberti. Cultural celebrities, such as Einstein or Madonna, can still within their specialised areas make a mark on their environment, but they are not rulers who open new horizons on all fronts. Overpowering political rulers, such as Hitler, Stalin or Mao, are, on the other hand, cultural barbarians. (Nietzsche was unjustly annexed by the national-socialists. He did not with his *Übermensch* target the blond Germanic race: his ideal was individualistic, not collectivist; he regarded French culture as much higher than German culture, and despised anti-Semites.) Although talents can vary enormously per individual, no one can in all areas of life stand out above the rest. For this reason it is better that the diverse, specialised elites remain divided in separated spheres of justice, and that the political elite be subjected to democratic control.

This commentary gives a bourgeois, liberal turn to Nietzsche's romantic hero worship. Creative individuals must indeed acquire as much space as possible outside of the political sphere. The government can, because of the social importance of experimentation, even create additional free space for the arts and sciences. However, in the public sphere this freedom may not affect the freedom of other citizens. To guarantee equal individual freedom, everyone must have equal rights to political participation. Hence, Nietzsche's vitalism is taken over in sterilised form in the liberal legal order. Mill, too, after all, campaigns for nonconformist individuals, on condition that they have been made harmless, as required by his harm principle.