C.W. Maris · F.C.L.M. Jacobs   *Editors*

Law, Order and Freedom

A Historical Introduction to Legal Philosophy

Translated by J.R. de Ville

Springer

Chapter 8
Twentieth Century: 1900–1945

8.1 Introduction

8.1.1 General Developments

In the Western world, the 20th century was the stage for a continuation of the combined action of the two conflicting tendencies which are associated with the scientific worldview: the nihilistic-objectifying and the emancipatory. The first tendency found expression in a far-reaching rationalisation of social life under the influence of the pursuit of efficiency, characteristic of both natural science and the capitalist economy. This technological approach did not limit itself to the control of inanimate nature, but increasingly directed itself at human life. The consequence was the progressive arrangement of social life in accordance with means-ends rationality under the influence of two processes which had already been established in previous centuries, but now started to control the whole of society: in addition to growing industrialisation, an extensive bureaucratisation process occurred which led to the far-reaching regulation of social life by the state. The role of law was increased in proportion, with the consequence that the minimal state of the 19th century quickly belonged to the past.

Bureaucracy has a tendency towards technological rationality, because it is characterised by the separation of public position and person (in contrast with feudalism) as well as by functioning in accordance with standard rules. The advantage of this is that it furthers the efficiency of state action. Many, however, see in this a disadvantage, because they fear that it will lead to a standardisation and dehumanisation of social life. People would then merely be used as means towards anonymous state ends, and be regarded as objects to be manipulated. According to this criticism, all of this is the consequence of the instrumental approach of the natural sciences, aimed at the control of the causal processes of inanimate nature, to a domain where it is not at home: human life.

The process of modernisation developed along different lines depending on historical and social circumstances. In the whole of Europe, the United States, Australia and parts of Asia a process of economic and political rationalisation occurred, which led to enormous growth of industry and trade, to the centralisation of power,

bureaucratisation, and uniform legal systems. In Russia and China this was, however, accompanied by a communist polity; in Germany, Italy and Japan by a fascist state; and in the rest of Western Europe and in the United States by a liberal constitution. The precondition for development in the liberal sense was the existence of an economically independent city bourgeoisie, having sprung up as a consequence of free capitalist trade and the demolition of feudalism. In other countries modernisation was imposed by the state, so that the traditional, authoritarian forms of government remained in place.

In Germany and Japan the nobility (and the peasantry) had mainly retained their influence, so that the bourgeoisie was too weak to enforce political liberalism. In Germany capitalistic development was imposed late in the 19th century from above by members of the traditional elite, such as Bismarck. In the 1930s this authoritarian state form, via an unstable, intermediate democratic phase, led to populist fascism. 'The people are everything, you are nothing', was a characteristic maxim. With the help of modern techniques, political opponents were mercilessly eliminated; internal 'enemies of the people' were murdered by the millions in concentration and annihilation camps. Against external enemies, the Second World War was started in 1939.

Russia and China followed a third route. In these countries an agrarian mode of production had dominated since ancient times, led by centralised imperial bureaucracies which fended off external influences. Trade with foreign barbarians was regarded as despicable in China. Here no independent city-dwelling bourgeoisie came about. Ultimately the governments were forced to implement economic reforms so as not to be swept away by foreign countries. This was greatly resisted by the conservative rural population. In Russia, in 1917, the communists made use of this situation to grab power via a revolution. For the sake of convenience the communist leaders decided that the 'dictatorship of the proletariat', which Marx had predicted as a transitional phase, for the time being had to remain in place. This meant, in fact, that the Party appropriated to itself an absolute monopoly of political and economic power, as the only legitimate representative of the people. Since the people themselves were supposed to be in power, separation of powers and freedom rights were superfluous. An individual who opposed the politics of the party was per definition wrong. Every invocation of individual freedom rights against the state was regarded as the expression of criminal, petit-bourgeois egoism. Individuals mainly had duties in relation to their community. Private property was replaced by collective ownership, centrally controlled by the communist government. Obedient to Marxist dogmatism, the new rulers enforced speedy industrialisation by means of the traditional centralised bureaucracy. In this collective process of modernisation, the Soviet dictator, Stalin, caused the death of millions of peasants.

In the bourgeois, liberal countries the tendency towards rationalisation was tied to a process of emancipation which increasingly included larger sectors of the population, in accordance with the ideals of freedom, equality, democracy, the rule of law and human rights. For example, since 1919 all adults in the Netherlands have an

active right to vote. The fourth class thus now had a say, too, as well as the second sex. This tendency towards equal sharing of political power was, especially after the Second World War, in Western Europe supported by a more equal distribution of socio-economic goods, among other things, owing to the rise of the welfare state. In the United States the New Deal had, in reaction to the economic Depression, already in the 30s brought relief to the poor, although American social security never took the extensive form of care from the cradle to the grave that characterises Europe. The extreme emphasis of 19th-century liberalism on the principle of freedom was consequently rectified by means of more equality and less freedom in the economic domain. Even though in the last decades of the century the welfare provisions in Europe and America have been reduced for economic reasons, it is now generally accepted that unequal social starting conditions impede an equal use of freedom.

In international relations, too, a liberalising tendency occurred. The large fascist states were, after their defeat in the Second World War, from 1945 transformed into democratic constitutional states (in bureaucratic Japan, however, mainly as a formality), and absorbed into the liberal Western world of their victors. In the same period the sphere of influence of Russia, the other victor of the Second World War, extended itself to Central Europe, where communist vassal regimes were installed. The communist countries were referred to jointly as the 'Second World'. However, towards the end of the 1980s the European communist dictatorships, too, collapsed because of their weak economic performance, without liberal constitutions, however, being established everywhere in their place. Moreover, after the Second World War an increasing emphasis was placed on human rights. These were laid down in the *Universal Declaration of Human Rights* (1948) and a number of international treaties. In recent times positive law in European countries is increasingly tested against the European Convention of Human Rights (1950). Towards the end of the century it was accepted in international law that the Security Council of the United Nations can authorise humanitarian intervention against rogue states that systematically violate the basic human rights of their own citizens, for instance in the case of genocide. In 2002 the International Criminal Court was established in The Hague for the prosecution of crimes against humanity, genocide and war crimes.

It is, however, controversial whether there has really been progress in conformity with the Enlightenment ethics. The objectification process that is inherent in the scientific approach after all led to two worldwide wars, the last of which was ended by means of an atom bomb, and to the large-scale violation of the environment. Critics, furthermore, often point to the fact that far-reaching state interference has indeed had the consequence that everyone's basic needs are provided for, but that this was paid for by the extensive control of everyday life. The welfare state, for example, guarantees a basic income, but this requires extensive bureaucratic control of personal life: does the social security recipient have hidden earnings? does he live with someone? is he not on holiday for too long? This disciplining process,

moreover, would have a negative influence on human consciousness. People have to learn more and more self-control, as they have to take account of an enormous variety of rules in all areas of their life. This tendency would have deprived human life of much of its spontaneity. Other critics complain that the welfare state promotes an egotistical consumption drive. It would furthermore undermine the sense of social responsibility, by granting the citizen too many rights without accompanying duties.

Doubts about the Enlightenment ideals were, moreover, raised under the influence of developments in the non-Western 'Third World'. As a consequence of the decolonisation process non-Western cultures laid claim to an equal status. Because of the large-scale migration of inhabitants of the former colonies to the former colonising countries, Western legal orders now also need to take account of the deviating lifestyles of cultural minorities. Consequently, the self-evidence of Western cultural superiority has been questioned. The idea that Western civilisation constitutes a higher phase in human evolution, whereas non-Western cultures still find themselves in a primitive stage, has greatly lost its force. In its place many argue in favour of cultural relativism, which assumes the equal value of all cultures.[1] This tendency has been strengthened by the economic success of Japan, China and other Asian countries around the turn of the millennium, which combine a modern economy with a non-individualistic way of life.

Because the moral conceptions of different cultures diverge greatly, cultural relativism can lead to ethical relativism: the diverse moral views of all cultures are similarly of equal value. This would mean that cultures where inequality and lack of freedom are regarded as morally appropriate have an equal voice vis-à-vis Western culture with its Enlightenment values. The values of freedom, equality, democracy and human rights can then make no claim to universal validity, and can no longer be regarded as the culminating point in a process of moral progress of human civilisation. They are then simply a time- and place-bound product of Western culture.

8.1.2 Developments in Philosophy and Related Fields

These developments left their mark on the philosophy of the 20th century. Some philosophical currents continued the emphasis of the Enlightenment on the close connection between scientific progress and moral emancipation in a liberal sense. Other currents were less optimistic, stressing the irrational side of mankind.

In 1900 an influential publication set the tone of the latter view. At the turn of the century Sigmund Freud introduced his method of psychoanalysis to the world with the publication of *Die Traumdeutung* (The Interpretation of Dreams), which left an equally significant imprint on the general as well as philosophical thinking of that century (Section 8.2). With this method access could be gained to the human

---

[1] See the Max Havelaar discussion at the beginning of this book.

unconscious, a dimension of the mind which led Freud to the conclusion that the modernist belief in the foundational nature of human consciousness is an illusion. Consciousness is only a derived effect of the more primary unconscious where the sexual and aggressive drives play a dominant role. The forces in the unconscious, according to Freud, are always at work, and their operation can most clearly be seen in dreams. Freud's insights opened the way not only towards a reconstruction of the narratives of patients, but also towards a radically revised understanding of all human practices, institutions and texts. Freud at the same time shared the Enlightenment belief in moral progress, for example, in his comparison of 'primitives' and 'savages' with children and neurotics. They are, according to Freud, (still) dominated to a great extent by their unconscious drives, as compared to mature, Western man who has learned to suppress these drives as a consequence of the development of reason. The contribution Freud made to legal philosophy lies, amongst others, in the attempt he made to understand the origins of law with reference to the forces at play in the unconscious. This is related, but at the same time stands in stark contrast, to the attempts by Grotius (Section 3.5), Hobbes (Section 4.1), Locke (Section 4.2), Kant (Chapter 6), and Rawls (Section 10.5) to find the origins of law and the state in the conscious decision of legal subjects. Based on an analysis of totems (the guardian spirit of a clan in the form of an animal, plant or inanimate object) and taboos in 'primitive' societies, Freud came to the conclusion that the origins of law lie in the Oedipus complex (a murderous intent of a boy against his father, and a desire for his mother, sublimated in moral conscience in the form of strict prohibitions on murder, incest and the like), which he views as a universal characteristic of man. Freud's views in this respect were partly based on the studies of anthropologists towards the end of the 19th and the beginning of the 20th centuries. Later anthropologists, however, cast serious doubts on the universality of the institution of the totem, which in turn places a question mark behind Freud's hypothesis of the universality of the Oedipus complex, as well as the progressive moral development of man.

A tension can be detected in Freud's texts between a belief, on the one hand, that the Oedipus complex in the unconscious constitutes the energising force leading to the establishment of law, religion and morality, and, on the other hand, the attempt to explain the development of consciousness and everything that goes along with it, with reference to a death drive which precedes the unconscious. The notion of a death drive was hypothesised by Freud to explain the peculiar feature of the repetition of unpleasant experiences in the mental lives of some people, in contrast with his earlier thesis that the pleasure principle prevails in the psyche. This drive Freud similarly viewed as a universal characteristic of man as well as of other organisms, which necessarily has to be 'repressed' in order for life to proceed. The more complex the organism, the more elaborate the detours that eventually returns it to death. Although the notion of a death drive took on increasing importance in Freud's later thinking, he did not work out in detail the implications of this thesis for his earlier reflections on the origins of law, morality and religion. Jacques Derrida attempts to do this by means of what he refers to as 'deconstruction' (Sections 9.1.7 and Section 9.5).

In logical positivism (Section 8.3), which similarly developed in the first half of the 20th century, the optimistic belief in progress which characterised Enlightenment philosophy dominated: as a consequence of the growth of scientific knowledge, moral emancipation would come about too.[2] In their manifesto of 1929, *Scientific Worldview*, the logical positivists expressed their concern about a revival of metaphysical and theological thinking, behind which they suspected a conservative, anti-Enlightenment attitude that sought to call a halt to the liberalisation and socialisation of society. This attitude is no longer suitable in the Modern Age, the positivists contended. As a consequence of the objectivisation of economic and social relations, people nowadays have become more down to earth. They look for their knowledge in sensory experience, and for their morality in worldly happiness: 'The scientific worldview serves life, and life receives it.' In the first place, the individual can, thanks to modern science, realistically determine his own goals. Furthermore, socio-economic relations can now be controlled as well, owing to the practical application of the new social sciences, such as sociology and economics. This 'social technique' enables the democratic central state to adjust the negative aspects of the free market: state intervention in the market can prevent economic recessions and rectify unjustified differences in income. Such a socio-economic emancipatory programme implied a substantial extension of the 19th-century minimal state, which guaranteed only negative freedom rights. In accordance with this social version of liberalism, the state, moreover, had to counteract the absence of the material conditions for equal freedom (or 'negative impediments', see Section 1.4). Here, in brief, the contours of the social-democratic welfare state are sketched.

With their name the logical positivists indicate that they regard empirical science as the model for all knowledge: 'positivism' implies that they take the positive (given) empirical phenomena as criteria for valid knowledge; 'logical' refers to the neutral, mathematical language in which science organises statements regarding such observations, in order to strip them of all subjective influence. Statements which claim to provide knowledge are, according to them, meaningful only if one can verify them, or test them against objective phenomena which are observable by everyone. Metaphysical statements about non-observable conceptions, such as God, gnomes, Hegel's Absolute Spirit, witches, the people's spirit, unicorns, or Plato's Ideas, are by contrast, because of their unverifiability, meaningless: concerning things unobservable one can fantasise as much as one likes, but one actually does not know what one is talking about. Such thought constructions are rather expressions of someone's subjective feelings; it is wonderful if one can bring them to expression in poetry or music, but they have no place in an objective argument. Their initial kindred spirit Wittgenstein (2007, p. 89) expressed it thus (albeit with a somewhat different, mystical intention): 'What we cannot speak about we must pass over in silence'. As an extension of this scientific worldview, the logical positivists propagated their emancipatory ideals, such as the rational reform of the state in a

---

[2]Logical Positivism is thus a general philosophical movement, not to be confused with legal-philosophical legal positivism, see Chapter 1.

liberal way, the socialisation of economic relations, and the unification of humanity as a whole.

It, however, soon appeared that the positivist belief in progress was too optimistic in three respects, which will be discussed below. In the first place, scientific knowledge and moral emancipation on closer inspection do not coincide as seamlessly as the logical positivists had hoped in their naïve optimism. Secondly, the ideal of objectivity of empirical science is likewise untenable: sensory observation itself is a matter of interpretation. Thirdly, the actual political and social developments in the 1930s and 1940s provided unprecedented evidence of an aggressive moral regress in an anti-liberal and anti-democratic direction. In Germany, the fascist and racist Nazi movement came to power, started a worldwide war, and committed large-scale genocide. In Russia, after the communist revolution of 1917, a terrorist dictatorship developed under Lenin and Stalin, which cost millions of lives.

(1) That the scientific ideal of the logical positivists has no logical relation to their moral and political ideals comes to the fore when one applies its verification criterion to liberal statements, such as 'all people are free and equal'. Empirical experience after all shows that people in reality are not always free, nor equal in all respects. Such normative statements, in brief, cannot be verified via sensory experience, and are, therefore, according to the epistemology of logical positivism, as meaningless as statements about gods, goddesses and mermaids.

Later kindred spirits of the logical positivists, such as Stevenson and Hare, who concentrated on a value-free analysis of moral language, concluded in this mode that normative concepts such as 'good' or 'just' primarily have an emotive or prescriptive meaning, rather than a descriptive import. Normative statements aim at guiding someone's actions. The content one ascribes to such prescriptions ultimately depends on one's personal attitude, so that there is no rational way of settling differences between moral views. According to some, moral debate is, therefore, mostly rhetorical persuasion in the spirit of the Sophists (see Chapter 2).

This value-free analysis of normative language nonetheless still provides some possibility for a rational moral debate (Section 8.2.2). In the first place, an apparent difference in moral views can be based on disagreement about empirical facts, which can be resolved on the basis of the empirical criterion of knowledge. Secondly, the parties to the discussion may share a background value, on the basis of which they can settle their moral dispute. Thirdly, with his moral statements a speaker claims to express more than just his personal preference, that is, he claims to posit a generally valid prescription. When I say that all people must be free, I mean that everyone should think this, and likewise act in accordance with this idea. In a political debate I will attempt to support this with arguments. According to Hare, I can never give decisive arguments in this respect to a person with a fundamentally different attitude to life. However, owing to the general claim of my statement, it does have consequences for me: when I soon thereafter argue in favour of slavery, I am being inconsistent. Because of their claim to universal validity, moral statements prohibit one from making an exception for oneself. And because nobody wants to be a slave himself, Hare contends, nobody can logically preach a slave morality

(in the style of Aristotle, not in the style of Nietzsche; on which, see below). Hare consequently develops a formal, immanent test for the tenability of moral judgments, even though they are not objectively verifiable: does the judgment concerning a specific instance allow itself to be universalised for all instances which are similar in relevant respects, including the hypothetical instance that one would oneself be in the disadvantageous position? This universalisability test shows similarities with that of Kant's Categorical Imperative (see Section 6.3.1; compare, likewise, the universalisability test of Habermas, Section 9.3, and Rawls, Section 10.5): It forces one to view the matter from an impartial point of view.

There is, however, an important difference. Kant's test presupposes that all people are equal in dignity, so that one cannot merely use others as a means for one's own ends. He bases this on his metaphysical conception of man: all people are autonomous persons. With Hare, by contrast, all substantive moral assumptions are absent, because these can in terms of his empiricist criterion of knowledge not be proved objectively. Therefore, his universalisability test is much more permissive. A Nietzschean (see Section 7.5) would be able to defend his elitist arrangement of masters and slaves as universal morality on the basis of his assumption that the elite and the masses are in the relevant respects fundamentally dissimilar: that a herdsman has to play the role of a servant, therefore, does not mean that a superman must likewise be able to see himself as a slave. If one regards the empiricist criterion of knowledge as decisive, the possibility of settling moral disputes is thus very limited. Liberal values, such as equality and freedom, cannot be proved to those who think differently. Progress in empirical science, then, does not necessarily coincide with moral emancipation.

In this completely value-free version, empiricist philosophy was elaborated on by *Legal Realism*, which aims at scientifically mapping the law as a social reality. The realists rejected the natural-law doctrine as non-verifiable metaphysics, as well as every invocation of objective values, such as justice. This movement flourished especially in the United States and Scandinavia. According to the American realists, law can be reduced to the factual conduct of judges. If one wants to know what the law prescribes in a specific instance, one must predict what the judgment of the judiciary will be in this case. In this realistic view the normative character of the law (the legal rule) is thus interpreted as a social fact (the judgment of a judge), which the legal scientist must map out from a value-free perspective: as a matter of fact, the American judge judges that slavery is not permissible. Or, in a hard case about which jurisprudence is not yet clear, one has to predict how the judge will probably decide, in the light of the relevant empirical material, such as laws, precedents, the preferences of the judges, etc.

The Scandinavian Realists looked at the law rather as a supra-personal social system. The function of the law is, in their view, to realise social order by means of the central establishment of norms. This occurs through the interplay of four factors in the relation between state and legal subjects, which is based on power and authority. An authoritative central institution establishes general norms (1); if necessary, it maintains these by means of force (2); legal subjects mostly obey the legal rules owing to a combination of unselfishness and self-interest: via education

a normative consciousness has been instilled in them that they should observe the general norms, even when this conflicts with their self-interest (3); this is supported by fear of sanctions (4). Apart from formal laws, customary law as well as unwritten principles of reasonableness and fairness play a role, too.

This realistic view of the law is akin to the sociological description of the legal positivist Hart who similarly points to the interplay between external coercion and internal acceptance of the power of the legal authorities (see Section 1.2.3.2). This acceptance is, according to Scandinavian Realism, nothing more than a social-psychic reality: it is a social fact that legal subjects, because of a process of socialisation, experience their legal system (inter)subjectively as valid law. Concerning objective justice, science cannot make any pronouncement, because normative statements simply express the subjective preferences of the speaker; legal norms are expressions of the ruling ideology in a legal culture. Empirical legal science can, on the basis of an investigation of the actual consequences of legislation on society, indicate by which legal means the legislature can realise its aims in the most efficient manner. The selection of the aims is, however, an extra-scientific, political affair.

(2) However, if this is the case, critics of the positivistic scientific ideal argue, then the applied science or 'social technique' from which the positivists expect moral progress, can equally be used for amoral or immoral purposes. Amoral: by raising science to the one beneficial institution, one cultivates a purely instrumental way of thinking. State and law become mere instruments in the control of social life; individuals are subordinated to an anonymous bureaucracy. Control replaces individual autonomy. Immoral: in the 1930s and 1940s the Nazi regime made extremely effective use of modern applied science in committing mass murder and waging a total war.

In the first half of the 20th century sharp criticism was in this fashion voiced against the scientific ideal of the positivists: empirical science, according to critics, provides only an impoverished technocratic thinking, which can give no account of the meaning reality has for man. Adherents of *Phenomenology* and *Existentialism*, such as Husserl and Heidegger,[3] contend that the phenomena which appear in human experience are determined by the intentions of the perceptive consciousness. In this view, philosophy must give an analysis of reality as it appears to human consciousness, our 'life-world'. Everyday experience is not value-free; people inevitably view the world from the perspective of value-laden goals. Even so-called value-free science has a specific goal – control of the environment – and is, therefore, just one of the many human cognitive activities.

According to Heidegger, man distinguishes himself from other living beings because he is aware of his existence. On the one hand, he is determined by the world as he encounters it, and, on the other hand, he must design his own life by cultivating his environment and making it his own. He, however, experiences the

---

[3]Heidegger himself denied that he was an existentialist, and there are clear differences between his thinking and that of Jean-Paul Sartre, one of the most famous French existentialists.

relative indeterminacy as terrifying, especially because he realises that his life ends in death. He thus has the responsibility of making something of his life within a short period. Because of a fear of death many people tend to deny this finiteness and responsibility, and seek refuge in a superficial, conformist mode of life. The positivistic limitation of human knowledge to the fixed categories of science, likewise testify to fear of the elusive richness of life. Philosophy as well as poetry must behind the veil of science and conformism observe life itself.

Related to this view of man as a meaning- and value-giving being, is the approach of *hermeneutics*, or the doctrine of the interpretation of the meaning of human action and its products (Section 8.5). Hermeneutics seeks to understand human intentions, while natural science explains natural events by determining their causes. One can study inanimate nature quite well by means of the observation of external regularities, such as the orbits of the sun and the moon. However, the actions of human beings one can only situate when one knows their motives, ideals and values, and such contents of consciousness are not empirically observable. Take the following example. On the hallstand of a restaurant hang a row of overcoats. I take my worn coat even though next to it a much better one is hanging. You can understand my conduct only if you know that I have an awareness of the notion of property, and that I respect the difference between what is mine and what is yours. As the legal positivist Hart expresses it: my actions are guided by a rule which I accept as appropriate. From the two coats themselves the difference between what is mine and what is yours cannot be seen, neither can it be seen from my empirically observable exterior: I am motivated by an internal consciousness of norms. When I *do* put on the other coat, I am likewise led by a motive, possibly the desire to look presentable.

The idea of an observing, value-free natural science undermines Aristotle's teleological worldview, which ascribes to all natural phenomena an immanent purpose: according to natural science the world consists of blind processes without a final goal. Hermeneutical human science contends, in opposition to this, that human practices clearly demonstrate an orientation towards a goal. These goals are, however, cultural, not natural. Hence, Hart views the legal order as a system of norms which is based on the value which people attach to their own survival. The rules of Hart's 'minimal natural law', such as not to kill and not to steal, serve this goal (see Section 1.2.3.2).

A scholar in the human sciences cannot observe another man's intentions, but because he is himself equally a human being, he does know his own intentions. By analogy he can reconstruct similar contents of consciousness from the utterances of the persons whom he investigates. Hermeneutics not only concerns the psychological understanding of concrete human actions, but especially the interpretation of the meaning of impersonal human utterances, such as legislative texts, or of cultural practices, such as religion or literature, which have a specific sense or value for the participants.

The goal of the human sciences is, therefore, more practical and normative than the objective-explanatory natural sciences: they strive towards increasing one's insight into one's own life practice by taking note of other human practices or cultural utterances.

According to the legal theory of Paul Scholten (Section 8.5) and other hermeneutic scholars, such as Ronald Dworkin (Section 1.2.3.3), legal science has a similar practical-normative character. The practising lawyer and the legal scholar aim, in a hermeneutic manner, at deriving jurisprudential guidelines for the conduct of legal subjects from authoritative legislative texts and earlier judgments. This presupposes that lawyer and legal subjects participate in the same normative legal order, and accept the basic assumptions of its legal practice. However, modern positive law is so complex that non-specialists can impossibly take it in at a glance. For lawyers the law is similarly not always clear. Often the law first has to be interpreted before it can be applied to a specific case. According to Scholten, the judge then develops with his mind's eye, and by going back and forth between the specific case and general rules, an intuitive insight into the right answer. Scholten, as a Christian, presupposes that God helps the judge to find this answer. In retrospect, the judge legitimates his legal finding by anchoring it in an acceptable way in the law.

Dworkin advocates a more rational hermeneutic approach to hard cases. As a first step, the ideal judge brings more coherence to the set of unsettled laws and precedents. For this purpose he constructs a limited number of unwritten principles which one must presuppose, should one wish for the specific laws and jurisprudence to cohere in a meaningful way. For instance, he can in separate legal fields, such as the (American) law of sale and lease as well as labour law, characterised by protection of weak parties, such as the tenant and the employee, presuppose the existence of an implicit substantive principle: the principle of equality. Subsequently the judge derives from these general implicit principles the right interpretation for the specific hard case.

A value-free empirical legal science would never be able to replace this normative communicative practice of social-scientific and legal understanding, goes the criticism of hermeneutic scholars against the logical positivists. It can indicate means-ends relationships only. It thus leaves people empty-handed who are wondering how to arrange their personal and social lives.

(3) This reproach against the logical positivists is supported by the very same empirical reality from which the positivists derive their truth claims: history shows that science, because of its amoral character, can as equally lead to immoral practices as to moral progress. The political developments in the first half of the 20th century in fact demonstrated the concurrence of extremely modern, applied science and unprecedented moral regress. Rhetorical and physical violence replaced moral rationality and equal freedom. In the *Gay Twenties* after the First World War things momentarily appeared to go in the democratic direction. However, in financial respect the belief in progress was undermined by the worldwide stock-market crash of 1929, which in one fell swoop destroyed fortunes and ushered in a protracted economic depression. Because of rapid social modernisation many had, moreover, lost their traditional foothold. In Germany people sought help in a strong Leader, Hitler, who in 1933 in a democratic manner, but equally by means of terror, came to power, and subsequently established a national-socialist, totalitarian, racist, state. (He called it 'national' and 'socialist' because the national state lay claim to

encompass all of the people.) National-socialism was based on a caricatured mixture of the legal-historical 'people's spirit' and Nietzsche's 'will to power': the German people had to internally purify its Germanic body and spirit from foreign, especially Jewish, infection, and externally conquer 'living space' from the inferior Slavic race. Fellow Germanic peoples, such as the Dutch and Scandinavians, were supposed to exultantly join in all of this. Hitler combined this pre-modern racial mysticism with an extremely modern, centrally organised use of technology in transportation, communication, weaponry, and mass murder, as a result of which he could deploy the German masses for his goals with unprecedented efficiency, and annihilate his political and racial enemies in concentration camps. In 1939 he started the Second World War, which initially proceeded surprisingly successfully for Germany and its allies, Italy and Japan. Within a short period most of Central and Western Europe, with the exception of Great Britain, was conquered. The Netherlands was overpowered in 5 days and lost the Dutch East Indies to Japan. However, when Russia and the United States became involved in the war, the tide turned. In 1945 Germany capitulated. Japan was brought to its knees with a sophisticated scientific invention, the atom bomb.

The ideal of scientific progress can, nonetheless, in an indirect manner be presented as a model for moral emancipation. During the Second World War, a kindred spirit of logical positivism, the Austrian Karl Popper, who as a Jew fled from the Nazis to Australia, wrote a philosophical study against the despotic regimes of Hitler and Stalin, *The Open Society and its Enemies* (Section 8.3.2). Popper (1902–1994) gave his criticism the philosophical appearance of an attack on the totalitarian state ideals of Plato, Hegel and Marx.

With an appeal to the epistemological model of empirical science, Popper opposed the metaphysics behind Plato's ideal of an elitist government by philosopher-kings (Section 2.4). According to Plato, philosophers have to take the political lead, because only they possess supra-partial wisdom: they have an exclusive insight into supra-sensory rational Ideas, such as the True, Good and Beautiful. However, in Popper's scientific model of knowledge such metaphysical claims to absolutely valid knowledge cannot be proved. Human knowledge is necessarily restricted to past experience, and, thus, in principle fallible. This similarly applies to scientific knowledge: natural scientific laws take the form of universally valid regularities in the style of '*always* when x, then y', but in fact an empirical phenomenon can occur tomorrow which negates this law. The claim to certain, all-encompassing knowledge of philosophers such as Plato and Marx, is, therefore, unfounded, and dangerous in practice: the elite who think that they possess all wisdom regard themselves as infallible and close themselves off from criticism. Intolerantly they force others to follow their totalitarian plans, which subsequently mostly fail in practice. Moreover, experience shows that power tends to corrupt. One must, therefore, not entrust rulers with all power if one wants them to rule impartially.

As alternative, Popper pleads for an open society, based on the liberal principles of freedom and equality. If knowledge does not stem from a higher metaphysical source, but from human experience, it is in principle accessible to everybody.

Although people vary in their mental capacities, nobody rises so high above the rest in all domains of knowledge that one should entrust him exclusively with state power. Therefore, all should have a say in governmental policy via a representative democracy. Freedom rights are necessary for an open critical debate, by means of which the plans of the fallible rulers can be tested for their tenability. Only in this way can one learn from one's mistakes. Separation of powers is required to prevent abuse of power.

Popper acknowledges that he cannot ground his liberal state ideal in empirical science, since norms cannot be derived from empirical facts. However, from the success of science one can by analogy draw lessons for other social domains: just as fallible scientific knowledge progresses by way of methodical, critical testing, political decision-making leads to the best results when it is exposed to public debate. In brief, experience teaches that democracy, understood as organised mistrust, provides the best guarantee of social progress.

8.2 Psychoanalysis

8.2.1 Introduction

Sigmund Freud (1856–1939) is known as the father of psychoanalysis. An understanding of his thinking concerning the unconscious is essential to comprehend much of 20th-century philosophy which via France influenced the rest of the world. Although Freud probably would have denied being a philosopher, his meta-psychology and reflections on culture engage in important respects with the concerns of the philosophers who have been discussed thus far, so that Freud indeed deserves attention here. Freud first contemplated becoming a lawyer, but then decided to rather study medicine and eventually specialised in nervous diseases. It is during this time that he came to the conclusion that some 'ailments', specifically those of neurotic patients,[4] cannot be explained simply with reference to physical factors, and realised that these cannot be treated effectively with the then existing techniques. His first book on the topic, *Die Traumdeutung* (The Interpretation of Dreams, 1900), posits the notion of unconscious mental processes as the primary cause of dreams. Freud's investigation is already anticipated by Plato (Section 2.4), who in the *Republic* notes that '[o]ur dreams make it clear that there is a dangerous, wild, and lawless form of desire in everyone, even in those of us who seem to be entirely moderate or measured' (Plato 1997, p. 1181). According to Freud, dreams are a result of the weakening during sleep of the control which is usually exercised

---

[4]Greek: *neuron* = nerves, and *osis* = thrust, push, resulting in an abnormal condition. The term is nowadays mostly used to refer to mild mental disorders, such as hysteria (any kind of frenzied emotional state), anxiety, depression, obsession, compulsion, hypochondria, and phobia. Neurosis is usually distinguished from psychosis (a serious mental illness, such as hallucination, delusion and schizophrenia) and from mental problems that are regarded as having a physical cause (such as epilepsy or Parkinson's disease).

by the *ego* in waking hours over unconscious mental processes. Freud furthermore asserts that dreams, in spite of the seeming irrationality of their manifest content (the dream as recalled), have a 'meaning' if account is taken of their latent content (the thoughts that lie behind the dream). In *Zur Psychopathologie des Alltagsleben* (The Psychopathology of Everyday Life, 1901) and *Der Witz und seine Beziehung zum Unbewussten* (Jokes and their relation to the Unconscious, 1905), Freud further emphasises the fact that everyone is affected by their unconscious. The operation of the unconscious can be detected in everyday life in, for example, slips of the tongue and forgetting certain things. The laughter evoked by a joke is caused by the link between that joke and the unconscious. A joke dares to say out loud (for example, by alluding to sex or by invoking wordplay) what is usually suppressed, thereby satisfying an instinct, causing pleasure, or a discharge of energy, by means of laughter. The lack of control of unconscious mental processes makes all people neurotic to a certain extent, although not everyone suffers to the same degree from neurosis. The so-called Oedipus complex became increasingly central to the thinking of Freud as the cause of most neuroses and, as we will see below, is likewise relied on by Freud to explain the development of law, morality and religion.

Sophocles's drama *Oedipus Rex* (ca 420 BC), tells the story of Oedipus, the son of Laius and Jocasta, the King and Queen of Thebes in Greece. Laius was told earlier by an oracle that should he have a son, he will grow up to kill his father. To avoid this, after the birth of Oedipus, Jocasta gave instructions to a servant for Oedipus to be killed. Oedipus, however, survived this attempt on his life, and was eventually adopted by the King and Queen of Corinth who were childless. Many years later, after having heard that he was adopted and upon trying to find out the truth from an oracle, he was told that he will kill his father and have sex with his mother. To prevent this from happening he left Corinth. On his way to Thebes he entered into a dispute about the right of way with a stranger. This led to Oedipus killing the stranger, who, it later turned out, was his father Laius. When Oedipus later solved the riddle of the Sphinx which saved Thebes from her curse, he was made King of Thebes and was given Jocasta, his mother, as wife. Their sexual union led to the birth of four children. When he later found out the truth, Oedipus stabbed out his own eyes and left Thebes, with his daughter, Antigone, guiding him. Jocasta hanged herself.

According to Freud, an Oedipus complex develops between the ages of three to five in all children. A little boy at this age desires his mother sexually. He sees his father as a threat to this desire and, like Oedipus, desires to kill his father to be with his mother. Because of the fear of castration (resulting from a threat, usually uttered by a caregiver), the symbolic substitute of which is blindness, in combination with having seen that girls are 'castrated' (lacking a penis), as well as the realisation that his desire cannot be satisfied, the boy, in the case of 'normal' development, destroys his Oedipus complex, and through the formation of the *super-ego*, or conscience, introjects the authority of the parents along with the prohibition of incest. In the case of girls, the mother is similarly the first love-object. After a realisation that the mother is castrated, and believing the mother to be responsible for her (the girl's) own castration, a girl turns away from her mother in hostility, towards her father as

love-object. Her penis envy, which Freud describes as 'unappeasable', makes her want a baby as a gift from her father as a substitute. She then in a sense takes the place of her mother, by desiring her father. Because a girl does not have the fear of castration that is found in boys, a girl does not have the same motivation as a boy to overcome the Oedipus complex, Freud asserts. According to Freud, girls remain in this complex for a long time and if they overcome it, do so incompletely.

After initially exploring with hypnosis, Freud concluded that neurotics can best be 'cured' by allowing them to talk to the psychoanalyst by saying anything that enters their mind (free association), thereby circumventing the censorship that is usually imposed by the ego on the unconscious. (Habermas (Sections 1.2.2.3, Section 9.1.5, and Section 9.3) incidentally sees a correspondence between this effort of psychoanalysis to undo repression and his own theory's attempt to achieve emancipation by way of the resolution of distorted communication in society as a whole.) It is important to note from the start that Freud uses the term 'unconscious' in a number of senses in describing psychic life. It is firstly used in a *descriptive* sense, referring to everything that is not conscious or that one is not aware of at a certain point in time. Used in this sense, latent memories, too, are unconscious. It is secondly used in a *dynamic* sense to refer to the unconscious proper, and in order to distinguish it from the preconscious. Memories in the preconscious, as we will see, can relatively easily be recalled, whereas those in the unconscious proper can be recalled only with difficulty or not at all. This is because of repression which incidentally can likewise occur in relation to the preconscious. The unconscious in this sense is so to speak 'active behind the scenes'. Thirdly, it is used in a *systemic* sense when partitioning the mind topographically or structurally. The systemic unconscious is where the primary process in the mental apparatus is situated, and would later be referred to by Freud, following Nietzsche (Section 7.5), as the *id*, or the animal instincts. A fourth, *economic* 'sense' of the unconscious can be distinguished, which paradoxically undermines the notion of the unconscious itself (see Section 9.5). Freud relies specifically on this perspective in seeking to understand the relation between *Eros* (sexual desire) and *Thanatos* (the death drive), and he speaks in this regard in 'economic' terms of the free flow and binding of energy in relation to, respectively, the primary and secondary mental processes.

8.2.2 The Mental Apparatus

In order to understand Freud's reflections on the origins of law, morality and religion, it is necessary to enquire briefly into his model of the mental apparatus. In his book, *Das Ich und das Es* (The Ego and the Id, 1923), Freud divides the mental apparatus topographically into the ego, the id and the super-ego, and in doing so abandons, because of its ambiguity, the use of the term 'the unconscious', except in its descriptive sense. The three realms, regions or provinces of the mental apparatus do not all occupy the same 'space'. The *id* occupies a space which is much larger than that of the ego or the preconscious. According to Freud, the development of the ego from out of the id involves a later development, brought about by the

demands of the external world that are placed on the perceptual system. We can even go as far as saying that the ego is the representative in the mind of the real external world. In the id the primary instincts are at work, and all mental processes take place unconsciously. This is the 'place' which, in Nietzsche's words, is beyond good and evil (Section 7.5.2), as the id knows no morality and no judgments of value. Freud describes it as 'the great reservoir of libido'. Consciousness, which is characteristic of the *ego*, is furthermore only a small part of psychic life, and of a passing nature. With the development of the ego (from out of the id), a portion of the contents of the id is taken up in the ego, whereas another portion stays behind – the unconscious proper. A part of the ego is, therefore, likewise unconscious, to be distinguished from the preconscious portion of the ego. In the development of the psyche, certain experiences of the ego are, furthermore, for defensive reasons repressed and pushed into the id. The unconscious portion of the ego is, according to Freud, for example, to be seen in the resistance of the ego (in collaboration with the super-ego) in analysis, more specifically in refusing to concern itself with what has been repressed. This resistance is something patients are often unaware of.

In addition to the ego and the id, Freud identified a *super-ego*. The ego, as we saw, is formed out of the id and at the same time attains its energy from the id. The way in which the ego concentrates its energy on objects is a result of the instinctual demands of the id. This, moreover, explains the formation of the super-ego. Apart from a conscious portion, it has, like the ego, an unconscious portion, and in this respect it has an intimate relation with the id. The parent, as we saw above, is first desired as a sexual object (this happens with boys, too, in relation to their fathers before the Oedipus complex sets in). When the child is obliged to give up on this object it compensates itself by setting the object up in the ego or by intensifying its identification with it. The installation of the super-ego is thus a result of a successful identification with a parental figure. The super-ego is consequently an heir to the Oedipus complex and involves more precisely a repression of the Oedipus complex. This explains the function of the super-ego as a critical, observing and prohibiting agency which continually confronts the ego in instances where it seeks to comply with the demands of the id. By means of the super-ego, that which is the lowest or most 'primitive' part of mental life has thus, by turning it into an ideal, been transformed into that which is the most valued. Whereas unpleasure is the consequence of abstention due to inhibiting forces in the external world, compliance with the wishes of the super-ego leads to pleasure. Other figures that take the place of the parents, such as teachers or other ideal models, similarly inform the super-ego, although these figures are not incorporated or introjected[5] like the early parental figures. The formation of a child's super-ego is furthermore determined by its relation not with the parents themselves, but with the super-ego of the parents. This is the way in which tradition and culture are passed on from one generation to the next.

---

[5]Freud does not draw a strict distinction between these notions, something which would later be done by the Hungarian-French psychoanalysts Nicolas Abraham and Maria Torok.

Freud, thus, to a certain extent, agrees with both Kant (Chapter 6) and with Hegel (Sections 7.1.4 and Section 7.3) regarding the way in which morality is formed: with Kant, in so far as this is determined by the super-ego; and with Hegel, in so far as the super-ego is not simply of an individual nature, but determined by tradition. As we will see later, the notion of the super-ego, in addition to its important role in relation to morality, likewise explains the formation of a social sense and of religion.

The ego can thus be said to have three 'masters': reality, the id, and the super-ego. In his *New Introductory Lectures* Freud describes as follows the difficult task the ego has of satisfying these 'severe' masters:

> Thus the ego, driven by the id, confined by the super-ego, repulsed by reality, struggles to master its economic task of bringing about harmony among the forces and influences working in and upon it; and we can understand how it is that so often we cannot suppress a cry: 'Life is not easy!' (volume XXII, p. 78)

The different parts of the mental personality are, furthermore, not sharply distinguished from each other, but rather melt into one another. The development of the different parts, moreover, takes place in different ways in different persons. From the above it should be clear that that which is conscious does not simply coincide with the ego, nor that which is repressed, with the id.

8.2.3 The Functioning of the Mind

In light of the main themes of this book, Freud's contemplations on the workings of the mind are of particular interest to us. This of course ties in with the topographical picture of the mind presented above. In the philosophical theories we have discussed thus far, mention has often been made of the (untamed) instincts, or what Kant refers to as inclinations, which we can now locate in the id, and which Freud from an economic perspective refers to as the primary process because of its relation to the discharge of energy. The notions of logic, rationality and common sense, which entail a secondary, inhibitory process, we can locate in the ego. The ego is, moreover, where the perceptual system introduces the notion of time, in comparison with the id which has no relation to time. The notion of conscience or the moral law in Kant, and which Plato refers to as 'shame', we can locate in the super-ego. Freud could more specifically be said to reduce Kant's notion of moral consciousness to the sphere of empirically observable reality or the phenomenal world, seeing that it reflects the influence and judgments of one's parents, grandparents and ancestors, and is, therefore, in a way, causally determined. The objectivity that Kant ascribes to the supra-sensory, rational moral law which speaks to us unconditionally via our conscience is hence unmasked as an illusion. (Freud incidentally agrees with the utilitarians that the seeking of happiness, or what Freud refers to as the pleasure principle, dominates in the mental apparatus, and he did not fail to link this to genital love as the prototype of all happiness; he, however, expressed some doubt regarding the dominance of the pleasure principle in mental life in *Beyond*

the Pleasure Principle.) With Kant we saw the synthesis of the views of empiricism that mental processes are preceded by empirical observation and of rationalism that empirical observation is preceded by certain ideas in the mind. Freud, as an empirical scientist, seeks to go beyond Kant's answer that the mind structures the way in which empirical observation takes place. Psychoanalysis, in Freud's view, enables us to answer the question as to what drives us to interact with objects, and at the same time how it comes about that the mind structures this interaction in a specific way. The instigator of both empirical observation and of rational thinking is to be found in the unconscious. Freud, in other words, contends that the ego and the super-ego are only secondary effects of a more primary process to be found in the id. The id is, in other words, the locomotive energy of the psychic system. For the purpose of instinctual satisfaction it brings the organism into motion. The only contact the id, however, has with the external world is by way of the ego. According to Freud, the ego has acquired the task of representing the external world to the id. This is so because without the ego's 'reality-testing' (which includes the laying down of accurate pictures in the memory traces) the id would have destroyed the organism in its attempt to satisfy the instincts. To understand this we have to investigate the phases through which a psychical act goes from the unconscious to consciousness.

According to Freud, thought relies on the mnemic residues of experience. Where are these residues to be found in the mental apparatus? As we saw above, the perceptual-conscious system forms the surface of the mental apparatus, the contact that exists between an organism and the external world. In the latter respect it produces perceptions of excitations of the sense organs that come from the external world. The excitatory processes leave no traces within the perceptual system itself, as it would otherwise not be able to remain open to new receptions of stimuli. The perceptual system thus has no memory. The excitation is instead transferred to the other (mnemic) systems lying within the mental apparatus (adjacent to the preconscious system) and leaves traces behind there. In his *Notiz über den 'Wunderblock'* (Note on the 'Mystic Writing Pad', 1925), Freud illustrated this manner of functioning with reference to a writing pad consisting of a celluloid sheet, thin waxed paper, and a clay or wax slab. The celluloid sheet of the writing pad can be written on with a sharp instrument without the need for ink. The celluloid sheet can furthermore be lifted from the slab to remove the markings and, like the perception-consciousness system, does not itself retain any permanent traces. The wax slab, like the unconscious, permanently preserves all the inscriptions that have been made on the celluloid cover. This registration of an event is, according to Freud, registered in different ways or in keeping with different methods of classification: in one mnemic system, for example, according to simultaneity in time, and in another, according to relations of similarity. In so far as relations of similarity, or what could be termed 'chains of association', are concerned, some dream-images are, for example, about things which sound the same, such as *kilo*metre and *kilo*gramme. In a descriptive sense, all memories are unconscious. Whereas events registered in the preconscious system are generally accessible to consciousness, those registered in the system unconscious or id, are as a rule inaccessible to consciousness. This is so because

in the unconscious system, thing-cathexes[6] of objects take place. Unconscious presentations are, therefore, only of things, whereas in the preconscious system, the thing-presentation is hyper-cathected by being linked to the word-presentations that correspond with it. Word-presentations are thus residues of memories which at one time were perceptions – words that were heard or read. Freud elsewhere nonetheless affirms the possibility that some memories may be destroyed in the normal course of things, and thus will not be subject to recollection by any means. (This will be referred to again in our discussion of Derrida in Section 9.5).

Repression (involving a withdrawal of cathexis) can in light of the above be said to involve the refusal to translate into words that which is attached to an object. Should a presentation not be put into words, it will remain in the unconscious in a state of repression, hence the importance of the talking cure. Repression can, moreover, be described as involving a process of censorship of psychical acts coming from the unconscious. If it passes the test, the psychical act goes through to the preconscious system from where it can become part of consciousness. In the preconscious stage it is not, however, as yet conscious, it is simply capable of becoming conscious. This enables us to define the activity of thought or rationality as the postponement between a need, or what the id desires, and an action. By means of thought, the ego tones down the seeking for pleasure in the id, by testing these desires against reality. For conscious thinking to occur, excitation of the perceptual-conscious system must, therefore, flow from the interior of the mental apparatus. In his *Entwurf einer Psychologie* (Project for a Scientific Psychology, 1895, published posthumously in 1950) Freud contends that this is indicated by the fact that qualities (conscious sensations) cannot originate in the external world as there one finds only masses in motion (see Hobbes in Section 4.1.2). Memory is similarly without quality. Something else must, therefore, give rise to an idea becoming preconscious (for a thing to be connected to a word), and consequently for conscious sensations to arise. It is as a result of contact between the different systems, as Freud explains in the *Note on the 'Mystic Writing Pad'*, that consciousness arises, and this contact consists of cathectic (or libidinal) innervations. Consciousness is extinguished every time the cathexes are withdrawn, resulting in the coming to a standstill of the entire system. This 'something else' is unpleasant (a heightening of tension) and is aimed at what is pleasant (a lowering of tension). The activity of (conscious) thinking thus involves the making of a connecting link between unconscious thought-processes and that which Freud, in *Der Mann Moses und die monotheistische Religion* (Moses and Monotheism, 1939), refers to as the 'mnemic residues of visual and auditory perceptions along the path of the function of speech'. By means of the interposition of word-presentations, internal thought-processes are, in other words, made into perceptions. For this reason the 'inexplicable' phenomenon of consciousness arises in the perceptual system, *instead of* the memory traces.

---

[6]*Cathexis* = attachment of an amount of psychical energy to an idea, object, etc.

The process of thought can be clearly illustrated by what happens in dreams (and hallucinations). In the case of dreams, a retrogressive movement (already commented on by Hobbes in his *Leviathan*) takes place from mnemic systems towards the perceptual-conscious system (the ego), for example, in visual images. This is so because dreams are made from memories, some of which were registered shortly before the dream, and others which date from childhood. Something similar happens in thinking, the only difference being the absence of a hallucinatory revival of perceptual images. Unconscious thinking is, in other words, and as already noted, as active in the day as at night, although it is mostly not strong enough to make itself perceptible during the day because of the censorship of the ego. The similarity between the processes taking place in dreams and wakeful life can be better understood when, as Freud points out in *The Interpretation of Dreams*, we recognise a dream –

> as a *form of expression* of impulses which are under the pressure of resistance during the day but which have been able to find reinforcement during the night from deep-lying sources of excitation (volume V, p. 614).

8.2.4 The Origin of Law, Morality and Religion

In a number of publications Freud attempted to tease out the implications of his 'discovery' of the structure of mental functioning and the Oedipus complex in individuals, to society as a whole. Freud, in other words, contends that the same mental structures as identified in individuals are to be found in societies, with 'primitive' societies corresponding with the mental functioning to be found in infants, and more 'civilized' societies corresponding with the mental functioning of adults. These contentions have, of course, not remained uncontroversial. According to Freud, unconscious (suppressed) memory-traces of past experiences are retained not only in individuals, but also in groups, such as a community or a nation. (Some have understood this as an expression of Lamarckian views on the inheritance of acquired traits, but Freud need not be understood thus.) For Freud, this, for example, explains the notions of totem and taboo, in what we will refer to here as 'archaic' communities (see Section 1.2.1.2), as a first attempt at religion, as well as the other large-scale manifestations of religion, for example, Judaism, Christianity and Islam. In *Totem und Tabu* (Totem and Taboo, 1913) Freud enquires into 'totemism', with reference to some of the anthropological studies of the time which followed an evolutionary approach to social phenomena. In accordance with the version of totemism which Freud adopts, a totem (originally an animal, but later also plants, or natural phenomena, such as rain or water) is used to distinguish one clan from others, and has important implications for sexual relations. In its original form, according to Freud, the totem animal is worshipped as the progenitor and protector of the clan, and may not be harmed or killed by members of the clan. The totem animal is, nonetheless, killed once a year during a special ceremony, where all the men of the clan tear it apart and consume it raw. As part of the ceremony all the members dress in the likeness of the totem and imitate it in sound and movement, thus

stressing their identity with the totem. After the consumption of the totem animal, its death is mourned, followed by licentious festivities. To try to explain this institution, as well as the fact that many of the archaic communities still observed at the time consist of bands of males in totemic clans while concerning themselves primarily with the prohibition of two crimes (murder and incest), Freud posits an event which shows some correspondence with the notions of the state of nature to be found in philosophers, such as Hobbes (Section 4.1), Locke (Section 4.2), Rousseau (Section 5.5), and Marx (Section 7.4). In *Moses and Monotheism* Freud points out that this event took place over thousands of years and was repeated numerous times. In the beginning stages of mankind, Freud contends, mankind lived in small hordes with a jealous, primal father in each instance ruling over such horde. The father had exclusive possession of all the women in the horde. If a son would invoke his father's jealousy, he would be killed, castrated or driven from the horde. The sons, fearing, honouring, and at the same time hating, the primal father (as is the case with male children in contemporary society), deprived by him from having their sexual desires fulfilled by their mother(s) and sisters, one day rose against him, killed, and consumed him. Either because none of the brothers was strong enough to take the place of the primal father, or because if one of them were, it led to new battles, they eventually realised that the previous position of a single leader is no longer tenable. For the sake of peace with one another, they therefore decided on the institution of a (totemic) community of brothers, a kind of 'social contract' by means of which incest and murder (of the totem animal) were prohibited.

In this development lies the commencement of social, moral and religious obligations, according to Freud. The institution of the totem (the totem being a substitute for the father) and the totem prohibitions served a number of purposes: (1) a covenant between the sons and the totem (the totem granting them everything they could wish for, and they in turn respecting its life); (2) making amends for the murder of the primal father out of a feeling of guilt; (3) an attempt at self-justification: if the primal father had treated them the way the totem treats them, they would never have killed him; as well as (4) making it possible to forget the event which lies at the origin of the totem. This is so because after the murder the feelings of affection they had for him turned into remorse. The dead father consequently became stronger than he had been before. The father was, in other words, internalised by way of the super-ego, as explained above in the case of individuals. The special nature of the totem festivities point to the fact that the killing of the father is both prohibited (as a rule), and yet the occasion for joyful celebration.[7] Freud indicates that the institution of the totem was likely to have been preceded (during the period when there was no leader strong enough to take the place of the primal father) by, and perhaps even existed alongside, a period of gynaecocracy (government by women), with women deities developing towards the end of this period as a compensation for taking power away from women. Men thus gradually started re-asserting themselves, first by means of the totem prohibitions, and then through the further development of religion. They,

---

[7]We saw a similar ambivalence in Section 6.4.1 in Kant's estimation of revolutions.

moreover, slowly came to institute themselves as the heads of smaller families. At a later stage the primal father was re-introduced in a different form by means of the notion of a god who stands in some relation with an animal; male gods in the form of sons who appear together with great mothers; thereafter, by the idea of supreme deities; and later, the idea of one father-God; and in Christianity, the idea of God's son having atoned for the sins of the brothers (for killing the father), becoming God himself. All religions, Freud contends, are attempts at solving the problem of remorse for, as well as satisfaction concerning the triumph of, the killing of the father. There are, moreover, clear similarities between Christian Holy Communion and the totem meal, involving the symbolic drinking of blood and the eating of flesh. At the basis of every religion, Freud contends, lies a longing for the father. The bond between brothers that made possible the killing of the father, Freud suggests, was possibly based on homosexual feelings and acts. These social fraternal feelings, furthermore, continued to have a profound effect on the further development of society, as, for example, expressed in the general prohibition of the murder of any member of the clan, thereby extending the prohibition on the killing of the totem in accordance with the tie of blood; and later, to all members of society.

Did Freud believe that the killing of a primal father actually once occurred, or is it a hypothesis as with Hobbes (Section 4.1)? According to Freud, the archaic mind is similar to that of neurotics who do not draw a rigid distinction between thoughts and actual events. The Oedipus complex, as we saw, is for Freud the primary cause of neurosis. This is so because of the similarly ambivalent attitude sons have towards their father, loving and admiring him, and at the same time hating and desiring to kill him as an obstacle to their craving for power and their sexual desires. This complex, in other words, lies at the foundation of totem and taboo as well as of society, whether or not an actual murder of the pre-historic father occurred.

In an exchange of letters with Albert Einstein, *Warum Krieg?* (Why War?, 1933) Freud similarly explains the institution of law as a development which flowed from the initial domination of the strongest. Without referring expressly to his theory of the primal horde in *Totem and Taboo*, Freud expresses the view that at some point a realisation occurred that the unity of a number of weaker men was more advantageous than domination by one who is the strongest. This new order was called 'law' in comparison with the violence of the one individual. Right, law or justice is, in other words, the might or violence of the community. This new order can be kept in place only by means of an organisation of the community, the issuing of regulations, and the establishment of institutions which enforce these laws (by resorting to violence) against anyone rebelling against them. This organisation leads to emotional ties between the members of the community which serve as the source of its strength. Matters are, however, not that simple as a community never consists only of people of equal strength. Differences exist between men and women, parents and children, and slaves and masters. Because of power imbalances, struggles, civil wars or revolutions will occur within a community as a result of attempts by the oppressed groups to achieve greater equality with the dominant ones or to rule over them. Because of the necessities of living together, relative peace within a community is possible. This is not, however, the case between different communities,

races, nations or empires. A society structured to ensure peace between members of the community is, like Hobbes (Section 4.1) proposes, in other words, no guarantee against wars with other nations or groupings. Wars sometimes lead to the establishment of greater unities which can ensure peace for a certain period of time between the united groups, which then often fall apart again. Freud expresses his scepticism that it would ever, or at least in the near future, be possible to unite all the peoples of the world through an idea (such as the League of Nations, which was established in Freud's time) to ensure permanent peace. Freud explains this with reference to his theory of the drives. He distinguishes here between the erotic or sexual drive, the aim of which is to preserve and unite, on the one hand, and the destructive or aggressive drive which seeks to destroy and kill, on the other. Both these drives are essential to life, and the one never operates completely without the other. Freud finds the origin of the destructive drive in what he refers to in *Beyond the Pleasure Principle* as a death drive that is at work in every organism, and which seeks to make life return to its original inorganic state. (In a sense, tying in with what was said towards the end of Section 4.1.2, Freud contends that we are all 'seriously disturbed', although some of us succeed in 'repressing' this better than others. The 'existence' of such a drive clearly has the potential of complicating the principle that stands central in many philosophies of law, for example, in the theories of Hart (Section 1.2.3.2), Grotius (Section 3.5), and Hobbes (Section 4.1.5), and which are themselves based on the assumption of the primacy of an instinct or inclination, that is, of self-preservation. We will return to this in Section 9.5.) The German philosopher Schopenhauer (1788–1860) similarly expressed the view that the actual purpose of life is death. When this death drive is turned outwards by means of certain organs, it finds expression in the destruction of extraneous objects, and serves to preserve the life of the organism. Some part of the death drive, however, at the same time operates within the organism, causing it to turn the destructive instinct towards itself. It is, therefore, according to Freud, impossible to get rid completely of man's aggressive impulses. They are in a sense more 'natural' than the effort to prevent them from finding expression. The only way in which war can to some extent be combated is in an indirect way: by encouraging emotional ties between men via the opposing drive, Eros. This can be done through relations that are similar to those towards a love object, and/or by means of identification by sharing important interests. The evolution of culture which finds expression in the displacement of instinctual aims and the limitation of instinctual impulses, according to Freud, inevitably leads to a resistance to war, although this in itself threatens the survival of the human race as it, in turn, leads to the impairment of the sexual function.

The notion of equality can, in Freud's view, be explained equally well at the level of individual psychology. In *Massenpsychologie und Ich-Analyse* (Group Psychology and the Analysis of the Ego, 1921) Freud explains the notion of justice or equal treatment for all with reference to individual mental life which is on a par with the story of the primal horde recounted above. According to Freud, these ideas, which some would call a herd instinct, are not something with which children are born. These ideas arise from the family relationship where the older child is confronted with the birth of younger siblings. The birth of a younger sibling evokes

feelings of envy and the wish to destroy or in some other way neutralise the rival(s). However, a realisation that this hostile attitude is ultimately not in his own interest, as well as the observation that the other children are loved by the parents as much as he himself is, leads to identification with the other children. A communal or group feeling is consequently developed, and even more so, at school. This forced identification or reaction-formation results in the imposition of the demand for equal treatment: if I cannot be the favourite (any longer), nobody else should be either. What was originally envy is hence replaced by a group feeling or spirit. Freud consequently explains social justice as follows:

> Social justice means that we deny ourselves many things so that others may have to do without them as well, or, what is the same thing, may not be able to ask for them. This demand for equality is the root of social conscience and the sense of duty (volume XVIII, p. 121).

The exception to this demand of equality is the leader, who has to be superior to the members of the group. Freud compares the leader of the group who loves no one but himself, and others only in so far as they serve his needs, with Nietzsche's 'superman' (Section 7.5.2). Viewed from the perspective of group psychology, the father of the primal horde, by inhibiting the sexual desires of the sons, as we saw, forced them into emotional ties with himself and with each other. Freud in this way provides an explanation of the origins of the Enlightenment ideals of equality (or equal freedom), and brotherhood.

8.2.5 Commentary

To conclude, a few points of criticism that have been raised against Freud, and then, finally, an assessment. Many psychoanalysts have not accepted Freud's idea of a death drive, and his views on the universality of the Oedipus complex have been questioned. This has also been the case with many of his other theories. As can be expected, those who adopt a strictly scientific view (such as Popper in Section 8.4) have contended that Freud's theories do not qualify as such as they are not falsifiable (a similar contention can be made in terms of the position adopted by logical positivism, discussed in Section 8.3). Freud's theories are from this point of view of a 'metaphysical' nature. To this it can be responded that Freud specifically tries to investigate what made the development of scientific thinking possible, or what motivates people to form a society and start thinking in a scientific way: a sublimation of libidinal instincts, as we saw. To contend that these views are not 'scientific' in Popper's sense, is perhaps to put the cart before the horse. This does not, however, mean that Freud's theories amount to wild speculations. Although he rigidly held fast to many views, he changed many others because of their failure to account for mental 'reality' as he observed it. The fact that something is not strictly speaking 'science' in terms of Popper's definition (or in terms of the criterion of logical positivism) furthermore does not necessarily make it metaphysical, if

one views metaphysics as Heidegger and Derrida do (Section 9.5).[8] Marxists have termed Freud's psychoanalysis a 'bourgeois science' (Freud incidentally regarded Marx's view on the sole importance of economic motives as somewhat restrictive, and communism's belief in harmony amongst men once capitalism is abolished as naïve). In relation to human nature and the origin of law, Freud undoubtedly probed more deeply than anyone before him. Anthropologists have, nevertheless, mostly reacted with scepticism to Freud's theories about the universal and originary nature of totemism as well as his story of the primal horde, at least in so far as the latter involves (or may involve) a claim to historical truth. Those who believe in the equal value of all cultures (see Section 9.2) have understandably accused Freud of Western cultural arrogance; and those with a religious bent have, as understandably, not found Freud's views on religion very attractive. Feminists have found many objectionable things in Freud's writings, for example, the notion of penis envy and a resulting inferiority complex which Freud identified in women, his view that women have a weaker super-ego than men, that they are more narcissistic than men, have little of a sense of justice, are more jealous than men, are weaker in their social interests, and have a lesser capacity than men of sublimating their instincts.

Why should one then, despite all these criticisms, still take note of Freud? Freud, as we saw, provides us with an explanation of the origins of the institutions and laws we have in society, as well as of the differences between societies. This explanation, as we moreover saw, is intimately related to a view of human nature, that is, that unconscious processes which are similar in all individuals and nations are fundamental to humanity. This structure is quite different from the ones we have encountered before. Freud saw his task, in line with the ideals of the Enlightenment, as opening the eyes of humanity to the important influence of unconscious mental factors, and especially of sexuality, in everyday life. In this respect he undoubtedly succeeded: his writings have had an enormous impact on intellectual life in the 20th century, and which is bound to continue in years to come. The French psychoanalyst Jacques Lacan (1901–1981) and the Algerian-French philosopher Jacques Derrida (Section 9.5) are probably the most important thinkers who have, in markedly different ways, sought, after his death, to develop further Freud's thinking. To conclude, Freud was sceptical, especially in the later part of his life, of the possibility of effecting lasting changes in neurotics by means of psychoanalysis, as well as of curing humanity as a whole from its illusions, the most important of which is religion. The demands placed upon the ego by the super-ego, the id and reality, as well as those impossible demands which society's super-ego by way of culture places on its members, make discontent a lasting feature of humanity. Freud's sceptical optimism for the individual is expressed in the famous maxim: '*Wo Es war soll Ich werden*' (where id was, there ego shall be); and of humanity, that hopefully one day the

---

[8]In terms of Derrida's understanding of metaphysics, Freud's thinking none the less shows many signs of still belonging to metaphysics, as is, for example, illustrated by the oppositional categories he employs, such as Eros and Thanatos.

ideal will be reached of 'a community of men who had subordinated their instinctual life to the dictatorship of reason' (*Why War?*). In spite of his emphasis on the unconscious, Freud, unlike Nietzsche, still believed in the rationality of science.

8.3 Logical Positivism

8.3.1 Scientific Progress

Logical positivism, which views natural science as the model for all human knowledge, recognises claims to knowledge as meaningful only when they can be tested against sensory ('positive') data. Thus, logical positivism follows in the steps of the earlier positivism which was formulated by the 19th-century philosopher Comte (1794–1857). According to Comte, human thinking has evolved from subjective, phantasy-laden 'magical' thinking to objective scientific knowledge. Primitive people still possess little knowledge, and, therefore, interpret the world by analogy to themselves. They represent all things, similarly to man, as having a soul, in accordance with the animistic belief in spirits: every tree, every river is ruled by its own spirit. This magical way of thinking makes sense in a period when scientific control of nature is not as yet possible: it at least gives primitive man the idea that he can influence his environment, for example, by pleading to the spirits by means of sacrificial rituals to let it rain, or by reading the future from the stars. In the evolution of human thinking still greater abstraction and generalisation subsequently takes place. When astrologers study the stars to determine Destiny, they at the same time fortuitously gather real empirical knowledge concerning the orbit of planets and the relation of the sun and the moon to the earth. Hence, irrational astrology is in the long term converted into the realistic science of astronomy. Before it reaches this point humanity first has to go through an intermediate phase. In the second 'metaphysical' phase, events in the world are still presented as purposive (analogous to human intentional action), but now under the influence of abstract forces, such as Aristotle's final causes, Hegel's 'Absolute Spirit', 'God', or 'Nature'. In the scientific or 'positive' third stage of evolution, this teleological outlook is finally replaced by a worldview that is based on objective observation, and thus presents the world as it is.

This rationalisation of human thinking, according to Comte, does not take place simultaneously in all areas. First, during the 16th century, the natural science of Galileo and Newton emerged, which enabled man to control inanimate nature (and led to an industrial way of production). The systematic scientific approach to the more complex phenomena of human social life only occurred in the time of Comte, who is himself regarded as the father of sociology. Thanks to this new science of human relations, Comte expected that people would in future likewise be able to arrange social life according to rational planning. Thanks to economic developments, the modern society of his time already showed significant moral progress in comparison with the militaristic, chivalrous culture of the Middle Ages. Because

of the industrial division of labour and expansion of the market, people had become more dependent on each other. When one needs others in the longer term, people will treat each other with greater care, and feel responsibility towards the whole network of social relations. Comte did notice that the drastic increase in labour specialisation had actually induced narrow-mindedness and group egoism. However, this deficiency could, he believed, in future be addressed by means of better social organisation on the basis of the growing knowledge of social science: specialisation must be compensated for by means of integration at the central level of the state, so that a general feeling of solidarity can come into existence.[9]

Logical positivism stems from a group of philosophers and scientists, such as Carnap, Schlick and Neurath, who in the 1920s and 1930s regularly met in Vienna (*Wiener Kreis*). In 1929 they published a manifesto with the title *Wissenschaftliche Weltauffassung: Der Wiener Kreis* (Scientific Worldview: The Vienna Circle), in which they set out their philosophical programme. Their programme was of a mixed epistemological and ethical nature. Following in the footsteps of the Enlightenment and Comte's positivism they expected that scientific progress would lead to moral emancipation.

In the first place, the logical positivists propagated the empiricist ideal of scientific knowledge as a model for all knowledge, including that of human life (*Unified Science*). The logical positivists added the term 'logical' to 'positivism', because they emphasised logic and language, and specifically analysed the language of science. According to the logical positivists, a knowledge claim concerning reality is meaningful only if it complies with the *verification criterion*: it must be provable on the basis of sensory observation, which in principle can be accomplished by everyone. An assertion of knowledge must in all its elements and relations provide a symbolic reflection of empirical reality. For this reason all claims of knowledge must be capable of analysis into simple statements of observation which refer directly to the simplest observable characteristics of reality, such as 'This is red'. In this way scientific language has direct contact with reality, so that subjective distortion and interpretation are excluded.

All metaphysical contentions concerning a non-observable 'higher' world behind empirical phenomena, such as 'God has the shape of a sphere' or 'The movement of things is the result of final causes', are, on the contrary, not verifiable. The metaphysical thinker cannot with reference to reality make clear what concepts, such as 'God' or 'final cause', mean, and thus his utterances are meaningless from the perspective of knowledge.

In the second place, logical positivists intended to promote the emancipatory ideals of the Enlightenment with the assistance of objective scientific knowledge. After the First World War hope momentarily grew of a more humane society. (The positivist Neurath participated in the short-lived soviet-style Republic of Bavaria.)

---

[9]Comte subsequently arrived at a hierarchical, illiberal, ideal of society in which spiritual power would rest with scientists and worldly power with bankers.

However, after 1919 an authoritarian reaction set in, partly justified by means of traditional theological and metaphysical (neo-Kantian and neo-Hegelian) authoritarian thinking. The Vienna Circle wanted to oppose this by means of the scientific approach, both in a theoretical and a political sense. The logical positivists hoped for a rational improvement of society by unmasking metaphysical prejudices and ideologies (for example, that the government obtains its authority from God). In so doing, power asymmetries would diminish, and individual maturity would increase. All individuals would be able, in a situation of freedom and equality, to arrive at rational choices on the basis of unbiased factual knowledge.

The social sciences would, moreover, enable a better control of social relations, in the service of the equal happiness of all citizens. Thanks to the growth of science, Neurath contended, in modern times social conditions can be realised which in earlier times appeared to be fantastic utopias: 'utopianism as science'. In the Greek myth, Daedalus could escape from the Labyrinth by flying away with self-made wings. Nowadays we have learned through methodical scientific research how one can really fly. In the same way, social utopias can now be realised, too, with the assistance of applied social science, or 'social technique'. To attain that goal, the social technician must map out all the characteristics of human consciousness, such as curiosity and fidelity to tradition, ambition, egoism, and myopia. (Freud's analysis of the unconscious partly had a similar intent.) In his study of human beings the scientist must, in brief, view everything that characterises them and determines their socio-economic actions, in the same way as an engineer determines the elasticity of iron, resistance against copper fractures, the colour of glass, and such like. With the help of this knowledge, the state, which had during the First World War rationalised its organisation to wage war more efficiently, could now deploy its institutions for peaceful purposes, Neurath maintained.

In this way the central state would use economic and statistical knowledge to regulate socio-economic life more efficiently and more humanely. The unregulated free market had led to unjustifiable inequalities in income, and to uncontrollable catastrophes, such as the stock market crash of 1929 and the economic Depression of the 1930s. State regulation of the economy on a scientific and democratic basis had to prevent this in future.[10] The democratic state, moreover, had to socialise economic relations. With this Neurath did not aim at complete equalisation, but, among other things, at bringing wages in line with performance. In all of this the state could delegate its regulatory power to consultative bodies of employers, employees and consumers. Within industries, democratisation likewise had to take place, but the economic operational management had to stay in the hands of expert entrepreneurs. In brief, Neurath developed as a scientifically sound utopia the model of a social democracy, which after the Second World War would be realised in the

---

[10]The economist Keynes argued during this time in favour of the cushioning of economic recession by way of active state intervention in the market: state expenditure on public works would stimulate the economy and as a result increase the general welfare; Hitler's state in the 1930s indeed stimulated the German economy through large-scale state investment in the war industry and road construction, but this is not quite what Neurath had in mind.

Western European welfare states (albeit in more moderate form, without the central harmonisation of production and consumption).

8.3.2 Ethics

The Enlightenment ideals of logical positivism, however, on closer inspection stand in tension with its empiricist model of knowledge: measured against the verification criterion, moral utterances are as meaningless as metaphysical ones, because a moral term, such as 'good', cannot be reduced to observable characteristics of reality. The statement 'Suffering is bad' grammatically has the same form as 'This apple is green', but it does not furnish any verifiable, objective knowledge. A kindred spirit of the positivists, Bertrand Russell, therefore regards moral statements as the expression of subjective desires:

> When a man says "this is good in itself," he *seems* to be making a statement, just as much as if he had said, "this is square". . .. I think what the man really means is "I wish everybody to desire this" (Russell 1997, p. 235).

Someone who contends that 'It is just that all people be treated equally' therefore does not say something objective, but simply expresses a personal preference. He actually says something like 'Hurrah for Equality!'. Adherents of the scientific model of knowledge can at most establish the value-free fact *that* some people express such moral preferences – and that other people have opposing preferences.

According to this meta-ethical non-cognitivism in the case of moral disputes, no objective test exists with which to establish who is right.[11] One can only attempt to convince one another by rhetorical means. Logical positivism must, therefore, acknowledge that its own moral Enlightenment ideals of freedom and equality are not justifiable. The statement 'all people are free and equal' does not correspond with empirical reality. The actual social division of labour is specifically based on the diverse capacities of different people. Individual freedom from moralising interference by the state or fellow men is, moreover, as a matter of historical fact, the exception rather than the rule. Such a moral statement, therefore, does not attempt to describe empirical reality – indeed, if everyone was already free and equal, it would not make any moral sense. It aims at formulating a normative measure against which to test reality. If reality deviates from this standard, so much the worse for the facts. However, according to the verification test of logical positivism, these and similar normative statements lack solid ground. One can just as well, like Plato and Nietzsche, from the fact of human inequalities, conclude that there should be *un*equal rights and duties. In the empiricist view, both normative positions, in favour of moral equality *and* of inequality, say more about the speaker than about reality: these are subjective expressions of his attitude towards life.

---

[11] *Meta-ethics*: the a-normative analysis of normative ethics: Which types of ethics exist? What is the function of ethical concepts? How can ethical points of view be justified? *Non-cognitivism*: the thesis that knowledge (cognition) is not possible.

Whether scientific knowledge will really be used in favour of emancipation thus is an open question. The only emancipation of which logical positivism is capable on the basis of its own verification criterion is the unmasking of ideologies which appeal to an incorrect account of the empirical facts (such as a racist state ideal, based on an incorrect biological racial theory). It can likewise reject ideologies which are justified by invoking non-verifiable phenomena (such as: the Japanese emperor has to be obeyed because he is of divine descent). However, positivists are not capable of grounding any alternative social ideal in its own right.

Thus, all that remains is the nihilistic-objectifying tendency of modern science. Scientific knowledge can furnish means-ends relations, but according to the scientific ideal of knowledge the establishment of goals is based on irrational decisions. The 'social technique' of applied social science, therefore, is at risk of leading to the instrumental control of society by an anonymous state bureaucracy. Should this be the case, state and law may equalise citizens, but will show little respect for their individual freedom.

Later linguistic philosophers of kindred spirit have modified the thesis that moral language is meaningless. They support the view of meta-ethical non-cognitivism that ethical statements do not furnish any knowledge, but in the final instance are based upon subjective valuation. Yet, they still regard moral language as meaningful and partly susceptible to rational argumentation. In their view, language which furnishes no knowledge can nonetheless be meaningful. Commands, for example, have an inherent meaning even though they do not have the sense of describing reality.

According to the linguistic philosopher Stevenson, moral statements are similar to commands: one expresses an emotional attitude with them, and attempts simultaneously to have others adopt the same attitude. Stevenson calls this the 'emotional meaning' of moral judgments.

By attaching the pseudo-objective moral concept 'good' to an element of reality which is emotionally preferred by the speaker, he is, according to Stevenson, making use of a *persuasive definition*: moral terms possess a suggestive, emotional force which reflects on a particular element of reality, and suggests that the addressee similarly approves emotionally of that element (in the same way as 'whitening power' in an advertisement for toothpaste). As an example of the persuasive use of suggestive, normatively laden terms, Stevenson points to the Marxist interpretation of the concept of 'value'. Early economists like Adam Smith gave a purely technical, value-free description of this notion: 'value' is what is added to something by means of labour. However, because the word 'value' in everyday language use has a peculiarly emotional meaning, Proudhon could later make persuasive use of Smith's definition: what an object costs more than its value (according to Smith's definition, consisting of the costs in labour time and expenses) constitutes theft. In the same way, Marx's view that only labour can create value and that interest and profit, therefore, constitute theft, is a suggestive conclusion from a definition intended as value-free, made possible by the emotional meaning which the word 'value' possesses in everyday language use.

According to Stevenson, in the case of moral disputes rational discussion is, nonetheless, possible within certain limits. In the first place, certain moral disputes are on closer inspection based on a disagreement about facts which can indeed be settled empirically. Suppose that the parties to the discussion, because of like-minded emotions, all agree to a persuasive definition of what amounts to 'good', such as: 'good is what promotes peaceful co-existence', and are thus in agreement about the *normative* meaning of 'good'. On the basis of this presupposition, currently almost everyone in Western culture, including liberals, agree that the state has to instil in citizens certain basic virtues which are necessary for peaceful social relations, such as respect for mine and thine. The argument in favour of a responsibility of the state to make citizens virtuous in a broader sense, which is in some of these countries made by Christian Democrats, is, however, controversial. They advocate this view with the argument that citizens have become amoral and egotistical after the demise of the influence of the church and other traditional bonds. Opponents can falsify this Christian-Democratic moral appeal on the grounds of sociological research showing that the greatest majority of citizens actually still adhere to the ideal of a virtuous, monogamous family, and subscribe to the existing democratic legal order.

Secondly, the parties to the discussion may share a deeper value on the basis of which they can settle their moral dispute at a more concrete level. Suppose that I argue in favour of absolute freedom of expression, whereas my opponent wants to prohibit racist statements. To his question why I am so much in favour of freedom, I answer as an authentic liberal: it follows from my ideal of individual autonomy; to develop their own life ideals, people must be free to collect information and to express their views. – But I am in favour of autonomy *too*, says my opponent, and thus also in favour of free speech; but the very same autonomy ideal implies that this freedom ends when one's statements deny the equal autonomy of others by excluding them as inferior beings. – You are right again, I may concede.[12]

However, a substantive dispute concerning basic moral values, for example, whether one should privilege individual autonomy or communal traditions, is based on differences in the mind-sets of the parties to the discussion, and these cannot be resolved rationally. Whenever such a moral disagreement arises, Stevenson contends, only irrational persuasion or war remains. This confirms that the ideals of freedom and equality cannot be objectively proved to opponents of the Enlightenment.

The linguistic philosopher Hare extrapolated the full implications of Stevenson's analysis of the use of moral language. Hare supports Stevenson's statement that moral language primarily has a prescriptive character, and does not describe objective norms. He, however, contests Stevenson's view that the language of morals is simply suggestive and rhetorical: it entails a claim of impartiality which rises

---

[12]However, I *could* also argue that racist actions must be prohibited, but that racist speech can be better opposed by counter-arguments.

above mere subjective arbitrariness. For this reason Hare sees more possibilities for rationality in ethics.[13]

Hare belongs to a later generation of linguistic philosophers who, just like the logical positivists before them, concentrated on linguistic analysis because it is by means of language that people orient themselves in the world and conceptualise reality. Like Stevenson, they did not, however, limit themselves to scientific language; they also attempted to analyse the meaning of other types of language use, such as moral language. Hare thus diverges in many respects from the empiricist programme of the logical positivists. His non-cognitivist meta-ethics, nonetheless, remains related to it. Hare does not regard moral statements as reports of knowledge, because they primarily reflect the subjective attitude of the speaker.

Hare nonetheless criticises Stevenson for too closely associating moral statements with expressions of subjective emotion. In fact, the speaker has a different intention. When someone says: 'It is good that you are generous towards X', he does not wish to express only his personal preference. Otherwise he would rather have said: 'I *find* it good'. His '*is* good' means that all people should subscribe to the principle of generosity in general, not only in this specific case, but in all similar cases. The speaker thus intends to dispense a prescription with universal implications.

In Hare's non-cognitivist view, the specific content which a speaker gives to moral terms like 'good' is not fixed beforehand; an openness which is absent in judgments concerning facts. One cannot, for example, equally well say 'The earth is square' and 'The earth is round'. The empirical facts only allow for the second description. But one can with equal right say 'Human equality is good' and 'Human inequality is good'. It depends on one's attitude to life which specific moral position one chooses, and this may vary per person. Yet, the universal purport of moral statements does make rational criticism possible in retrospect. It imposes a logical limitation on irrational arbitrariness: logically, a moral judgment is acceptable only when it complies with its own universal claims. The test for this is whether the speaker would accept his statement in all circumstances which are the same in relevant respects. He can, therefore, not make an exception for himself. If Aristotle states that slavery is good, he would then have to accept that he *himself* can end up in the position of a slave. He would, on the other hand, logically contradict himself if he should say: 'Slavery is good, except for me'. The *universalisability criterion* will, according to Hare, disqualify a great number of lopsided moral judgments. Few people would after all want to be a slave themselves. For sure, it is possible that someone finds slavery such an important good that he would even accept this arrangement if he himself complied with the criteria of a slave. But someone like this is disqualified by Hare as a 'fanatic', and would in fact seldom be found.

Hare recognises, on the other hand, that rational moral criticism has its limits. In moral disputes where all conflicting views have passed the universalisability test,

---

[13]Hare's later work, where he converts to utilitarianism, will not be considered here.

no further rational discussion is possible. When two speakers pronounce contradictory moral prescriptions, for example, in favour of, and against, human equality, and if both are prepared to accept the consequences of their own prescription were they to find themselves in the position of the others involved, then no further criteria are available to settle their dispute. Here two persons with opposing mentalities simply confront each other. The possibility of rational argumentation in ethics is, therefore, greater in Hare's view than in Stevenson's, but still very limited.

The rationality of Hare's ethics is even more reduced because of a difficulty which he does not sufficiently realise. Hare's universalisability criterion entails that the speaker must accept the same moral judgment in all instances which are similar to each other in *relevant* respects. This emphasis on 'relevant' is necessary, because situations are almost never completely identical. Thus, it first has to be established what is regarded as 'relevant'. Because of this, infinite chances of evasion arise, as one can always allege that there is a relevant difference between two situations. One could even deny that all *human beings* as such are similar in relevant respects. Someone who, like Plato, Aristotle or Nietzsche, presumes that different categories of people are unequal in kind, may simply refuse to put himself in the position of others whom he regards as inferior. Nietzsche, for instance, contended that intelligent, courageous, and authentic people are of a superior class, who stand high above the masses of the 'all too many' and, therefore, have to rule over the masses (see Section 7.5). A Nietzschean superman would deny that herd-people are similar to him in the relevant respects and, therefore, he does not have to imagine how he would feel should he himself be in their position. A cow after all does not have to place itself in the position of the grass that it eats. (Or, if it did, it would have no problem in conceding: 'Of course, *if* I were grass, I should be eaten.') Hare thus mistakenly supposes that every speaker, as a human being, is interchangeable with all other human beings who are involved, and, therefore, has to place himself in their position. Under the mask of a neutral analysis of the meaning of moral language use, he smuggles in a contested substantive norm of human equality. Plato, Aristotle and Nietzsche would not have to accept it.

This shows that Hare's meta-ethics is not capable of grounding the Enlightenment value of equality. The same applies to the principle of freedom. Someone who does not care much about his personal liberties can very well propagate an unfree mode of life as universal norm.

Finally, Hare has no arguments against those who themselves refrain from making moral statements. His universalisability criterion merely provides a retrospective critical test, which can be applied only after a speaker has used moral terminology. He can then be required to be consistent. However, Hare's analysis of moral language allows for a complete rejection of morality as such. According to Hare, moral statements do not refer to something objective. They are just the expression of someone's mental 'disposition'. Why, then, would I take any interest in such prescriptions? Why be moral? This also applies to the moral prescriptions which emerge from my own mental disposition. Suppose that my moral consciousness prohibits me from engaging in all kinds of egotistical enjoyments. Why would I then

not consistently choose in favour of my egotistical inclinations without further justifying them in moral terms? My conscience after all does not, as Kant assumed, refer to some rational moral law; my moral dispositions can be explained as a result of socialisation, and are thus not of a higher order than my other empirical dispositions. I find myself confronted by an internal conflict between two psychical inclinations – in Freudian terms, between my ego and my super-ego. I only live once, thus why would I not be egocentric? Morality is for the simple-minded.

Hare's invocation of the universalisability criterion is characteristic of modern ethics. One recognises it in different terms in Kant's categorical imperative,[14] as well as in the ethics of Habermas (Section 9.3) and Rawls (Sections 10.5 and 10.6). It indicates that, since in the Modern Age no self-evident agreement exists concerning the content of moral values, ethics falls back onto a more *formal* standard, which expresses the impartial character of moral decision-making. For this reason the universalisability criterion requires of one to distance oneself from one's egocentric perspective, and reconsider one's viewpoint from a general point of view. Hare's version of this approach operates unsatisfactorily as a critical test, because the selection of acceptable moral judgments depends strongly on the psychological fact whether a subjective speaker would regard something as acceptable for himself should he find himself in the position of the others who are involved. In the next two chapters it will be discussed whether versions of the universalisability criterion that take the form of an intersubjective deliberation procedure (Habermas) or a hypothetical social contract (Rawls), can produce more satisfactory results.

8.3.3 Law

For *legal science* the requirement of empirical verifiability in its most radical form implies that the legal scientist should restrict himself to statements about the externally observable conduct of legal subjects. Legal science would thus have to take the form of a kind of legal sociology that describes the law in the manner of the legal philosopher Austin (Section 1.2.3.1): The highest authority proclaims commands; the conduct of the majority mostly coincides with these commands; and if not, coercion follows.

Legal science would by contrast lose its status as *science* as soon as it makes normative statements about non-observable matters, such as 'reasonableness and fairness', 'good faith', 'equality', 'tort/delict', 'illegality' or 'fault'. These are unverifiable and, therefore, meaningless statements, which have nothing to do with objective knowledge. References to supposed objective, metaphysical moral values, such as justice, as with Plato, or an eternally valid natural law as with Thomas Aquinas, are completely unwarranted.

---

[14]Or unconditional command: A rule of conduct counts as moral only when it is acceptable as *universal law*, see Section 6.2.

The verifiability criterion would thus require a legal science that radically differs from jurisprudence as it is typically taught today at law schools. Contemporary academic legal studies are not aimed at the objective registration of observable facts, but at normative argumentation about the best solution for legal problems in light of the positive legal order. This appears from scholarly articles in law journals and commentaries on decisions of the courts. In these publications the legal scholar usually performs a similar kind of normative activity as the judge, albeit in a more systematic manner, and sometimes also with a critical attitude towards positive law. From the perspective of unified science, this practice is not 'science' at all, but rather a skill, or 'legal scholarship'.

In keeping with the ideal of unified science, an empirical approach to law was in the 20th century developed by American and Scandinavian *Realism*. The *American Realists* focused on the empirical conduct of judges: law is what the judge actually says it is. The judge indeed consults the legal texts, but it is his interpretation that settles the matter. When the view of the judge in a hard case is unclear, the legal scientist must predict what the outcome of the interpretation will be. In this realistic approach the legal scientist must then in a value-free manner take stock of the norms which the judge in fact proclaims, for example: it is an empirical fact that judges condemn murder and punish it harshly.

With this approach the American Realists place themselves in opposition to the views of legal formalism which dominated 19th-century legal science: the judge must simply apply the general rule of the law to the specific case. To be sure, as the Realists themselves recognised, legal sources such as legislation and precedent, play a role as a backdrop to the judicial decision. Ultimately, however, the judge establishes how these are to be applied: one does not find the law in books, but in judicial action. The judge is, furthermore, influenced by his own view of the general welfare and his highly personal preferences, political prejudices and mood of the day: Does he like blonde women? Does he dislike men with beards? Is he a Catholic? Is he altruistic? The legal scientist must take account of all the legal and non-legal stimuli to describe and explain legal reality.

The *Scandinavian* variant of Realism gives a more systematic description of law as a subsystem of society as a whole, and also gives a better account of law's normative side. According to the Scandinavian Realists their American congeners disregard the institutional embeddedness of judicial power: they do not realise that the judicial institution is in its turn determined by rules of competence, so that the person of the judge is not all-decisive. Moreover, the Americans can also not explain why the authority of the judiciary is generally accepted.

This realistic picture of the law is akin to the sociological description of the legal positivist Hart, who similarly points to the interplay between external coercion and internal acceptance of the rules of the legal authorities (see Section 1.2.3.2). Much earlier than Hart, the Scandinavian legal realists opposed the view of Austin's legal positivism (Section 1.2.3.1) that custom and coercion alone are sufficient to explain why most citizens generally obey the law: the general public must also have the

subjective conviction that it is *appropriate* to obey the law. This acceptance, according to Scandinavian Realism (and Hart), does not point to an objective morality or to natural law – something like that is after all unverifiable. It reflects the psychical fact that most legal subjects possess a 'legal consciousness', a moral-legal sense of justice which is established by means of socialisation and education within a legal culture.[15] Such psychological facts subsequently lead to changes in social reality. Legal-moral assertions, such as 'This car is my property' or 'He is my heir', have actual social consequences, because within a legal community they invoke in a suggestive manner representations of appropriate action, and legal subjects will subsequently act accordingly. In this respect the realistic explanation of the operation of legal terms corresponds with Stevenson's analysis of moral language.

According to Realism, law on the other hand distinguishes itself from morality through its ordering function, which requires central legislation and its enforcement. As a consequence, law has taken the shape of a social institution which is based on the interaction of four factors. The legal order consists, first, of a system of coercive sanctions. This system of coercion is bound up, secondly, with a mental attitude of legal subjects, that is, self-interest, stimulated by fear of sanction. In the third place, an authoritative public institution exists to establish general norms, and which derives its authority from a fourth factor: an unselfish normative consciousness (formed through education) requiring subjects to obey these legal norms. The content of the law is not only determined by central legislation and judicial decisions, but also by customary law and non-positivised principles, such as fairness.

Realistic legal theory leads to a non-cognitivist view of the normative legal discussions that typically take place in legal practice and in academic legal scholarship. In the case of disputes about the right answer in hard cases where positive law is unclear, no generally valid standard exists. Criticism invoking natural law is based on subjective preferences.[16]

In an extension of this view, Hans Albert, a follower of Popper (Section 8.4), scornfully compared normal legal science with theology: it views laws and precedents as authoritative sources of legal reasoning, in the same way as traditional theology uncritically builds upon religious dogmas, such as the existence of God or the validity of the Ten Commandments. Legal scholarship, just like theology, is based on an irrational *revelationist* model of knowledge: the belief that one

---

[15]Scandinavian Realism, moreover, takes account – in this respect it is less strict than Logical Positivism – of psychic phenomena which are not directly verifiable, such as moral consciousness. The existence of the contents of consciousness is indeed not directly observable by the senses, but can, according to the Realists, be verified indirectly. A hypothesis, such as that a person has the intention of renting a house, can, for example, be verified by observing his external conduct.

[16]Subjective rights, such as the right to property, exist only in a social sense: as the mutual expectations of legal subjects, derived from the central regulatory process and coercion. 'Natural rights' or non-positivised human rights are simply figments of the imagination, from which a suggestive rhetorical force can none the less go forth.

must obtain the truth from the utterances of institutions which are clothed with indisputable authority to solve the problems in question.

The empiricist ideal of Realism and of Albert requires that legal science abandon all normative positions. In this way it may be more objective than traditional legal scholarship, but this has to be paid for by a loss in practical usefulness. Science after all provides no normative guidelines to legal practice. Albert points out that empirical science can, on the other hand, assist in means-ends calculations. Just as in the case of normative legal scholarship, public goals must be established elsewhere – in the political domain. Subsequently the legal scientist can, by means of applied science, indicate which rules or interpretation is functional if one wants to attain these goals. 'Legal technology' can even do this much better than dogmatic legal science, because it focuses on the empirical relation between law and its social environment. It can in this way screen the efficiency of the whole legal system, and confront it with more effective ways to attain its goals.

8.4 Critical Rationalism

8.4.1 Popper

Critical rationalism improved on some of the weaknesses of logical positivism, but nonetheless remains closely related to it with its empiricist criterion of science and correspondence theory of truth. Critical rationalism is now considered as the standard approach in scientific practice, at least in the natural sciences.

The founder of critical rationalism is Karl Popper (1902–1994), who in the 1930s attended gatherings of the *Vienna Circle* and then already criticised a number of deficiencies in logical positivism. According to Popper, logical positivism with its empiricist criterion of verification makes the same mistake as the rationalistic theory of knowledge, which the positivists themselves reject as unverifiable: rationalists *and* positivists search erroneously for a certain foundation for all knowledge. Rationalism searches for this foundation in what is a priori self-evident to reason. Logical positivists regard this as speculative, because what appears self-evident in the eyes of rationalists often turns out to be completely subjective. Instead, they posit sensory observation as the certain foundation. They regard empirical data as objective, because these are directly verifiable by everyone.

However, this empirical basis likewise appears on closer inspection to be less certain and objective than the positivists claimed. According to Popper, even the simplest statements of observation, such as 'This is red', require interpretation. When I, for example, in an ostensive (demonstrative) definition point to a red piece of paper, the addressee must already understand that I am referring to the colour, and not to the shape or to the material. Popper, therefore, speaks of a 'searchlight' view of observation: observation is led by a selective viewpoint which places the spotlight on aspects of reality that are regarded as relevant. What counts

as a 'fact' is not objectively given, but turns out to be dependent on human conventions.

Popper nonetheless retains the principle of empirical verification as delimitation of the domain of scientific knowledge, as well as the correspondence theory of truth: a theory is true when it corresponds to external reality. The conventional nature of scientific facts does not detract from this, because people in general do not disagree about which facts are relevant for scientific testing. According to Popper, in the scientific forum such a degree of consensus actually exists regarding what counts as empirical facts, so that these can nevertheless serve as an intersubjective test for the truth of theories.

On the other hand, the character of empirical testing diverges from positivism because of Popper's objections to the positivist principle of verification. The most important objection is that the verification criterion prohibits universal statements of regularity such as '*always* if x, then y', whereas this precisely constitutes the core of natural science.[17] The reason for this lies in the 'induction problem': a finite number of observations are insufficient to verify universal statements concerning an infinite number of cases. Such universal statements relate to all future cases, and these are per definition not as yet confirmed by observation. The logical positivist, therefore, has to reject the scientific laws of nature as senseless, whereas he specifically regards natural science as *the* example of objective knowledge. To escape from this outcome, Popper introduces a *falsification criterion* in the place of the verification criterion of the logical positivists. The falsification criterion only posits the negative claim, that from scientific statements concrete predictions can be derived regarding possible observations which can refute the statement as *un*true. Because of this, universal statements are again permissible. The statement 'All ravens are black' can, for example, not be fully verified, but it can be annulled by the observation of a white raven. By contrast, all statements which cannot be falsified by means of empirical observation, fall outside the domain of science. Popper incidentally does not regard forms of knowledge which are not falsifiable, such as myths, Plato's metaphysics, Marxism, or psychoanalysis, as completely senseless. They can provide a useful heuristic strategy to invent scientific hypotheses. They only do not themselves furnish any objective knowledge. In this respect, Popper distinguishes between the *context of discovery* where anything goes, and the *context of justification* that has to comply with strict methodological standards. That the empirical basis provides a less objective standard than logical positivism contended does not detract from the essential difference between such pre-scientific theories and real science. Although the falsifiable fact is based on human interpretation, and is, therefore, not identical to reality-in-itself, a scientific theory at the moment of falsification indeed touches 'something' in reality. Reality thus provides resistance against all wild speculation. This gives Popper the confidence that it is possible to come still closer to the truth, even if we can never reach it completely.

---

[17]The same problem is pointed to in the discussion of Kant's doctrine of knowledge (Section 6.2).

Because it appears impossible to posit universal scientific statements with complete certainty by way of empirical observation, Popper regards these as hypotheses. Such hypotheses can be regarded as true only *provisionally*, that is, for as long as they have not been falsified.

8.4.2 The Open Society and Its Enemies

Popper posits the requirement of negative empirical verification for both the natural and the human sciences. Critical rationalism thus subscribes to the ideal of the unity of the scientific method of logical positivism. What is not empirically falsifiable, falls outside the domain of scientific knowledge.

This, moreover, means that *ethical* and *legal-normative* statements cannot make any claim to the status of objective science. Normative judgments can after all not be refuted by way of observation of facts. Popper thus subscribes to the empiricist dualism of the logical positivists and Hume between factual and normative statements: statements about facts provide objective knowledge; but normative judgments are ultimately based on an irrational subjective decision, which cannot be grounded any further. Science can at most provide the most efficient means, after the irrational choice in favour of a normative purpose has been made.

Popper did, however, work out the implications of his doctrine regarding the uncertainty and provisional nature of all human knowledge for the normative domain of political decisions. *The Open Society and its Enemies*, which he wrote in Australia after having fled Austria when it was under Nazi rule, is a pamphlet against the Nazi dictatorship. Popper moulds it in the form of an attack on theories of philosophers, like Plato, Hegel and Marx, who defend a totalitarian state. Popper contends that in politics, just as in science, one should acknowledge the fundamental fallibility of all human convictions and compensate for this by being open to criticism. Only thus can one learn from one's mistakes. This results in a liberal view of state and law, in accordance with the Enlightenment ideals.

Popper recommends two precautions. In the first place, one must not attempt to improve society as a whole in one fell swoop in accordance with a blueprint of the ideal society – as propagated by Plato and Marx. Because of our deficient knowledge we cannot predict the real consequences of such a utopian ideal so that there is a good chance that the result could be even worse than the current situation. (Notorious for example, is the anti-sparrow war which Mao later in the century imposed on the whole of communist China. All sparrows had to be killed because they ate the seeds in the fields. Unfortunately, after the sparrows were exterminated, caterpillars could increase their numbers without hindrance into a new plague that destroyed the harvest.) Popper argues in favour of an evolutionary cautiousness instead of revolutionary rashness: do not start completely anew, but fix the worst abuses on the basis of experience. In addition he propagates a kind of negative utilitarianism: one cannot know which social institution leads to the greatest happiness for the greatest number, but it is clear where the greatest suffering occurs. One, therefore, has to concentrate on the removal of this.

Secondly, Popper advocates an *open society* where decisions are taken by means of critical democratic deliberation about desirable social developments. Against Plato's authoritarian state ideal, he contends that no person can ever possess the infallible knowledge which Plato ascribes to the philosopher-kings. On the basis of his falsification criterion Popper recognises only knowledge of the sensory observable world, which in Plato's view too consists of provisional and changing 'opinions'. Plato's appeal to a higher form of knowledge, located in an unchanging world of Ideas, Popper regards as indemonstrable and unscientific. Thus only empirical knowledge remains. The latter, as Popper contended in his polemic with the logical positivists, can never be certain, and always has a provisional character. Progress in knowledge, according to Popper, takes place only by way of the progressive falsification of untrue theories. For this reason in society, too, an open and critical climate should exist, in which all views are tested against experience, so that man can learn from his mistakes. Popper argues on this basis, in contrast with Plato, for an 'open society' where freedom of expression rules. Because there is no elite who possess all wisdom, a democratic constitution should give everyone an equal vote in decisions about the organisation of society. According to Popper, history illustrates that the state should be arranged in such a way that the authorities are under constant critical control. Absolute, authoritarian state institutions have in almost all instances led to abuse of power, however much the rulers have argued that control is not necessary because they embody 'the people', 'the proletariat', or 'the general will', in brief, the general interest. Democracy, then, must, in Popper's view, not be viewed in terms of delegated trust, but as organised distrust. Popper's theory about the essential fallibility of human knowledge that moreover exclusively refers to the empirical world, consequently results in a normative plea for the rule of law, democracy, equality, and freedom rights.

Popper nevertheless retains the distinction between objective factual knowledge and subjective moral positions: in the case of normative discussions about the best way of organising the state, an external empirical test, which *can* settle scientific disputes, is lacking. For this reason Popper concedes that his own choice for an open, critical society is indeed based on argumentation (rather than on empirical facts), but that the acceptance of these arguments ultimately amounts to an irrational decision.

8.4.3 Commentary

Logical positivism and the related movements in meta-ethics and legal philosophy must pay for their ideal of scientific objectivity with the loss of rational ways to settle fundamental normative disputes. This involves the risk that the objectives of the individual, the community, the state and the law are surrendered to a blind political power play, as some Sophists have it. Moreover, traditional legal science degenerates into an irrational practice. The expectation of the positivists that they could unite the two ideals of the Enlightenment – scientific progress and moral emancipation – thus ends in failure because of the amoral character of empirical science. The positivists,

moreover, overestimated the objectivity of scientific knowledge, because sensory observation always rests on interpretation.

Popper's critical rationalism addresses the second, and partly the first, objection. Popper does give an account of the interpretive character of science, but retains its empirical foundation. His scientific doctrine, therefore, similarly leaves no room for a rational foundation of normative positions. He does, however, give reasons in favour of a liberal constitution in presenting his scientific model to the political domain by way of analogy. In the domain of law, Popper's follower Albert arrives only at an instrumental 'legal technique', which itself cannot provide any objectives. However, in combination with Popper's liberal basic values, this applied empirical legal science does open up certain possibilities.

Critics, however, contend that causal-explanatory science is as such unsuited to give an account of human life, since the latter is characterised by having meaning and value for the actors (Section 8.5). Causal-explanatory science moreover denies non-empirical, but nonetheless meaningful ways in which to arrive at reasonable solutions for normative problems, including hard legal cases. The mode of conflict resolution by way of impartial arbitration which has been developed in legal practice could indeed serve as model for moral discussion in general, states Habermas (Section 9.3).

8.5   Hermeneutics

8.5.1   The Practical Meaning of Understanding

Logical positivism and critical rationalism both propagate the ideal of a unified science in accordance with the model of natural science. Opponents object that this model has fundamental shortcomings in relation to human conduct. For this reason the social sciences require a unique method of their own, that of interpretive understanding or *hermeneutics*.[18]

As regards human life, hermeneutics wants to restore the Aristotelian teleological model at the expense of the causal model of natural science. According to hermeneutics *human* activities are indeed determined by normative objectives and not by efficient causes, such as the aimless, mechanical processes of inanimate nature. Unlike Aristotle, hermeneutics restricts this teleological model to the cultural world. Hence, according to Hart, the legal order is at the service of the common human urge to survive (see Section 1.2.3.2). This is more than a neutral, empirical fact, Hart contends. From an objective viewpoint it is indeed immaterial whether people live or die, but from the viewpoint of man himself, his survival has a special value which affects his entire interpretation of reality. From this perspective he

---

[18]The doctrine of understanding, interpretation; derived from the Greek God Hermes and the Greek verb 'hermeneuein'. Hermes is presented as messenger of the gods. He had to make divine truth clear to the limited understanding of mortals. The verb means reporting, making clear.

classifies the world in value-laden concepts which determine his conduct: herb and weed, healthy and sick, rain and sunshine, order and chaos, conduct and misconduct, freedom and harm; in brief, things which one either has to cherish or avoid. Only by gaining insight into this tendency, which is also to be found in legal practice, can one understand the meaning of legal institutions, such as property, contract and penal sanctions. This insight can subsequently serve to provide *reasons* to legal subjects for honouring these institutions.

Hermeneutics was initially developed under the inspiration of legal scholarship. Consequently, due to the reception of the codifications of Roman law of the sixth century AD in 13th-century Italy, the need arose for a method to make authoritative legal texts from an earlier historical period via interpretation applicable to a totally different kind of society. Later on, hermeneutics was extended from textual interpretation to a method with which to interpret human action in general. The most sophisticated version was formulated by Hans-Georg Gadamer (1900–2002) in *Wahrheit und Methode* (Truth and Method, 1960).

The point of departure of hermeneutics is that human life and its cultural products (such as legal texts) show a meaningful coherence. Unlike inanimate nature, man is not determined by causes, but guided by reasons or rules. In other words, human beings themselves give meaning to their lives, and this cannot be registered by means of external observation in accordance with the model of natural science. It must be understood from the 'inside'. The human scientist is capable of this because he is himself also a meaning-giving being.

It, for example, makes little sense if you should observe this text in accordance with the scientific method simply as an empirical observer from the outside. The observation of the black characters on the white surface, which together constitute this sentence, in itself does not provide any insight into the meaning of the sentence. You nevertheless understood the sentence. This is possible because you *interpreted* the characters as letters that belong to the English language, which together form words, which in turn are signs for concepts. These concepts are, moreover, so polysemic that they acquire their specific meaning only in connection with the text as a whole (and the larger cultural environment). The reader must, therefore, also take account of the symbolic coherence of the whole. In brief, he can interpret his perceptions only from a preceding understanding of the English language and culture.

The same applies to the understanding of all human action. People after all act on the basis of a meaning-laden interpretation of reality. People orient themselves in social reality, specifically in relation to each other, via shared, normatively-laden concepts (which do not at all comply with the requirement of value-free language use of natural science). Concepts such as 'man', 'woman', 'child', 'adult', 'judge' and 'suspect', are, for example, laden with normative expectations concerning the proper exercise of a social role, in accordance with social rules which are determined by the practices of the specific society. What these rules contain cannot be established by the observation of external conduct. The empirical observer can after all only register external regularities, but not the *reasons* why people act in this way. Someone who without any foreknowledge observes the external conduct of adults in

a democracy, would, for example, indeed be able to establish that most of them, once every four or five years, enter a large building, and there colour a space on a piece of paper. He would, however, never be able to understand the meaning of this conduct (voting for Parliament or the President) on the basis of these empirical data. To understand this, he would have to know which ideas regarding representative democracy, political programmes, etc, lead people to such actions. The social scientist must, therefore, first acquire the normatively laden interpretation of reality on the basis of which the members of a society act, if he wants to gain an understanding of social reality.

The legal positivist Hart (Section 1.2.3.2) made the same contention about legal science. Hart opposed the earlier legal positivism of Austin, according to whom the obedience of legal subjects to positive law is caused by pressure from state sanctions and custom. According to Hart, customs, or externally observable regularities of conduct, do not provide a sufficient explanation. Austin denies the internal, normative aspect of law: most legal subjects obey the law because they accept it as appropriate. As Hart expresses it: at stake is not a custom, but a *rule*. One must, therefore, first understand this non-empirically observable state of consciousness before one can understand the conduct of legal subjects. That a normative legal consciousness like this indeed motivates others' actions one can indirectly derive from their external conduct: one must presuppose the existence of such a motive when someone criticises others (or himself) because of the contravention of a law. Through this combination of intention and external conduct, human conduct acquires its meaning.

In the place of the neutral observation of observable facts, hermeneutics, therefore, posits *understanding* (*Verstehen*) by means of the interpretation of symbolic connections. The interpreter is, according to hermeneutics, moreover not capable of neutral observation, because he himself necessarily interprets from the perspective of his own traditionally determined pre-understanding (*Vorverständnis*). Interpretation of a text, for example, presupposes command of a language. The interpreter has acquired a language via a learning process which, however, differs depending on the social situation and historical period. As a consequence of this, every person is caught in local traditions. Therefore, every reader initially approaches a foreign text with questions from his own interpretive framework. Only gradually does he replace his provisional interpretation on the basis of his own prejudices by a growing insight into what was initially foreign to him. The original pre-understanding is then changed through confrontation with the text, and this makes it possible to posit new questions. The most important recent defender of hermeneutics, Gadamer, regards complete understanding of the original meaning as impossible. In his view, at most a 'fusion of horizons' takes place.

This furthermore means that knowledge without prejudices is not possible. Gadamer does not attach a negative meaning to the term 'prejudice'. He makes a distinction between blind and justified prejudices. The second kind consists of interpretations which have been refined by taking account of alternatives. Authority and tradition, according to Gadamer, similarly play an important role in the selection of the better prejudices. But again: it is not a matter of blind obedience to

authorities, but of recognising the better insight of the expert; and not of the irrational, dead ballast of the past, but of living, working traditions. Hence, for the legal interpretation of a legislative text it is of great importance how the text has been interpreted on previous occasions, especially by the highest court in a specific legal order.

The understanding of social science also deviates fundamentally from the method of analysis of component parts of classical natural science (applied by Hobbes to social phenomena, such as human society – see Section 4.1.2). The parts of a text, for example, the separate words, after all acquire their specific meaning only in relation to the text as a whole. On the other hand, one cannot understand the whole without first having read all the parts. The interpretation process which is connected with this is referred to as the *hermeneutic circle*: the glance of the reader roams during the reading, as it were, constantly backwards and forwards between the parts and the whole of the text until he understands it as a coherent whole.

Hermeneutics does not regard objective descriptive and explanatory knowledge as the central aim of social sciences like sociology, cultural anthropology or history. Their import is rather of a *practical* nature: increasing insight into one's own situation by taking account of models of life which stem from other sources. The interpretation is regarded as successful when the interpreter is able to put his newly obtained insights into practice in his own environment. According to Gadamer, the comparative interpretation of different models of life cannot provide any universal standards for the good life. One can at most establish that the one mode of living is *different* from the other, but not that it is *better*.

In the same way, models of conduct which are to be found in more recent sources of one's own culture can be interpreted to serve as a guideline for practical orientation. Interpretation of such recent sources is characteristic of contemporary judicial decisions and legal science where authoritative legal texts, in light of the jurisprudence and the commentary of legal experts, are applied to actual legal practice.

The above in fact amounts to a methodical explanation of the process of cultural transfer. Via language every new generation learns to interpret its environment in accordance with the worldview of its culture. This worldview is not an objective representation of the world, as logical positivism requires, but a tainted narrative: it does not contain any objective judgments, but constitutes a totality of 'pre-judgments'. It is nevertheless the warehouse of the solidified experience of all previous generations. Man, moreover, has no other anchor with which to orientate himself in his environment. Because the living conditions of human beings change continuously, the traditional authoritative stories must be adapted continuously to new situations by means of interpretation, as in the case of the reception of Roman law texts since the 13th century.

In brief, in the view of hermeneutics, because of their practical import the human sciences are not satisfied with the value-free distance of the natural scientist. There is little space for an external observer in this field. The issue at stake is precisely

the *participation* of a symbolic being, the researcher, in a symbolic order. The goal is unification through the 'fusion of horizons': one must make the interpretations of others, *one's own*. Communication takes the place of calm registration. For this reason it is said that the subject-object model of the natural sciences must be replaced in the human sciences by a subject-subject model. The criterion for truth is no longer the match of a theory with reality, as is the case with the correspondence theory, but intersubjective agreement about the most appropriate interpretation, as required by the consensus theory of truth.

Such a participatory understanding moreover has a practical, *normative* significance. The interpretation stands in the service of the life and practices of the interpreter and his audience. For this reason hermeneutics links up especially well with contemporary legal science.

8.5.2 Hermeneutics and Legal Science

As indicated in Sections 8.1, 8.3, and 8.4, contemporary legal science falls short of the empiricist requirements that logical positivism and critical rationalism pose for knowledge and science. The empiricist model of knowledge requires the scientist to adopt a neutral position by taking the perspective of a value-free observer. The accepted view of legal science ties in more closely with hermeneutics. The legal scholar Paul Scholten (1875–1946), an early Dutch precursor of Dworkin's view that the right legal answer is to be found by a rational construction of immanent legal principles (Section 1.2.3.3), demands exactly the opposite of neutral distance:

> The science of positive law is always the science of a specific positive law in a specific country. It is itself determined historically and nationally. ... This implies something else. Only someone who partakes in law can work on it; only the Dutch can process Dutch positive law (Scholten 1949, p. 437).

Scholten's legal scientist is, therefore, an active participant in the same legal order which he studies. This is connected with a second characteristic of contemporary legal science, which empiricism strictly prohibits: its normative character. Legal science, as viewed by Scholten, is ultimately aimed at the formulation of normative statements, because it constitutes an extension of legal practice: it aims at giving direction to legal decision-making, with justice as ultimate objective. This normative function can be performed well only by a member of the legal order: 'only he who feels himself responsible for the application, may express a judgment about it' (ibid).

Scholten stated all of this in an address in which he defended the scientific character of contemporary legal science against the claims of empirical 'unified science'. Measured against the ideal of knowledge of natural science, the traditional academic study of law is, as mentioned before, simply a pseudo-science. Consequently, the German legal scholar, Von Kirchmann, as early as 1848 spoke about *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (The worthlessness of

jurisprudence as a science). In contrast, in his address Scholten opposes the monopolistic claims of empirical science. He points to other human sciences, such as linguistics and historiography, which like legal science do not formulate any causal regularities but establish connections of another kind.

Although Scholten does not use the typical terminology of hermeneutics, his view of legal interpretation is closely connected to it. This is not strange because hermeneutics was originally developed under the influence of legal science.[19]

Scholten subsequently enquires in detail into the resemblances and differences between natural and legal science. The similarities are summarised in five points: both kinds of science regard all data as objectively as possible; both are governed by logic, specifically by the principle of non-contradiction, which brings about a consistent unity between statements; both strive towards simplification, by reducing the diversity of specific ideas to a smaller number of general ideas; both analyse and classify data by means of the construction of concepts; and, finally, both disciplines make their findings intersubjectively verifiable by reconstructing them into a coherent argument which refers to experience and which is accessible to everyone. On the basis of these methodological similarities Scholten concludes that both natural science and legal science equally qualify as 'science' in the full sense of the term.

For the rest, however, the two disciplines have a completely different character. In the first place, natural science is aimed at truth. Legal science, on the other hand, has justice as its ultimate objective, even though it also relies on factual knowledge of the historical and social context within which law is applied: 'law and legal science strive towards value-judgments, which are dependent on judgments concerning reality'.

Legal science differs, in the second place, from natural science because of its greater freedom of interpretation. The verification principle of logical positivism is aimed at reducing the interpretive space, by binding theory-construction to elementary statements of observation and logical construction. Legal science, in Scholten's view, however requires a different interpretive *method*, because of the specific nature of its *object*: it after all does not take ordinary sensory observation as its point of departure, but complex polysemic social circumstances, in combination with texts, constructed in non-formalised language.

In contrast with the artificial language of the natural sciences, argues Scholten, legal language by its very nature cannot be analysed into simple component parts: law forms a coherent whole, in which the separate legal rules and jurisprudential statements acquire their meaning because of their place and interaction in the system as a whole. Furthermore, legal rules can only be understood in their social context and in relation to the concrete cases to which they apply. Reciprocally social circumstances must be interpreted in accordance with their legal relevance. In every new case it may be unclear whether it is similar enough to the paradigmatic case envisaged by legislation, with the consequence that it has to be treated analogously, or that it differs so much therefrom that it should be decided *a contrario*. What is

---

[19] An explicit application of hermeneutics to jurisprudence has, for example, been formulated by Josef Esser and Karl Larenz.

at stake in legal interpretation is relating abstract rules to concrete cases. In this, Scholten's view of legal science is closely related to hermeneutics.

With this approach Scholten also rejects *legal formalism*. According to the formalist view, the legal interpreter can arrive at a legal decision via purely logical, deductive reasoning, by directly subsuming the concrete case without any interpretation under the given legal rules. However, according to Scholten, this is impossible because of the polysemic nature of legal reality.

Scholten describes the method of interpretation of legal science as follows:

> It interprets legal rules. What does this mean? It attempts to summarise the unwritten rules into specific formulas; it explains the authoritatively prescribed rule; attempts to ascertain its scope of application by investigating its history and purpose, by fitting the rule into the rest of the system, by analysing the words employed, or by moulding the rules in a different way, so that they are ready for application to cases which have occurred or which are anticipated. The interpretation always takes place from a specific idea: the background of the law, its logical form, its quality of justice, towards a specific objective: the application, the transposition of law to real life. It fills up the skeleton of the law or other authoritative rules with new statements, which it regards as included in the existing ones. And at the same time it 'construes' the law (Scholten 1949, p. 457).

Scholten here mentions a number of traditional interpretive methods of legal science, successively, the historical, teleological, systematic and grammatical. He does not, however, provide a meta-method to choose between these alternative ways of interpretation. The legal scientist can thus go in many different directions. He can in other words get close to the right answer in hard cases by making explicit the immanent general principles that express the common purpose of relevant laws. However, this still does not unequivocally lead to a 'right' solution.

Scholten subsequently limits this interpretive space by invoking a Christian conception of law: law stands in the sign of a God-given idea of justice, of which the jurist can have knowledge through his conscience. The idea of justice must continuously serve as the decisive guide for legal interpretation. Scholten, however, acknowledges that this idea is one of the most polysemic legal elements. In his Calvinist view it resides in our legal consciousness, but because of our sinful nature, we have only a limited insight into it. Therefore, the normative conclusions of legal argumentation necessarily require an evaluative leap, since they cannot be directly derived from the legal rules and social circumstances.

As a consequence of this freedom in legal interpretation, the very personal characteristics of the scientist which natural science attempts to eliminate, play a prominent role in legal science. Scholten attaches much importance to the interpretive intuition of the jurist:

> The history of legal science mentions the names of men who reasoned in a pointed way and thought logically, and whose work was nonetheless sterile or harmful, because they lacked intuition, because they sometimes simply did not ask the question of the justice of their statement – a question which a proper judge *cannot* avoid (Scholten 1949, p. 458).

In the natural sciences, by contrast, the observer should as much as possible detach himself from his personal peculiarities. Here, objectivity must appear from the interchangeability of scholars.

Scholten's legal scientist, in brief, does not maintain a neutral distance from positive law, but practises the same normative activity as the judge: legal interpretation. Scholten subsequently distinguishes *within* the viewpoint of the participant in legal practice between different levels of abstraction. The least abstract is everyday reality which has to be regulated by law. Positive law itself, as formulated by the legislature and the judge, is more abstract: it stands at a distance from empirical reality, by organising it into general legal concepts. This abstraction is required because legal order makes use of general rules. Moreover, because of its ordering function, law requires concepts of a much more precise definition than the polysemic everyday use of language. Legal science has a still higher level of abstraction: it develops the concepts of positive law into a systematic, logical, balanced hierarchy of rules. Because positive law itself is already systematic in design, the academic systematising activity is a direct extension of legal practice. Legal practice and legal science, moreover, serve the same normative objective: finding the proper solution for legal cases. There is, therefore, no fundamental difference between them.

In opposition to the neutral distance and value-free character of natural science, Scholten thus emphasises the normative involvement of legal science, in accordance with the hermeneutical view of science. The legal scientist must not only be able to identify himself with the objectives and normative views of the participants of a specific legal community. His involvement, moreover, appears from his normative proposals for the desirable development of the legal order. This lack of distance and neutrality of legal science goes along with a diminished verifiability of its claims.

The hermeneutical approach is also akin to the view of law of Dworkin (Section 1.2.3.3). As with Scholten, Dworkin's legal theory is based on an analysis of the interpretive activity of the judge. The judge, according to Dworkin, tackles hard cases via an interpretation of the spirit of the legal order as a whole, against the background of the prevailing political and moral ideals. Dworkin's model for judicial interpretation is more specific than Scholten's view, and leaves less freedom of interpretation to the judge: the judge must deduce a number of fundamental moral principles from the positive law as a whole, which can justify a major part of it as a coherent system. These immanent principles of positive law must then serve as guideline for decisions in hard cases. Unlike Scholten, Dworkin believes that in this way an ideal judge can find the right answer. The resemblance with hermeneutics is clear: legal texts must be read as a coherent whole, which in turn acquires its meaning from an understanding of the cultural context. This legal interpretation subsequently serves as guideline for a social practice.

8.5.3 Commentary

Measured against the empiricist model of knowledge of the logical positivists and the critical rationalists, the normative activity of most law schools in the world today is unscientific. On the other hand, this legal practice can maintain its status as 'science' in the view of science adopted by hermeneutics. As an alternative to the

approach of natural science, in the domain of human life, hermeneutics proposes the criterion of intersubjective consensus. This leads to the question whether this criterion is sufficient for the settlement of moral and legal disputes. Does it provide the lawyer with a way out in hard cases where the law mumbles under its breath? Is it adequate for the legitimation of a liberal constitution, based on the values of freedom, equality, democracy and the rule of law?

In our Post-Metaphysical Age the practising lawyer cannot reasonably appeal to a suprasensory natural law, or a divine intuition à la Paul Scholten. Legal positivism provides him with as little of an anchor, as appears from Chapter 1: according to Hart he is faced with normative problems which cannot be resolved by simply invoking positive law. If judicial interpretation wishes to avoid ending up in arbitrariness, rational extra-legal standards must be supplied.

Hermeneutics appears to be insufficiently capable of this. This movement starts from the assumption that all human practices, including their standards of rationality, are historically and culturally determined. When conflicting practices clash with each other, one can only ascertain that the one differs from the others, not that one of them is better. This leads to ethical relativism: the consensus stops as soon as fundamental disagreements occur. Legal subjects who accept the moral principles of their legal system may within this framework arrive at a consensus regarding specific legal disputes, by means of Dworkin's constructivist hermeneutics.[20] However, where cultures clash, basic agreement cannot be attained because independent critical standards are lacking. In a liberal legal order Dworkin's method leads to equal individual rights, in a fascist state, to the total subjection of the individual. More generally, from the hermeneutic point of view, the Enlightenment ideals as a typical product of modern Western culture have only limited validity. If one assumes with hermeneutic scholars that both metaphysical and empirical objectivity is impossible because knowledge is necessarily based on human interpretation, it becomes difficult to establish standards for the right interpretation. These are after all themselves again based on interpretation.

---

[20]See however the criticism of Critical Legal Studies that the legal system may be too incoherent for this, in Section 1.2.3.4.