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Law, Order and Freedom

A Historical Introduction to Legal Philosophy

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Chapter 9
Twentieth Century: 1945–2000

9.1 Introduction

9.1.1 Political and Philosophical Developments

After the victory over national-socialism in 1945, it was smooth sailing for the liberal ideals of the logical positivists and of Popper, at least in the Western world where after the reconstruction of Western Europe, unprecedented economic growth took place. Later in the century this growth obtained a new impulse through the *electronic revolution*. Western countries combined a relatively free-market economy with political liberalism, in addition to which Europe developed a far more extensive social welfare state than the United States. The positivistic hope for a united humanity came closer through the *Universal Declaration of Human Rights*, which was adopted by the United Nations in 1948 to, in future, prevent terror, such as that of the Nazis. Would humanity then indeed be able to learn from its experiences, as Popper hoped? In the processes at Nuremberg and Tokyo, German and Japanese leaders were condemned on the basis of newly formulated, international law crimes against humanity and against peace. Colonial exploitation came to an end because Western European powers were so weakened by the Second World War that they were forced to grant independence to their most important colonies. The moral conviction that colonialism involves illegitimate oppression also played a role in this.

Already in the 1950s, however, a non-violent cold war arose between the main victors of the Second World War, the United States and the Soviet Union, through which the world fell apart into two power blocks. But towards the end of the century, communism surrendered, battle-weary. In Eastern Europe communism was replaced by parliamentary systems (some of which still tended to authoritarian rule, most notably Russia). Around the turn of the millennium many European countries had joined economic and political forces in the European Union, in terms of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. By then, the United States was by far the most powerful country in the world. The dictatorship in communist China opened the door to capitalism,

which led to huge economic growth; the party leaders are still holding on to political power, but as a convincing ideology communism has had its day.

As a result of the decolonisation process, in addition to the liberal First World and the communist Second World, a Third World of independent, but often dictatorially governed, former colonies came into being.[1] Initially many of the Third World countries played the two power blocks off against each other. After the fall of communism this kind of politics was no longer effective, and these countries became more dependent on the West. Countries that were socialist in name, confessed to capitalism, but continued having difficulties with the political freedoms of liberalism. A number of authoritarianly governed Asian countries, such as Japan, Taiwan and other 'Asian tigers', later joined by China and India, developed advanced industries and experienced strong economic growth in the last decennia. Based on their successes, these countries started to proclaim themselves as being superior to Western liberal societies, also in respect of morality: their traditional communal morality was far preferable to the Western emphasis on individual rights, which would lead to selfishness, drug abuse, free sex, divorce, and social disintegration. Chinese intellectuals, also in 'Communist' China, in this respect often refer to the philosophical tradition of K'ung Fu-tzu or Confucius (551–479 BC), who proposed an ideal state in accordance with the hierarchically constructed, communal model of the patriarchal family.

In Western (legal) philosophy these developments were accompanied by a further elaboration of the ideals of the Enlightenment, as well as of the fundamental criticism thereof. Criticism of the idealisation of scientific thinking by phenomenology and hermeneutics (Section 8.5) was continued by existentialism (Sartre), Critical Theory (Adorno, Habermas, see Sections 9.1.5 and 9.3), later analytical linguistic philosophy (Wittgenstein, see Sections 9.1.3 and 9.2), communitarianism (MacIntyre, Section 9.1.2), neo-Aristotelianism (Nussbaum, Section 9.1.6), (post-)structuralism (Foucault), postmodernism (Lyotard, Section 9.1.4), and deconstruction (Derrida, Sections 9.1.7 and 9.5). These movements maintain that knowledge which limits itself to empirical data (that is, what can be observed only from an external point of view), cannot succeed in accounting for substantial aspects of human existence. Whereas Foucault and Derrida enquire into the structures which determine our understanding without us being aware of them, the other movements contend that human existence can be understood only from the 'inside out', that is, from the perspective of the meaning that human beings give to the world. Moreover, knowledge, scientific knowledge included, is, according to this criticism, always based on human interpretation. Science cannot possibly be value-free because it is itself a human activity which has its basis in everyday human existence, thus in normatively laden human interests. For this reason these movements oppose the

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[1] Nowadays it is more politically correct to speak of countries in terms of their level of development.

empiricist subject-object model of knowledge (a subject observing from a neutral position an object that requires explanation), the correspondence theory of truth (a theory is true if it corresponds to the objective facts), as well as the contrast between, on the one hand, objective assertions of fact and, on the other, subjective, normative assertions. Some of these theories adopt *intersubjective consensus* as the criterion of true knowledge. As already came to the fore with hermeneutics (Section 8.5), this anti-empiricist view clears the way for normative-practical reasoning in law and ethics.

The critics of scientific thinking, however, differ from each other as to whether their epistemological alternatives give better support to the liberal Enlightenment ideals than scientific empiricism. Wittgenstein's follower Winch (Section 9.2) and MacIntyre (Section 9.1.2) deny that the emancipation ideal of the Enlightenment has universal validity. With hermeneutics they tend towards historical and cultural relativism: moral values and other ideals of life can be understood only from within the culture in which they have their origin. When one imposes so-called rational, universally valid ways of life onto another culture from the outside, this would lead to social disintegration.

Others reject the scientism of the Enlightenment, but defend its liberal ethics (Habermas, Lyotard). Habermas strongly advocates the emancipation ideal of the Enlightenment as universal model for the whole of humanity (Sections 9.1.5 and 9.3). Other champions of liberalism, such as Rawls, adopt a more modest position (Sections 10.5 and Section 10.6). They recognise that the portrayal of man as an autonomous individual by Locke and Kant is based on indemonstrable metaphysics, and thus has no universal validity. They nevertheless see liberal freedom rights as the best political solution for modern plural societies, in which people have to cooperate in spite of their conflicting ideals of life.

A third position, adopted by Derrida (Sections 9.1.7 and 9.5), is that the Enlightenment ideals need to be radically re-thought. Freud's death drive plays an important role in this respect. This does not lead to a rejection of a liberal ethics, but to the positing of an unconditional standard of self-sacrifice in relation to which this ethics needs to be transformed.

9.1.2   Communitarianism

The conservative criticism of liberal human rights (see Section 7.1.3) is continued in the second half of the 20th century by proponents of *communitarianism*, such as MacIntyre, who view traditional communal values as being threatened by the modern emphasis on individual autonomy. MacIntyre denies the existence of unwritten, universal human rights: 'there are no such rights, and belief in them is one with belief in witches and in unicorns' (MacIntyre 2007, p. 69). They are arbitrary thought-constructions that belong to the rhetoric of liberal ideology. Rights can, according to MacIntyre, only exist within the framework of a system of rules

that has grown historically in a specific social situation. They thus differ per culture, and cannot possibly be attributed to man as such.

For the same reasons MacIntyre turns against the idea of human autonomy which lies at the basis of human rights. The idea of an independent 'I' is likewise pure fiction. Think of Descartes (Section 3.4). He thought that he could question all truths that have been passed down, in order to subsequently find a totally new, indubitable truth which makes a start in his own thinking: *I think, therefore I am*. An individual cannot, however, possibly think completely independently from point zero, MacIntyre objects. MacIntyre, moreover, regards it as impossible to place everything in doubt at the same time: doubt always arises in a historical context, and is formulated in a language which is based on communal traditions. Just as little can one establish completely independently what a good way of life entails for oneself. Everyone derives his identity from social roles, such as man, woman, family member, employee, citizen, etc, which in turn are determined by the practices and traditions of the society in which one lives. In contrast with the suggestion of the liberal social-contract model then, social associations also do not rest on the voluntary agreement of the individuals concerned: every person, from childhood on, willy-nilly grows up within them. To these roles, virtues are attached which determine how one could perfectly fulfil them. A traditional society, moreover, has general ideals of life which combine the diverse social roles into a unity.

In modern society such communal traditions have regrettably fallen away, MacIntyre sombrely concludes. Because of this, society has sunk deeply into a moral crisis and social disintegration. The Enlightenment propagates liberation from traditional bonds; in fact, this has not led to *autonomy*, but to *anomy* (normlessness). MacIntyre does not expect any good from the attempts of the Enlightenment philosophers to replace traditional virtue ethics with a universal liberal ethics. Liberalism moves away from communal traditions and substantive life ideals so that the classical freedom rights simply offer an empty concept of freedom. Because of this, society fragments into separate individuals, who have lost all anchors which could have given direction to their lives. In this way liberal human rights in reality simply lead to individual caprice. In addition, liberalism causes social fragmentation through its strict separation of state and society: there is no longer a relation between one's role in the public and in the private spheres.

MacIntyre moreover points to the tension within modernism between the ideal of an objective value-free science, on the one hand, and the moral ideal of individual emancipation, on the other: because in the scientific worldview nature contains no values, moral ideals can no longer be legitimised. Modern disenchanted culture consequently lacks a rational criterion with which to settle moral disputes. Ethics is reduced to a matter of subjective emotions. All that remains is the boundless Self, completely separated from the moral definitions which traditional societies derive from their inherited personality ideals. The modern individual no longer has any reason to take account of others as soon as this clashes with his self-interest.

Because science renders agreement on moral values impossible, and can only provide knowledge concerning causal relations, MacIntyre complains, modern man takes his refuge in pragmatic means-ends calculations: people see each other, as well

as social and political institutions, simply as instruments for their own purposes. Social relations then degenerate into mutual manipulation. This can take on two undesirable forms: unrestricted egoistic caprice, or totalitarian bureaucratic control. In short, one can only hope that the shore stops the ship of the Enlightenment, so that people can find the way back to warm communal values.

9.1.3 Philosophy of Language and Cultural Relativism

The value of cultural traditions is, similarly, defended against the belief in progress of the Enlightenment by adherents of cultural relativism, who want to defend the authentic cultures of non-Western thinking against the imposing Western lifestyle. Spokespersons for this view are to be found among cultural anthropologists and philosophers, such as Peter Winch (Section 9.2). Winch adopts the view that all theoretical and moral views are culturally determined. As a consequence an invocation of universal human rights is impossible since views concerning human nature differ along with culture. In this view both the claim to objectivity of empirical science and the claim to universal validity of liberal emancipation ethics dissolve. Each cultural way of life has its own unique value.

In a normative extension of this relativist view, a collective right to cultural identity is argued for. The more specific rights that are associated with this, such as the right to self-determination of peoples, the right to national resources, and cultural rights, are currently referred to as *third generation human rights*. Such group rights can clash with the two earlier generations of human rights – the classical and the social – because in many cultures the principles of freedom and equality are not recognised. The right to one's own culture played an important role in the decolonisation process which took place after the Second World War. The former colonies invoked it to underline their own identity as against their former Western occupying powers, who had partly justified their actions with an appeal to the Enlightenment ideals: thanks to colonisation, immature primitive nations could be educated so as to reach the level of civilisation of the enlightened motherland (see the Max Havelaar fragment with which this book opens). The right to the self-determination of every people is, for instance, laid down in the *African Charter on Human and Peoples' Rights* of 1981 – but what counts as a 'people' is controversial: the inhabitants of the earlier colonial territories or the pre-colonial tribal units.[2]

In the former Second World, the tension around questions of ethnic and cultural identity has increased since the 1990s after the disintegration of the communist regimes. In the First World, the political and economic unification of Western Europe raised a new need to protect the separate cultural identity of different nations (in so far as this is not in conflict with the human rights of the European Convention).

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[2]Art 27 of the International Covenant on Civil and Political Rights of the United Nations of 1966 recognises the right to an own identity of ethnic, religious or linguistic peoples or minorities. Art 5 settles the generational conflict between first and third generation human rights by making group rights subject to liberal freedom rights: the right to individual freedom may not be cast aside through the invocation of communal values which do not recognise individual autonomy.

In addition, an argument is raised in favour of group rights for cultural minorities in
Europe coming from the Third World. It is controversial to what extent these immi-
grant groups may retain their own identity. In the prevailing view they, at the very
least, have to adapt themselves to Western constitutional values, but according to
radical relativists such an adaptation would already go too far.

The cultural and ethical relativism of Winch is based on the philosophy of language
of the later Wittgenstein (Section 9.2). Like MacIntyre, Wittgenstein states that peo-
ple derive their view of the world from cultural traditions – the form of life – of the
community within which they are brought up. According to Wittgenstein's linguistic
philosophy such traditions are handed down via language. In its conceptual organi-
sation, language constitutes a worldview from which people interpret the world (and
which is differentiated in various 'language games' that are associated with diverse
social practices, for instance those of religion, science, ethics or law). Such a linguis-
tic worldview functions like glasses which one cannot take off. It can itself not be
tested against empirical facts, because it also determines what one views as 'fact',
'meaningful', 'rational', and 'true'. Logical positivism thus incorrectly states that
empirical verifiability constitutes an objective criterion for meaningful statements.
Because of the lack of independent objective standards by which to test worldviews
one cannot even say that a scientifically oriented culture provides better knowl-
edge than cultures with a magical worldview. In contrast with what Enlightenment
philosophers hoped for, science, therefore, does not per se lead to cognitive progress.

In the footsteps of Wittgenstein, Winch arrives at a relativistic view of moral
knowledge: what counts as morally just is dependent upon the moral practice of a
culture. The identity of a person, too, is fully determined by his communal tradi-
tions, so that it is impossible to settle intercultural moral conflicts with an appeal
to human nature. As a consequence, liberal human rights cannot make any claim of
universality vis-à-vis cultures that reject individual autonomy, freedom and equality
(a conclusion which Winch does not explicitly state). Individual freedom rights are
a typical product of Western culture. In this way Winch decides in favour of norma-
tive relativism: one must respect the value of each culture. Someone who wants to
impose human rights on other cultures thus makes himself guilty of spiritual colo-
nialism. As Wittgenstein remarked, 'Think what happens when missionaries convert
natives' (Wittgenstein 2003, par. 612).

9.1.4 Postmodernism

The modernising project of the Enlightenment has recently been criticised by the
movement of *postmodernism*. Under the influence of Nietzsche's perspectivism
(Section 7.5) postmodernism is even more relativistic than the cultural relativism
of Winch: even a culture does not constitute a unity, but entails a great diversity
of conflicting viewpoints. Postmodernists view this plurality positively as a breed-
ing ground for creativity: it is not identity which is worth striving for, but *difference*.

Claims to cultural identity induce stifling conformism where everything which deviates from the standard is excluded and suppressed. This applies to the moral ideals of the Enlightenment as well: because they claim universal validity, they mould reality into an oppressive, normative straitjacket. In the present age, all-encompassing Grand Narratives have lost their appeal, such as that of modernisation through Enlightenment. The modernist belief in progress is in any event no longer credible after the Second World War and the Holocaust. Therefore, this movement playfully calls itself *post*-modernism.

The French postmodernist Lyotard states under inspiration of Wittgenstein that the diversity of 'language games' does not allow for universal values, such as those of the Enlightenment. One can, for example, not ground these values in scientific knowledge. Prescriptive and descriptive statements after all belong to different language games which are irreducible to each other. Moreover, within science increasing specialisation leads to extreme fragmentation: a jurist, an economist, and a biologist can hardly understand each other. The social theatre is split up into divergent stage plays, leading to clashes of conflicting patterns of expectation. An officer storms ahead with the command, *I am attacking, follow me!* Perhaps the soldiers will rush ahead behind him. They can, however, just as well exclaim *bravo!* from the trenches and treat the hero to civilised applause. There is no universal rule which makes one response better than another.

Lyotard pinpoints such justification problems with a legal metaphor. In a legal dispute (French: *litige*) a conflict can be settled through the invocation of law. The law then serves as the shared paradigm of judgment for the arguments of the parties. A legal system, however, only permits arguments which are relevant in terms of existing legal categories. An appeal to moral principles which do not fit into the system would thus not be recognised by the judge. When a judge convicts someone who rejects the existing positive law as unjust, this would, according to Lyotard, therefore amount to an injustice. Since in such an instance a shared standard is lacking, one should not speak of a legal dispute, but rather of a discord (French: *différend*) or battle. The judge who employs the state's monopoly over violence is then the real criminal.

In general, conflicts can be settled only between parties who share the same dialogical paradigm with common criteria. By contrast, one does an injustice to another person when one imposes one's own frame of reference upon him. Universally valid judgments are consequently impossible. If the emancipation ideal of the Enlightenment is nevertheless imposed universally, this leads to destructive cultural equalisation. In this respect Lyotard's view is similar to Macintyre's conservative criticism of the Enlightenment ideals and Winch's culturally relativistic defence of non-Western cultures. Lyotard, however, has no nostalgia for the homogeneity of pre-modern societies. Instead, postmodernists welcome social diversity. He therefore expects the most from a plurality of subcultures. Along this way Lyotard still arrives at a liberal conclusion: individual freedom rights provide the best constitutional guarantee of social diversity.

9.1.5 Critical Theory

Other adherents of the consensus model of theoretical and moral truth advocate the emancipation ideal of the Enlightenment. Philosophers of *Critical Theory*, such as Habermas and Apel, invoke a theory of language which is related to Wittgenstein's linguistic philosophy, but arrive at a universalistic ethics (Section 9.3). They share Wittgenstein's criticism of the scientific model of knowledge: scientific language is embedded in a variety of other meaningful linguistic practices. They, however, oppose the relativistic consequences which Winch and Lyotard draw from the philosophy of language. According to Habermas and Apel, diverse language genres have a common purport which coincides fully with the modernising project of the Enlightenment: they are in essence aimed at the emancipation of humanity, which must find institutional expression in a democratic constitutional state with human rights.

Man orientates himself in the world especially via language, Habermas and Apel contend, and is, therefore, above all a communicative being. Communication also takes place between successive generations: in the process of education the accumulated experience of all preceding generations is passed on via the traditions of a culture, thus establishing the intersubjective conceptual understanding which is required for social interaction. Up to this point, Apel and Habermas subscribe to the views of Winch and MacIntyre. But as the name indicates, their Critical Theory distinguishes itself from the hermeneutical approach and from linguistic philosophy because of its critical dimension. Via *ideology criticism* à la Marx (Section 7.4) one can expose the oppressive character of existing traditions. Language, which enables man to abstract from the given situation, can help him to find a better way of life by looking up new information and by standing at a distance from existing traditions in a critical discussion. Such emancipation can, however, only take place in an open communication society where everyone can freely exchange arguments.

In actuality such a critical, open argumentation will often be hindered by traditional ideologies which legitimise the prevailing power relations, as Marx had already pointed out. Through indoctrination the powerful establish a general acceptance of the current social order, which is then also endorsed by the oppressed groups. In such circumstances space for criticism hardly exists. According to Habermas and Apel, one should try to subvert such ideologies: one has to strive for a society free from power asymmetries where everyone can freely and on equal footing participate in public deliberation. This emancipation ideal is already implied in everyday communication. After all, in the long term communication can succeed only when it complies with a number of conditions: the partners must be able to trust in each other's honesty and truthfulness. Communication thus has an emancipatory import, even though this often remains hidden in actual exchanges. Therefore, Habermas and Apel conclude, the essential nature of communication requires of man to strive for an *ideal communication society* which leads to a rational consensus on the basis of open argumentation.

   This ideal of open communication supposes a democratic constitutional state that is based on the principles of freedom and equality, and that includes the classical and social human rights. Within this constitutional framework, society must be organised via public decision-making based on rational consensus: only those arguments are taken account of which are acceptable to all participants. With this universalisability criterion, Habermas ties in with Kant (Section 6.3). Non-ideal societies should be emancipated in this direction.

9.1.6 Neo-Aristotelian Natural Law

The hermeneutic approach has also resulted in a non-metaphysical version of Aristotelian natural law, notably with John Finnis (1980) and Martha Nussbaum (1992).[3] In the hermeneutic tradition, Nussbaum maintains that knowledge of reality depends on human interpretation. In this way she also rejects metaphysical natural law because it claims an indemonstrable insight into the essential nature of man. Nevertheless, Nussbaum asserts that universally valid assertions concerning human nature are possible. Although cultures differ significantly in their interpretations of reality, we do recognise others worldwide *as* human beings. Via self-interpretation we can indicate a number of distinctive characteristics which define 'man'. Nussbaum calls this *internal essentialism*, in distinction to the 'external essentialism' of Aristotle's metaphysics (see Section 2.5). For the rest, she ties in closely with the Aristotelian worldview: if one knows which traits characterise human life, one likewise knows what is *good* for human flourishing. Subsequently one can construct a universal *natural law* which contains rules for a society in which human nature can thrive. Nussbaum's version of natural law thus distinguishes itself, on the one hand, from classical natural law: the normative element is not inherent in external nature, but flows from the internal human perspective. On the other hand, she stands at a distance from empirical science through her normatively guided hermeneutic approach: a strict separation between description and valuation is both impossible and undesirable.

   In the latter respect she agrees with the hermeneutic element in the 'minimal natural law' of Hart. As was indicated in Section 1.2.3.2, Hart, as legal positivist, rejects classical natural law, as being based on the indemonstrable metaphysical presupposition that nature exhibits a rational orientation to final ends. According to this metaphysical essentialism, distinct, inherent purposes would be hiding in all things, which coincide with the perfection of their essential nature. In opposition to this, Hart endorses the view of modern, value-free science that natural processes are determined by blind causal laws without any higher purpose. Biological organisms do show an orientation to inherent ends, such as the aspiration to stay alive, but

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[3]Nussbaum diverges from the natural-law tradition in that she develops a theory of social justice as a standard for law, without, however, making it part of the definition of 'law'.

such instinctive tendencies can be explained causally. Hart bases his empirical, minimal natural law on the human instinct of survival: any human society requires that one should respect each other person's bodily integrity and properties, and that one should observe agreements. As appears from Section 8.5, Hart adds a hermeneutic element to this empirical view of law. *Human* life indeed shows a normative purposeful orientation: man can intentionally set ends for himself, resulting from his evaluative interpretations of his environment and himself. People do not only instinctively seek to survive. As a starting point, almost everyone values his own life. This appears from the manner in which people interpret the world, as well as what they regard as good and bad: health versus sickness, vitamins versus toxins, skilful versus unskilful, etc. Therefore, Hart's doctrine of minimal natural law also provides a *reason* for keeping to these basic rules: they assist one in attaining one's most basic aim, staying alive. Hart, however, does not extend his natural law beyond this minimal content because people have very different interpretations regarding what the *good* life entails. In contrast, Nussbaum asserts that from an internal viewpoint far more universal human characteristics can be identified, from which one can derive a view of the good life as well as a perfectionistic natural law. She, therefore, speaks of a 'broad theory of the good' in contrast to the 'narrow theory' of liberalism (which restricts itself to the ideal of equal freedom, and in this respect in its turn is somewhat broader than Hart's minimum natural law).

Via self-interpretation as a human being, Nussbaum arrives at a list of ten characteristics, which are necessary for a truly *human* life, and indicate the conditions for human flourishing: (1) mortality: therefore everyone must be in the position to live a fully human life until his natural end; (2) bodily needs (hunger, thirst, sex, and movement): one must have sufficient means for a healthy life, as well as sufficient food, shelter, opportunity for sexual satisfaction, and the possibility of moving around; (3) the ability to experience pleasure and pain: unnecessary suffering must be avoided, and the conditions must be present for pleasurable experiences; (4) affectionate bonds during childhood (through which one learns how to deal with mutual relationships): everyone must have the opportunity of attaching himself to others; (5) social needs (life in family relationships as well as wider social relationships): it must thus be possible to live in such relationships, as well as in relationships of mutual affection and care; (6) solidarity with the natural environment: people must live in harmony with surrounding nature; (7) humour and play: there must be sufficient opportunity for playing and laughing; (8) individuality: everyone should have the possibility of living a distinct life in a self-chosen environment; (9) the cognitive ability to observe, to think and imagine: every person must be able to use these faculties; (10) practical reasonableness (the ability of designing one's life plan): every person must be capable of critical reflection concerning life.

These characteristics are irreducible to each other, and are all necessary for a flourishing human life. Yet, Nussbaum, agreeing here with Aristotle, regards man's social nature (5) and practical reasonableness (10) as his most essential characteristics: they provide coherence as well as a specifically human character to the rest. To be sure, there will be no complete intercultural unanimity concerning this list,

but Nussbaum expects that she could nevertheless count on a broad, overlapping consensus.

For legal philosophy, Nussbaum's list implies that the creation of the material and social conditions for a good life in conformity with the ten listed characteristics is a central task of government. But, in accordance with the 'subsidiarity principle', the state only has a role in those areas where people cannot do better themselves. According to Nussbaum, this requires a democratic constitutional and welfare state with freedom rights and social rights, which appears very similar to the 'narrow' state ideal of liberalism. At first sight one would not expect this in light of Nussbaum's neo-Aristotelian perfectionism: she advocates an ideal of the good life which emphasises man's social side. From a similarly essentialist concept of man, Aristotle defines 'freedom' as *essential freedom*: a citizen is free if he actively participates in political life, and in this way shares in the rational fashioning of his community. From this it could follow that the state must, for their own benefit, force citizens to take part in politics, so that very little freedom of choice (*negative freedom*) remains for them. Nussbaum, however, reasons differently: although not all lifestyles are equally valuable, the state must nonetheless guarantee the classical freedom rights out of respect for everyone's practical reasonableness (10) and because of his right to a distinct individuality (8). It may not *force* citizens to live the good life when they actually give preference to an unreasonable existence. From this follow the classical liberal negative freedom rights, an important deviation from Aristotle. This flows particularly from Nussbaum's modern, individualistic characteristic (8) with which she adopts a position in-between communitarianism and liberalism.

Because of the vulnerability and neediness of all people (1–7), Nussbaum's just state furthermore has a caring function, entailing fundamental social rights. However, here a difference can be detected between Nussbaum's perfectionist ethics and a liberal social-democracy. Social democrats concentrate on the redistribution of material goods, such as income and fortune, in order to provide everyone with a socio-economic basic existence, but allow individuals to choose the life style for which they want to employ these goods. In Nussbaum's view, such redistribution must occur in light of her 'broad' ideals of functioning well as a human being. Here the state is thus not as neutral as liberals would want.[4] In this way, the state may, because of characteristics (7) and (9), promote elitist 'higher' cultural goods via subsidies, even when many citizens see no point in them, and they would have disappeared in the free market. Think of opera and poetry. The state only acts here in a facilitating role. In contrast with Aristotle's or Plato's perfectionist state, it must for the rest grant full cultural freedom to individual citizens.[5] Nussbaum's just state only

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[4]Nussbaum develops her political philosophy specifically via a polemic with the liberalism of John Rawls; see Sections 10.5 and Section 10.6.

[5]Such activities are, moreover, also worthy of protection for a liberal state because of the benefit that the arts and the sciences, as semi-public goods, have in the long term for society as a whole; see the commentary on Nietzsche, Section 7.5.

guarantees the possibility to visit the opera, but does not *force* anyone to actually do so.

Just like the 'ideal communication society' of Critical Theory, Nussbaum's universalistic natural-law doctrine opposes the cultural relativism of Winch and traditionalistic communitarians: in many illiberal cultures the state institutions and traditional social bonds should undergo a fundamental change. A legal system which does not recognise individual freedom rights or favours unjust social relations constitutes an impermissible hindrance to human flourishing. As examples of unacceptable cultural traditions Nussbaum mentions the unequal relations between Japanese men and women, and purification prescriptions which impede the freedom of menstruating women in India.

In comparison with the procedural natural law of Critical Theory, Nussbaum's 'broad' natural law provides extensive moral substance. This makes her theory more vulnerable to the relativist objection that she wrongly presents her partial moral intuitions as universal truths. Specifically regarding the importance of an individual private sphere, and thus of freedom rights, views so strongly diverge that an overlapping consensus may actually be out of reach.

9.1.7 Deconstruction

The emancipation ideal of the Enlightenment is also advocated by *deconstruction*, with the French philosopher Jacques Derrida as its major spokesperson (Section 9.5). As with almost all characterisations of deconstruction, this statement cannot be made without qualification.[6] To understand something of Derrida's view of the Enlightenment and the relevance of his thinking for legal philosophy, it is necessary to first say something in brief about (1) the 'metaphysics of presence' which, according to Derrida, characterises Western philosophy, and which he seeks to challenge; (2) his neologism, the 'notion' of *différance*, the genealogy of which Derrida traces back to, amongst others, Nietzsche (Section 7.5), Freud (Section 8.2), and Heidegger (Section 8.1.2); as well as (3) deconstruction. According to Derrida, the notion of a metaphysics of presence involves the setting up of a hierarchical opposition, such as that between good/evil, pure/impure, proper/improper, meaning/nonsense, essential/accidental, original/imitation, normal/abnormal, speech/writing, nature/culture, literal/metaphorical, and reason/madness, where the first term serves as foundation or as a form of 'presence', with the second term representing a 'fall' from presence which is, moreover, to be understood in terms of the first term. In Western philosophy Plato's Ideas, God as creator, the self-presence of the cogito, consciousness, subjectivity, the belief in a reality that is directly accessible to the senses, have all played an important role in grounding the above oppositional structure. Derrida then

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[6]This also motivates the use of quotation marks in relation to some concepts in this section as well as in Section 9.5 below. The reason for such qualification will appear from the discussion.

proceeds to enquire into that which made the construction of these hierarchies possible in the first place. As we will see, 'desire' plays an important role here, which returns us to Freud (Section 8.2).

Freud's thinking in relation to the economic conception of the unconscious and the notion of the death drive can assist us in understanding certain aspects of the 'notion' of *différance*,[7] which plays an important role throughout Derrida's thinking. *Différance* is, according to Derrida, more 'originary' than the desire for presence which has characterised Western philosophy up until now. The notion of *différance* alludes more specifically to the restrictive movement or relation between the desire for presence and the desire for death, which Western philosophy has always attempted to exclude. Freud's notion of the death drive, as we saw, refers to a 'desire' which characterises all living organisms. It refers to a (never present) force without economy, aiming at an expenditure without reserve, in discord with, and differing from, the economic forces in the psyche. In other words, for life to continue, the fulfilment of the one desire (for death, the different, the absolutely other) necessarily has to be postponed or deferred. Freud explains this process by way of what he refers to as the 'conservative drives' which seek to preserve life. In metaphysics this conserving movement has resulted in a constant search for presence. Life and all its artefacts, including language, can therefore be said to ultimately amount to the repetition of this structure of deferral or postponement of the desire for death. The structure or 'stricture' of *différance* is relied on by Derrida to exceed in a certain way the metaphysics of presence. The 'stricture' of *différance* has the consequence that the oppositional structure informed by the desire for presence becomes destabilized, as the desire for presence necessarily stands in a *differantial* relation with a desire for radical absence. This, moreover, places a question mark behind the foundational value of all ideas of origin, such as, for example, to be found in the modern notion of subjectivity as well as of the ideals posited by such a subject.

In light of the above, *deconstruction* can be described as the 'attempt' to overcome the metaphysics of presence, including its hierarchical oppositions and ideas of origin, by pointing to the operation of *différance* in all structures.

In the legal and political context the desire for death is translated by Derrida into absolute hospitality or the closely related 'concepts' of justice, the gift, forgiveness, and the democracy to come. Because of the functioning of *différance*, all these concepts, however, acquire a different 'meaning' to that which has prevailed in the Western tradition up until now. In the tradition these concepts have mostly been given a restricted economic meaning, ensuring a return to the subject in an individual or collective sense, for example, in the notion of democracy as self-government. In their deconstructed 'sense' these concepts allow for no return to the self, and provide for a general instead of a restricted economy. Derrida consequently calls,

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[7]*Différance* combines the French *différence* (difference) and *différer* (to differ, to postpone, to defer). The 'a' in *différance* cannot be expressed in speech (it sounds the same as *différence*), but only in writing.

somewhat like the prophets of the Old Testament, but perhaps more radically so, for an 'affirmation' of the desire for death and its related 'concepts', as the only way in which to exceed the well-nigh inescapably self-preserving nature of law, politics and ethics. In the legal context, because law is also structured with reference to *différance*, decision makers, such as judges (as well as political office-bearers), are now required to suspend the law and affirm justice in this unconditional sense. This, for example, means the complete suspension of the restricted economic interests of the nation-state as they appear, for instance, in matters involving the way in which poverty in the world should be addressed, matters of immigration, and the treatment of animals. A judge must, in other words, no longer simply calculate with reference to rules, principles or ideals (which ultimately serve the collective subject), but must go beyond these in giving effect to unconditional justice, or what Derrida also refers to as 'the impossible'. This does not mean that all calculation, rules, principles and ideals must be abandoned in the taking of a decision. In order to survive (the other side of *différance*), these restrictions are necessarily required, but then only after the judge has given himself (as representative of the collective subject) over to the impossible decision. The notion of *différance* as well as the implications for law just stipulated, explain why Derrida, differing from most of the (legal) philosophers discussed in this book, does not attempt to spell out how society should be re-structured in light of his thinking. This is because such re-structuring will always again amount to a restriction of absolute hospitality. This can be frustrating for those who seek ethical guidance from his texts or practical guidelines as to the preferred institution of society or else for the best political policies to adopt. This does not, however, mean that deconstruction does not concern itself with these matters, as we will see in the more detailed discussion below (Section 9.5).

9.1.8 Intersubjectivity and Politics

The opposition to the Enlightenment's idealisation of natural science leads to an alternative model of knowledge that is endorsed by most of the philosophical approaches mentioned above: knowledge is the product of the intersubjective process of making sense of reality. Consensus then becomes the criterion for theoretical and moral knowledge. This leads to a problem as soon as basic agreement between cultures, groups or individuals is lacking: there are then no shared standards with which to settle differences in opinion. Communitarians, such as MacIntyre, and philosophers of language, such as Winch, welcome this: it confirms the importance of shared traditions in communal life. Such relativists, however, stand with empty hands when cultures or subcultures come into conflict as worldwide communication increases and cultures become increasingly plural. Relativists, furthermore, have no criterion with which to criticise oppressive cultures; on the contrary, one has to respect these as much as the others. As Finkielkraut ironically expresses it:

> But what if a culture teaches people to inflict corporal punishment on delinquents, to reject barren women, to kill adulterous women, to consider the testimony of one man the same as the testimony of two women, to give a sister only half as much inheritance as her brother, to

perform female circumcision, to forbid mixed marriages and permit polygamy? To love our neighbour must we respect these customs? If the answer is yes, we seem to be saying that the serf should be able to benefit from the knout, that to deprive her of this would mutilate her being, threaten her dignity as a person, give evidence, in other words, of our racism (Finkielkraut 1995, p. 105).

Habermas's Critical Theory attempts to escape this problem via a criterion of *rational* consensus which implies a confirmation of the liberal Enlightenment ideals. Habermas derives this from the same intersubjective character of human communication that Winch invokes. The weakness of his solution, however, lies precisely here. Critical Theory presupposes without justification that all forms of language have *one* essential characteristic in common, that is, that all communication is aimed at argumentation. There are after all many non-argumentative forms of communication which have nothing to do with the exchange of true and honest arguments. Literature is based on fiction, the language of advertising on suggestion, and the language of diplomacy on deception. Euphemistic language use, moreover, appears to be as indispensable for social interaction as truthful communication. In many non-Western cultures, telling the truth is regarded as very unrefined. The emancipation ideal of Apel and Habermas is then a typically Western invention which does not follow from the communicative nature of man as such. Because of this, this ideal cannot substantiate its claim to universal validity.

How must one then solve the problems of a pluralistic societal and world order? The political liberalism of John Rawls (Sections 10.5 and Section 10.6) attempts to do this. In this chapter a more detailed discussion of the linguistic philosophy of Wittgenstein and Winch (Section 9.2), the Critical Theory of Habermas (Section 9.3), and the deconstruction of Derrida (Section 9.5) will be undertaken.

9.2 The Philosophy of Ordinary Language

9.2.1 Linguistic Philosophy

The philosophy of language, or analytical philosophy, which has its origin in the Anglo-Saxon world, was in its early stages during the first half of the 20th century closely related to logical positivism (Section 8.3). Later on this movement moved away from the emphasis on the language of natural science of the logical positivists, and developed in the direction of hermeneutics (Section 8.5). Its adherents then concentrated on the clarification of ordinary language use, instead of artificial scientific language. For this reason it is referred to as 'philosophy of ordinary language' or 'linguistic philosophy'. Now, moral language use was no longer regarded as meaningless, but as having a distinct rationality of its own.

Ludwig Wittgenstein (1889–1951) played an important role in both stages. His *Tractatus Logico-Philosophicus* (1921) advocated an empiricist theory of knowledge and was one of the inspirational sources for the logical positivists. In a later period Wittgenstein criticised, in his posthumously published *Philosophische*

Untersuchungen (*Philosophical Investigations*, 1953), his original defence of the exclusive meaningfulness of empirically verifiable assertions. There he argues that one cannot formulate simple assertions of observation which refer unambiguously, and without the mediation of interpretation, to observable facts. In his view, an ostensive (demonstrative) definition, where a word, by pointing to a thing, is directly related to reality, is impossible. Suppose that someone attempts to teach his language to a foreigner. He says the word 'white' while pointing to a piece of paper. From these actions the foreigner can impossibly determine precisely which part of reality is meant: the colour? the form? the material? Even a simple statement, such as 'This is white', presupposes an insight into what 'colour' entails. Stated somewhat differently, one always observes a thing *as* something (in this case, as colour). Therefore, one is interpreting right from the start, with the consequence that the neutral observation of empirically given facts is impossible. Such an interpretation is, according to the later view of Wittgenstein, not a matter of individual caprice. It is determined by the conceptual structure of the language with which someone has grown up. Science, therefore, has no direct contact with reality, but only through the mediation of language traditions. The symbols of artificial scientific language, too, must in the end be defined by the concepts of colloquial speech in order to be understandable to scientists. In brief, scientific language does not provide unique access to the world. Something precedes it: the conceptual relations which are contained in the rules of our everyday use of language.

Because of this, the claim to priority of scientific language is unfounded. The later Wittgenstein consequently contends that science is only *one* of many meaningful linguistic *activities*. In addition to empirical description, one can with language also command, ask, act on stage, etc. Giving ethical prescriptions now regains its status as a meaningful activity as well. Wittgenstein refers to such linguistic activities and all other types of symbolic action as *language games*. Every language game has its own sense and its own rules. Taken together, these language games express the culture of the members, of their *form of life*. Such a form of life implies a worldview consisting of both factual and normative beliefs. The inherited language of a culture provides the inescapable paradigm by way of which one orientates oneself in the world, thus also of scientific practice.

The practice of science is therefore regarded as a conventionally determined activity of a scientific community. The correspondence criterion of truth is replaced by the consensus criterion: a theory is true when it is in line with the conventions the community of scientists agrees with. Such conventions, and not empirical reality, determine what is regarded as 'fact', 'knowledge', 'true', and 'rational'. These scientific conventions are, in their turn, based on a traditionally grown consensus regarding the language rules of a society. (They are thus not intentionally formulated arrangements.)

The foundational rules of our language provide a 'synthetic a priori' framework: they constitute the pre-given worldview within which we organise our knowledge. For instance, the statement that the world consists of material things (and not of spirits) is not verifiable, thus not true or untrue. The foundational rules constitute the inherited framework of all our further assertions concerning the world, in this

example specifically concerning concrete material things, such as 'This is my hand' (or this chair, or that house). Linguistic philosophy thus confirms Kant's anti-empiricist statement that our knowledge is the result of human constructions (Section 6.2). However, unlike Kant, Wittgenstein does not assume a universally valid, rational, organisational scheme. The fundamental concepts of a worldview are based on historically grown traditions. They are thus subject to change and, moreover, differ per culture.

This view of science relativises the positivist statement that natural science has an exclusive monopoly over knowledge. It opens the possibility of a variety of other kinds of sciences in addition to empirical natural science, for example, hermeneutics and jurisprudence. The natural and human sciences can, in this view, after all be regarded as different language games, each practised by a separate scientific community. In each of these scientific forums a distinct view applies concerning object, method and truth. Ethics as well acquires the status of a meaningful activity which is determined by its own rules.[8]

9.2.2 Linguistic Philosophy and Ethical Relativism

In the linguistic philosophy of Wittgenstein the making of ethical statements thus regains its status as a meaningful activity. Wittgenstein's version of linguistic philosophy, however, inclines towards ethical relativism. It after all presupposes that all knowledge is determined by the conceptual framework of the language of a particular culture or 'form of life'. This constitutes a worldview, an interpretive scheme through which we organise our knowledge. Because this worldview also determines what counts as fact, rational, and good, no independent objective standard exists by which to test the accuracy of a worldview as such. A language game has no foundation apart from itself. 'It is not reasonable (or unreasonable). It is there – like our life' (Wittgenstein 2003, par. 559). When different cultures with divergent worldviews have conflicting normative ideologies, there is, in Wittgenstein's view, no independent, supra-cultural moral standard by which to settle moral disputes. His linguistic philosophy, therefore, regards moral criticism of existing life forms on the basis of external standards as impossible. It even denies expressly that this belongs to the task of philosophy. Philosophy has as its sole task the clarification of the rules of the given language games through conceptual analysis. This can occur only by taking one's point of departure in the concepts and other types of language use of the participants of a language game. The later linguistic philosophy thus links up with the internal, normative, participant viewpoint of language users. As Wittgenstein (2009, par. 124) remarked: 'Philosophy . . . leaves everything as it is'.

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[8]Hare's analysis of moral language use exhibits similar features: the import of moral language is, according to Hare, the furnishing of prescriptions for conduct with a universal pretence; to the rules of the moral language game, therefore, belong that the speaker must take this pretence seriously; on the basis of this one can subject his normative statement to the universalisability criterion – see Section 8.3.2.

This coincides with the statement of the hermeneutic philosopher Gadamer that an enquiry aiming at 'understanding' can establish only that a foreign way of life is different, but not that is it better or worse. The researcher himself is after all, in his turn, determined by his own cultural horizon.

Peter Winch elaborated Wittgenstein's 'language-game' theory into a cultural and ethical *relativism*: every culture has its own traditional conceptual organisation, thus its own worldview and form of life, which determines what counts as 'fact', 'good and bad', or 'rational'. In the moral domain one has to distinguish between three types of cultural relativism, which cannot be reduced to each other, but to all three of which Winch subscribes. *Descriptive relativism* establishes that different cultures in fact recognise divergent values. Such descriptions of cultures belong to the domain of cultural anthropology. *Epistemological relativism* denies, moreover, that a supra-cultural standard exists with which to settle value conflicts between different cultures. This expresses a philosophical view on the possibility of knowledge. Finally, *normative relativism* states that different cultures each have a right to their own form of life. This is an ethical-philosophical conclusion. The statement that different cultures adhere to diverse views is in itself not as yet sufficient to arrive at epistemological relativism. It is after all possible that, viewed from an objective or intersubjective point of view, one of these cultures is simply wrong. In this way, someone who believes in the objectivity of natural science would insist that thunder and lightning can be better explained as a consequence of collisions between atoms than through the Germanic doctrine that the god Donar (Thor) throws his hammer. If Plato's theory of knowledge and morality was correct, the modern, Western, liberal-democratic culture would, viewed objectively, be immoral. Wittgenstein's theory however includes the additional epistemological thesis that supra-cultural objectivity is impossible. In his view of knowledge there are no objective standards which can serve as external test for the correctness of a worldview, because such criteria themselves can in turn only be established from within a worldview.

The remaining criterion for the correctness of a belief, then, is the consensus within a culture concerning the interpretive framework with which its members organise the world. For this reason external criticism of a culture on the basis of universally valid standards is impossible. A culture in which language use is, for example, permeated by magical concepts and a belief in spirits, is therefore not inferior to Western culture with its scientific belief that nature consists of aimless and inanimate material objects and forces. According to Wittgenstein, each worldview ultimately constitutes a mythology, also that of science. What one regards as good reasons for one's actions is thus fully determined by one's confidence in the worldview of one's culture. A farmer who wants to know whether it is going to rain will in a scientific culture be guided by meteorology, in a magical culture by an oracle. The one belief is not more rational or more objective than the other. When two cultures are irreconcilable, its respective members cannot but regard each other as crazy. As there is no shared foundation for an exchange of arguments, only rhetorical persuasion remains. Following in the footsteps of Wittgenstein, Winch

opposes the traditional Western view that Western culture entails a higher phase in the development of human civilization in comparison with non-Western 'primitive' cultures.

Winch rejects the idea that a universal progress of humanity has taken place from a primitive childish way of thinking to a more mature rational-scientific attitude, as the evolution theory of Comte implies (Section 8.3). According to this theory of progress, man in primitive societies is caught within irrational prejudices and superstitious fears. He projects his own human consciousness onto nature: he depicts inanimate things as animated and, therefore, believes that spirits lurk behind everything. The Christian belief in *one* single God is a more abstract version of this. An even more abstract form of this mechanism of projection is provided by the metaphysics of Plato and Aristotle who assume the existence of non-observable ideas behind, or final causes within nature. Through objective scientific thinking in the more highly developed cultures, man would be able to escape from such superstitions and arrive at an independent, rational standpoint in relation to life. According to Winch, this theory of cultural evolution is, however, itself based on a prejudice of Western culture which unjustly accords to itself a monopoly over rationality. Winch wants to protect non-Western cultures against such spiritual colonialism, and points to the distinct value and rationality of every culture.

Winch's cultural relativism is supported by the relativistic movement in cultural anthropology which set in since 1900. This movement opposes the self-confidence with which people in the West regard their own culture as superior. Accordingly, Ruth Benedict contends in *Patterns of Culture* (1934) that the ideals of the good life vary greatly in accordance with culture. The Hopi Indians in the south-west of the United States, for example, regard a moderate, controlled way of life as ideal, whereas the Dobu in the south of New Guinea favour an aggressive attitude. A person in Dobu society who lives in accordance with the Western ideal of neighbourly love would be regarded as a maladjusted lunatic.[9] According to Benedict, man at birth has a wide variety of dispositions that he may develop when growing up. In contrast with animals, his conduct is only to a small extent determined by heredity and instinct. In the cultural traditions of a society a particular set of characteristics is selected from this reservoir, which represent the ideal personality of that culture. Under the influence of education and social pressure the members of this society will then adopt the culturally desirable characteristics. Because each culture in this way makes its own selection from the totality of human possibilities, according to Benedict no single culture possesses universally valid standards by which to criticise the life ideals of other cultures.

On the basis of this descriptive and epistemological relativism, Benedict advocates normative relativism: all cultures are of an equal value; therefore one has to respect the differences between them. That is why Benedict and a number of her colleagues opposed the claim to universality of the *Universal Declaration of Human*

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[9]Later critics incidentally contended that Benedict had over-exaggerated these differences.

Rights of 1948. The so-called universal rights are, according to her, nothing more than a one-sided product of the individualistic Western culture. If the Universal Declaration should be implemented universally, it would lead to a worldwide identity crisis because the greatest part of humanity can then no longer live in keeping with their own traditions. This would go against the findings of cultural anthropology that people can develop their personality only via their own cultures. For this reason a person is only really free when he lives in accordance with the view of freedom of his society, according to Benedict. In a truly universal declaration of human rights one would, therefore, have to replace the Western ideal of individual autonomy with the collective right of cultural autonomy.

In itself the relativism of Benedict and Winch is well intended. By emphasising the distinct value of other cultures they seek to resist the Western spiritual domination of the world, through which many non-Western life styles are sidelined. For this reason they argue in favour of the right of each culture to its own way of life. This normative relativism nevertheless runs into a number of difficulties. In the first place, it is inconsistent with Winch's normative conclusion that all cultures must be respected. This conclusion, after all, itself presupposes a *universal* value of mutual respect, which is in conflict with relativism: many cultures do not recognise the value of tolerance. Winch can thus at most argue for tolerance as a partisan value. Or else, an inverse contradiction may arise here: cultures with a relativistic tolerant view must indeed regard themselves as superior to cultures which are convinced of being absolutely in the right.

A second objection against relativism is that it provides no solution when different cultures come into conflict with each other. Such conflicts inevitably occur because the worldwide communication between cultures is becoming increasingly intensive. This objection comes clearly to the fore in a society with cultural minorities who endorse values that deviate fundamentally from those of the dominant culture. How should one, for example, in a democratic constitutional state deal with minorities who are in favour of the inequality between men and women, or who have no understanding of the importance of freedom of expression, or who regard killing because of violated honour as a moral duty?

As a solution to such value pluralism, liberalism, as a political ethics of the second order, is often proposed. Political liberalism allows optimal freedom for everyone to live in accordance with his morality of the first order in so far as it does not affect the equal freedom of others (see Section 1.4, and the political liberalism of Rawls, Section 10.5). But if one accepts this solution, ethical relativism is on closer inspection not the endpoint. It appears to involve a universal ethics: liberalism. Critics therefore object that liberal freedom is unacceptable for cultures with an ethics of absolute claims. A culture with a Platonic perfectionist ethics would, for example, regard the tolerance of dissenters as reprehensible, and would, therefore, not be prepared to accept liberal tolerance. Plato would as little accept the liberal thesis that a way of life has moral value only when it is chosen voluntarily. He after all rejects the autonomy ideal because he regards most people as incapable of making independent rational choices. For a clash with an intolerant culture, relativism provides no solution. Only war then remains.

   To conclude, a third objection: from the perspective of the emancipation ideal it is objectionable that Winch's relativism respects cultural ideologies which are fundamentally in conflict with the values of freedom, equality, brotherhood, democracy, the rule of law, and human rights. Ethical relativism, in other words, undermines the ideal of progress of the Enlightenment. In accordance with Enlightenment philosophy, authoritarian or anti-egalitarian cultures should be emancipated. However, according to relativism, the Enlightenment values are themselves culturally determined so that they can make no claim to universal validity. In Winch's view, Multatuli's Max Havelaar was therefore wrong in attempting to break down the hierarchy of the prevailing Indonesian customary law on the basis of his Western ideal of equality. The call of Ayatollah Khomeini for censorship (and religious murder) was in this relativist view as rational as the Western notion of freedom of expression. Cultures in which women are denied a role in public life have an equal value to cultures which prohibit sexism in their constitutions. The presumption of the Enlightenment that it entails moral progress of human civilization is nullified through this approach.

   One can of course respond that a lack of freedom and equality is not so bad as long as this is accepted by the members of illiberal societies. Perhaps the Enlightenment values *are* not universally desirable. Critics of relativism, however, contend that the general acceptance of cultural values does not count for much, because such a consensus is often the outcome of indoctrination. The powerful frequently succeed in making the powerless believe in an ideology which justifies their inferior status. For example, in many non-white countries which used to be Western colonies, the ideals of whiteness still dominate. In the West most women for many centuries accepted their domestic function without much protest as 'natural'. According to this criticism one should break through such oppressive consensus by way of ideology criticism in the interest of the oppressed. This is specifically the viewpoint of Critical Theory which, just like Wittgenstein, places the emphasis on the importance of communication through language, but from this, instead of ethical relativism, derives a universal ideal of emancipation.

9.3 Critical Theory

9.3.1 Neo-Marxism

The initially Neo-Marxist inspired, but later social-democratic and liberal-oriented Critical Theory (Bloch, Lukács, members of the German *Frankfurter Schule*, such as Adorno, Marcuse, Habermas and Apel) developed a critical theory of society in opposition to the dominant scientific, technological way of thinking of capitalist society. The critical theorists state that scientific thinking has lost its original association with the emancipatory Enlightenment ideals of freedom, equality, and fraternity. Empirical science now simply provides 'instrumental rationality' (knowledge of the means with which to achieve a goal), but regards moral and political questions about the goals themselves as rationally unanswerable. This instrumental

scientific approach currently dominates not only the whole labour process, but has also infiltrated all other areas of human life. Through this objectification ('colonisation of the life world') social life has been dehumanised ('alienated' from its original humanity).

The Neo-Marxists acknowledge that, unlike Marx predicted, no revolution has taken place against the capitalist system (see Section 7.4). Technology developed massively after Marx, but so did the ability of capitalism to adapt itself. This happened, among other things, through active state intervention via social legislation that removed the sharp edges of capitalism, while at the same time maintaining the free market. Because of this, workers, according to Critical Theory, still lack an essential right: the right to a say in operational management. In the capitalist system this has remained in the hands of the providers of capital and of managers. As a consequence, the largest section of the population has no say in the determination of a fundamental part of their own destiny. They are still being disposed of as if they were sheer economic objects, on the basis of the economic utility of their labour. Neo-Marxists for this reason regard the welfare state as a sweetener. The 'proletariat' is currently, moreover, in all kinds of ways ideologically bound to the existing production relations, by means of increases in wages that promote their consumption. The need for consumption is furthermore manipulated by advertising and incentives of social status. In this way the members of capitalist society are, according to Neo-Marxism, alienated from their true human needs. Marcuse speaks of a 'one-dimensional man'.

Critical Theory attempts to promote emancipation from this alienation by alerting people to the dehumanising functioning of capitalism as well as scientific thinking. It wants to make people aware of the fact that the social system with all its inequalities is not an inescapable natural occurrence, but constructed by people (albeit not purposefully). It can, therefore, likewise be changed by people. When man acquires insight into his ability of self-mastery, he can arrive at a more humane society, in which everyone cooperates in freedom, equality, and fraternity.

9.3.2 The Interest in Emancipation

The critical philosophers Habermas and Apel do not oppose natural science, provided it restricts itself to the terrain of inanimate nature. There it has indeed contributed to a useful increase in knowledge. They only reject its claims in areas where it is inadequate, such as human social life. The latter requires a distinct manner of attaining knowledge.

Habermas distinguishes three specific ways in which man relates to his environment. These three attitudes determine the perspective from which he acquires his knowledge. With these correspond three 'knowledge interests': (1) In relation to external non-human nature, man adopts a technological attitude: he *exploits* it via his labour. (2) This he does in cooperation with other people with whom he lives together in a community. The relation with his fellow men is of a *communicative*

nature: people can gear their activities to one another by means of a shared collo-quial language, which is rooted in the traditions of their culture. (3) Finally, man has a relation with himself. The individual must adapt himself to communal life. For this purpose he has to develop a personality in which his egocentric, instinctive desires are brought into line with the demands of the prevailing social relations. According to Habermas and Apel, three types of knowledge, each characterised by a distinct human interest, correspond with these three types of relation.

(1) Natural science aims at controlling external nature. It is dominated by a *techno-logical interest in knowledge*. Through knowledge of the causes, man can after all co-determine the course of nature. In this model of knowledge, the 'subject' stands in opposition to the 'object'. One should not, however, attempt to use this method in other fields. Because of its 'scientistic reduction' of human life to causal regularities, in the humanities it can provide no insight into specifically human relations. There it plays into the hands of an impoverished, technocratic and manipulative view of man and society. This approach leads to a view of people as sheer objects, controllable by causal knowledge, instead of as fellow human beings with whom one cooperates towards a shared purpose.

(2) Hermeneutic social science provides interpretive knowledge through which one learns to orientate oneself within communal traditions. The human sciences are aimed at the understanding of human life forms. Here a *practical interest in knowledge* plays a role: the knowledge of the social sciences provides guide-lines for the better design of one's own life. In the place of the subject-object model of natural science, the communicative subject-subject model comes to the fore. In other words, the test for true knowledge of social relations is not correspondence with facts, but intersubjective understanding: has the enquirer understood the motives of the acting persons in such a way that they themselves agree with his interpretation of their way of life?

This second form of knowledge thus incorporates hermeneutics as well as linguistic philosophy into the Critical Theory of Habermas and Apel. As indicated, according to these two movements a universal ethics is impossi-ble, because one always remains caught within one's cultural traditions. This is, however, unacceptable to Habermas and Apel because they regard many of these traditions as oppressive. One often grows up in a society which is dominated by traditions that were formed under the influence of great social inequalities and power asymmetries. Again and again the dominant groups suc-ceed in shaping the worldview of all members of society in accordance with their own interests. In this way, capitalists will attempt to justify their power with the ideology that humanity as a whole is better off with free competition: the principle of the free market would guarantee high-quality production for prices that are as low as possible, from which everyone benefits. If the capital-ists succeed in making everyone believe in this ideology, the underlying power structure acquires an anonymous, apparently objective force, which determines human conduct as if it is an inescapable natural law: economic laws simply are like this.

The biased character of such an oppressive ideology can, according to Critical Theory, not be unmasked by the hermeneutic approach of the humanities. In keeping with its communicative import, hermeneutics attempts to understand human action from the internal perspective of the insights and values of the members of a society. However, according to Critical Theory such values can be in conflict with the true human needs of a society. Through indoctrination, women themselves can, for example, come to believe that they are inferior to men. The approach to understanding hermeneutics can, as Gadamer acknowledges, not provide an independent standard for criticism of a society. It can at most establish that one society is different from another, not that it is better. Habermas and Apel, however, state that man can transcend the limitations of such traditions by means of a critical social science.

(3) In the third place, there is an *emancipatory interest in knowledge* which leads to the *critical social science* which is characteristic of the Critical approach. This third interest in knowledge is based on the human ability of increasing self-awareness. People can realise that their own personalities have been deformed by oppressive ideologies, and on the basis of this 'emancipatory knowledge' adopt an autonomous, self-chosen way of life. The criticism of ideologies of critical social science must promote this self-awareness by unmasking the dominant power system – in the same way as, in personal life, Freudian psychotherapy may help an individual to free himself of neurotic obsessions by exposing their origin. It then shows that the generally accepted social convictions have no objective foundation, but serve as a covert justification for economic power relations. Critical social science can, for example, attempt to show that the free market principle in fact plays into the hands of egoism instead of cooperation and solidarity, and ultimately is in the interests of only the powerful. On the basis of this insight one can subsequently strive for a shared say in the production process aiming at everyone's interests. In this way critical social science stands under the sign of the 'emancipatory interest in knowledge'.

9.3.3 The Ideal Communication Society

From this view on the ways of acquiring human knowledge, Habermas and Apel derive a universal ethics of emancipation. They contend that of the three knowledge interests, the aspiration towards emancipation constitutes the essential characteristic of man. For this reason, every person has the duty to strive towards an emancipated society, controlled by the principles of freedom, equality, and fraternity. Habermas and Apel substantiate this with reference to the intersubjective, communicative character of human knowledge and culture.

Because the attainment of knowledge, in the view of Habermas and Apel, is guided by specific human interests, they reject the positivist claim that empirical science provides a value-free objective version of reality. Natural science is, according to Critical Theory, determined by the human need to control the environment,

or by a 'technological knowledge interest'. Empirical science, therefore, observes reality in a selective manner: it limits itself to the aspects which lend themselves to causal control. (For this reason, the method of natural science is not sufficient for social life.) It follows that the empiricist separation between objective judgments concerning facts, on the one hand, and subjective normative judgments, on the other hand, is untenable. Every form of knowledge is determined by a human need, and, therefore, has a normative import. Habermas and Apel conclude that knowledge must overtly be placed in the service of human interests, that is, of the emancipatory interest.

Apel invokes in addition an argument that has a natural-law flavour: the emancipatory aspiration constitutes the essential nature of man, and is, therefore, a universal norm for all people. Apel contends that intersubjective communication through language constitutes the essence of human life, and that the fundamental significance of all communication consists in a free and unprejudiced exchange of ideas and arguments. Therefore all people should strive towards emancipation on the way to an 'ideal communication society' in which freedom and equality prevail. Communication is, in Apel's view, an essential characteristic of man because the whole of human culture is based on language. Animals live in accordance with fixed, instinctively determined patterns of conduct. Man can, however, to a certain extent stand at a distance from his immediate environment. He can gather knowledge of the surrounding world, and on that basis adapt his environment to his needs. This is possible through language. With language, reality can be organised into general concepts which make it possible to speak abstractly *about* reality, instead of living immediately *in* it. Language, according to Apel, is not an individual issue, but an intersubjective means of communication which constitutes the expression of a long cultural tradition. Via language the experiences of many generations can be safeguarded and passed on so that human culture can evolve continuously. People thus orientate themselves in relation to their natural environment and in relation to each other via the shared language traditions of their culture, or via intersubjective communication.

Up to this point, Apel's contention corresponds with that of the hermeneutists and linguistic philosophers. This contention could lead to the conclusion that man, due to a lack of natural instincts, has no other way to orient himself but his cultural traditions. This would mean that all moral standards are culturally determined. One can then through the study of foreign cultures indeed broaden one's own horizon. However, because one always interprets from within one's own cultural traditions, one is not capable of formulating an objective, supra-cultural standard in order to establish which life form is the best.

Apel, however, adds to this that the central immanent purpose of human communication consists of transcending the restrictions of the dominant cultural traditions. Apel specifically argues that the core of the idea of human communication lies in the unrestricted and honest transfer of information, thus in free *argumentation*. In everyday communication, open argumentation is, however, often distorted because the parties manipulate the discussion for reasons of self-interest. Where the linguistic traditions are determined by the interests of the powerful, all communication is

from the very start tainted by a suppressive ideology. Because of this, one can in everyday life hardly speak of real communication in the sense of an open and free exchange of ideas and arguments. This ideal form of communication is, in Apel's view, nevertheless presupposed in every actual communication. Lying would, for example, have no effect when parties to a discussion do not assume that people mostly speak the truth. Indoctrination often no longer succeeds when one becomes aware of the manipulation. Therefore, the purpose of communication implies that parties to a discussion are honest and make true and understandable statements. If statements are placed in doubt, one must be able to defend them with arguments. If necessary, the whole cultural interpretive framework of a society must be subjected to discussion.

Since the ability of ideal communication constitutes the essence of man as communicative being, he must, according to Critical Theory, strive towards eliminating influences which distort this ideal. In Apel's view, the aspiration towards an *ideal communication society* is contained in the essential nature of human communication, that is, a society in which everyone can equally join the discussion in a free exchange of ideas. This societal ideal implies freedom of expression, political freedoms, equality in social conditions (thus the classical and social fundamental rights), as well as a democratic decision-making procedure.

In democratic deliberation about the further design of society, moreover, only those claims and needs should be recognised which can be justified intersubjectively, in other words, all claims which are in harmony with the claims and needs of all others. This is Habermas's version of the universalisability principle which he regards as a consequence of the ideal of impartiality that characterises moral discussion. Unlike Hare (Section 8.3.2), but similar to Kant (Section 6.3), Habermas does not limit the application of the universalisability principle to the normative statements of an individual speaker. He applies it to the imaginary community of all potential participants in moral communication as a whole. From this follows a universal duty placed on all people to eliminate unequal social power relations which distort ideal communication.

Contrary to the hermeneutists and the linguistic philosophers, in this way Apel derives a universal standard from the communicative nature of man with which to measure divergent cultural value systems. He regards cultures that are designed in conformity with the emancipatory ethic of the Enlightenment as superior, because only there can man flourish in accordance with his true nature. Societies which deviate from this, for example, because of a caste system or the unequal position of women or a capitalist economy, must be brought in line with this societal ideal. Contrary to Winch, Apel thus propagates the ideal of progress of the Enlightenment as universal test for the value of cultures.

Apel's invocation of a human 'essential nature' makes one think of the metaphysical, essentialist natural law of Aristotle and Thomas Aquinas (Sections 2.5 and Section 2.7.2). The difference is that these arrive at a broad ethics, whereas Habermas and Apel argue for an ethics that retains an intermediate position between perfectionism and liberalism. The reason for the difference lies in their divergent views of knowledge. According to Aristotle and Thomas Aquinas, objective

knowledge of (a higher, spiritual) nature is possible. This includes knowledge of an objective ideal of human perfection, thus a perfectionistic, broad ethics. Apel and Habermas reject such claims to objectivity because human interpretation necessarily plays a fundamental role in the attainment of knowledge. What is regarded as knowledge is, therefore, dependent on human consensus. Their ethics consequently does not follow from knowledge of the content of nature, but is based on a *procedure* for the achievement of rational consensus. Morally just is everything that is acceptable to all. To the conditions of this procedure belong that all parties to the discussion must arrive at their point of view in equal freedom, thus without having been forced into a specific way of life. The criterion of intersubjectivity in this way leads to a liberal, procedural ethics, in conformity with the Enlightenment ideals.

The emancipatory ethics of Critical Theory, however, also shows perfectionistic features. It after all does not accept all actual preferences that individuals have as basis for the formation of a free consensus. Desires that are in conflict with 'true humanity' must first be unmasked. Critical Theory thus adopts an ideal of human perfection: that of the emancipated, 'truly free' man. Yet, this does not imply a perfectionist *political* theory. As long as the ideal communication society has not as yet been achieved, most critical theorists want to present their liberating insights via open, rational argumentation in accordance with a liberal democratic decision-making procedure. In this, they adhere to a form of political liberalism. However, some more radical adherents of this movement contend that indoctrinated people are not open to rational argumentation. Therefore, strategic means may be used in addition in order to bring them to proper insight. In so far as Critical Theory in this way, following in the footsteps of Rousseau, wants to 'force people to be free' its political theory is perfectionist rather than liberal.

9.3.4 Legal Philosophy

Habermas has worked out the implications of his moral philosophy for law in the form of a modern natural-law doctrine. Contemporary Western law, in Habermas's view, has an inherently moral import, in which it shows a close relationship with his procedural ethics: law aims to solve social conflicts by an impartial procedure. The impartial character of law appears, among other things, from the institution of the impartial judge and from procedural rules concerning the allocation of the onus of proof, the hearing of all parties, and the judicial duty of justification. This presumption of supra-partiality one can subsequently adopt as a moral standard for the legitimation of actual legal decisions: can these indeed be defended from all possible points of view? Laws and decisions must, in other words, be tested in the imaginary decision-making procedure of Habermas's ideal communication society.

Habermas places this *procedural* natural-law theory in opposition to the classical metaphysical natural-law doctrine and to legal positivism. In his view, the metaphysical natural-law theory has lost its foundation through the 'disenchantment' of the world since the 17th century under the influence of natural science and modern economics. Law, economy and politics in this way separated themselves

from traditional religious values. Previously the law enacted by the state derived its legitimacy from the assumption of natural law that it was an elaboration of eternal values. Because faith in this metaphysical foundation has fallen away, *only* state law remains. This is reflected in Austin's legal positivism, which depicts law as the enforceable commands of the sovereign (Section 1.2.3.1). Austin's legal theory is, however, too simplistic because his definition does not distinguish between law and politics (power). The successive theory of Hart gives a better account of the typical structure of positive law as a hierarchy of norms: the state is in its enactment of rules itself bound by secondary, power-conferring rules (Section 1.2.3.2). Hart's legal doctrine is similarly legal positivist because what counts as law is exclusively characterised by formal criteria that rule its establishment, and not by substantive moral demands. Since according to legal positivism all rules count as law that are enacted as such by the government in the formally correct way, the question arises whence law can derive its legitimacy.

Habermas opposes the thesis of normative legal positivism which equates the *legality* of law with *legitimacy*: law which has been established in the correct manner should be obeyed. A standard argument for this equation goes that only then legal certainty, and thus social order, is safely secured. According to the sociologist Max Weber, owing to a number of formal characteristics, positive law possesses a distinct rationality which provides sufficient reason for obeying it. Positive law constitutes a well-organised system of laws which is formulated in a general, supra-personal form. Thus it can guide social interaction and state organisation into orderly trajectories which run according to generally known, calculable patterns of expectation. Through private law institutions, such as property and contract, law makes organised economic exchange possible. Rules of public law that assign authority regulate the power relations in political life. Positive law in this way provides a framework within which the citizen can lead a regular and calculable life according to his own values.[10] This gives modern law its specifically formal 'legal authority', a legitimacy that is no longer based on a moral foundation, as in traditional societies.

Habermas, however, contends that the legitimacy of law cannot be based upon a legalistic foundation. He points out that current law no longer complies with the formal characteristics which Weber ascribed to it in the first half of the 20th century. Since then law has been 'de-formalised': it no longer constitutes a closed system of commands and prohibitions which can be identified by the way in which it comes into effect, but an open system in which account is taken of social consequences and moral considerations. For example, in the second half of the 20th century in Western Europe a welfare state has been established which is based primarily on regulatory law in the service of political purposes such as redistribution. Moral values which have been positivised in constitutions play an increasingly important role in judicial decisions. In the terminology of Dworkin: instead of by *rules*, law is increasingly governed by *principles* (Section 1.2.3.3). Because of this 'materialisation' of law a strict separation between law and morality is no longer possible. Nowadays, legal

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[10]Weber regards such values as the result of irrational subjective preferences, because of which no generally valid moral demands can be made of law.

certainty is only one of the principles which the law serves. The property right as such, for example, only makes interferences with someone's property calculable. In the contemporary view of property, the principle of legal certainty must be balanced against the principle of equal chances for everyone which may require redistribution by the state. This is not guaranteed by the general and abstract form which characterises law in Weber's view. This form only provides for formal equality before the law, or impersonal application of existing legal categories, but not for material equality in economic and political life. For this reason, the 19th-century absolute right to property was in the course of the 20th century increasingly relativised.

According to Habermas, positive law consequently can no longer derive its legitimacy exclusively from its legality, as normative legal positivism claims. Then again, because of the decline of metaphysics and religion, the self-evident, generally shared moral traditions which of old used to serve as test for legitimacy no longer exist. Exit classical natural law. Instead, Habermas arrives at a formal version of natural law: the test for the appropriateness of legal rules is whether they can be the result of an impartial decision-making process. In support of this he points to an inner association between law and morality which is of a *procedural* nature: the law functions as an impartial arbitrator, which is formalised in the institution of the impartial judge, the principle of hearing both sides, and the judicial duty of justification. Legislation in contemporary Western culture is, moreover, established via a democratic decision-making process which is based on the idea of the free and equal participation of all citizens in the political and legal order. Habermas's procedural justice is, therefore, immanent *in* legal reality. Law has an inner relation with this procedural morality.

Just like the legal positivists, Habermas, therefore, bases the legitimacy of law on formal criteria. These criteria, however, do not refer to the legality of law, but to a more abstract characteristic with a moral import: the procedures concerning the impartial settling of disputes. In other words, the ability to solve conflicts in accordance with fixed rules (that is, legal certainty as stressed by normative legal positivism) does not provide a sufficient foundation for legitimacy; in addition, the law must solve such conflicts in a specific *neutral* manner, as is implied in the very nature of positive law. Only because law professes to stand beyond the parties can it legitimise a general duty of obedience, not simply by providing certainty and order.

The ideal of impartiality takes on different forms in the divergent legal procedures of decision-making. At the level of legislation where the formulation of general rules and principles is involved, this leads to the *universalisability criterion*: only those decisions are legitimate with which all involved may agree to in a free discussion on an equal footing. At the concrete level of judicial decisions this leads to the *adequacy criterion*: a judgment is legitimate when the judge has taken account of all aspects of the case. The form of government which complies best with these criteria is the democratic constitutional state. According to Habermas, the ideal of procedural justice was also contained in earlier forms of modern natural law, specifically in the social-contract model of Hobbes and Kant. The metaphor of the social contract indicates that the social order and the legal order must comply with values to which all citizens could agree.

In Habermas's view, then, law amounts to an extension of his general procedural ethics. This is not to say that law and procedural morality fully coincide. The most important difference lies in the positivised, institutionalised character of law which would provide an efficient societal order. In concrete instances, the outcome of the imaginary decision-making procedure of Habermas's procedural ethics is uncertain, because the universalisability criterion is formulated very broadly. Judicial decision-making is, on the contrary, not imaginary, but positivised. Here, the criterion of impartiality has assumed the concrete form of the independent judge and democratic legislature that make concrete decisions. Law is, in brief, based on positive legislative and judicial procedures, as a result of which a great number of rules are fixed beforehand, in order to make the conduct of citizens predictable. Law, moreover, supplements this through the possibility of using force against unwilling citizens. Law furthermore does not only consist of positivised moral principles, but is also an instrument for political policy.

Habermas realises that actual legal practice in the Western world does not comply with this ideal of law. Many democratic decisions do not result from reasonable argumentation, but from compromises between power factions. Citizens are often satisfied as long as their material interests are attended to, and decline further participation in the political debate. Therefore, in actuality, laws will not be equally acceptable to all. Judges moreover often insufficiently motivate the way in which they apply such laws. Their decisions are co-determined by social prejudices and partial interests. Nevertheless, Habermas contends that the fact that they are in such instances confronted with criticism regarding their *judicial* function, proves that the impartiality ideal nonetheless constitutes the core of the legal institution, even if positive law in actuality to a great extent does not comply with it. Morality, therefore, on the one hand, constitutes a substantial part of legal reality, and, on the other hand, provides the basis for a critical legal theory in relation to positive law.

In a very unjust legal order citizens may have a right to revolt. In a democracy, they have the more moderate right to 'civil disobedience' when the government violates their basic rights. They may take refuge in illegal acts in order to symbolically protest against specific unjust, for instance, racist laws. At the same time they should explicitly express their acceptance of the legitimacy of the legal order in general: their illegal actions should be in the open, non-violent, and related to the wrong in question. Exemplary are the actions of Martin Luther King. In line with Habermas's philosophy of language, the aim of civil disobedience is primarily communicative, giving a sign to the democratic majority to reopen the discussion about the legitimacy of the laws in question.

9.4 Commentary: Intersubjectivity and Universal Ethics

Critical Theory takes its point of departure in the same emphasis on intersubjective consensus as hermeneutics and linguistic philosophy. All these movements assume that knowledge is tainted by human interpretation. Objectivity in the sense

of correspondence with objective reality is, therefore, an illusion. This is superseded by the consensus criterion of truth: an interpretation is correct if it is met with a general consensus.

Philosophers of language and hermeneutists recognise that different cultures diverge in their interpretive frameworks. For this reason they advocate cultural and normative relativism. Morally good is what is accepted as such within a culture. In opposition to this, Habermas and Apel state that an *actual* consensus does not have to be the final word. It is often based on prejudices and power inequalities which can and must be transcended. The communicative essential nature of man imposes an obligation to strive for a *rational* consensus, based on a free and equal exchange of information. In the place of the criterion of factual acceptance by all those involved, they posit the criterion of *acceptability* for all in the hypothetical ideal circumstance of rational communication.

It is, however, very doubtful whether the claim to universality of this emancipation ethics can persist. Apel contends that it is a universal duty of all people to strive for an 'ideal communication society'. He bases this on the argument that all people are essentially communicative beings, and that communication is in essence argumentation which is free from power asymmetries. This reasoning, however, appears to be based on an unfounded essentialism. Even if one accepts that man is in his essence a cultural and thus communicative being, Apel's next step remains debatable: his equation of communication with argumentation. Apel is indeed correct with his statement that *argumentation* is aimed at unprejudiced, and honest discussion on an equal footing. *Communication*, however, also includes other, non-argumentative uses of language which are expressions of power, such as commands, or strategic persuasion, like advertising language and the language of diplomacy. Language can by means of its symbolic character refer to things which are *not* present, and is, therefore, pre-eminently suited for lies and manipulation.

Apel's emphasis on the informative and argumentative character of language appears to be strongly determined by culture. The language use of many Eastern cultures is rather aimed at the achievement of social harmony and the prevention of loss of face than the furnishing of objective knowledge. The aspiration to provide objective information is perhaps a specific characteristic only of the scientifically oriented Western culture. For that matter, without the constant use of euphemisms, social interaction in the West would probably also quickly come to an end. In Nietzsche's view, the whole of language is since its origin permeated by unequal power relations:

> The masters' right of giving names goes so far that it is permissible to look upon language itself as the expression of the power of the masters: they say 'this *is* that, and that,' they seal finally every object and every event with a sound, and thereby at the same time take possession of it (Nietzsche 2003b, p. 11)

In brief, even if man is in essence a communicative being, it does not follow that all people are characterised by an inherent pursuit of emancipation. When one assumes that intersubjective consensus is decisive for man, one can establish that the lives of all people are dominated by shared cultural traditions. However, these traditions contain many divergent forms of communication. Human culture and language are

as much characterised by a pursuit of power as of emancipation. The designation of *one* of these aspects as *the* human essence is based on an unfounded essentialism. One cannot, therefore, derive a universal emancipation ethics from the communicative nature of man. With this we are back with the thesis of the hermeneutists and the language philosophers that historically grown cultural traditions constitute the horizon of human life. The emphasis on the intersubjective character of human culture then leads to cultural and ethical relativism, with all its problems.

The same applies to Habermas's natural-law theory. This is primarily inspired by the form that law has recently taken in Western culture: that of the democratic constitutional and welfare state. In contrast, in authoritarian states with great social inequalities and a lack of freedom it is much less self-evident that Habermas's procedural justice is contained in legal reality. When the judge has an impartial role there, this would at most consist in an impersonal application of the prevailing authoritarian principles.

The problems of relativism become even greater when one assumes that cultures are not homogenous, because within one culture divergent subcultures exist with mutually irreconcilable moral views. Individual members of a culture can moreover give a new twist to dominant ideals. In such instances the internal consensus is shattered. It is then conceivable that, even within a single culture, universal moral standards can no longer be formulated, because no single moral view is generally accepted. In comparison with the moral non-cognitivism of the empiricists, the cultural relativism of Winch has the advantage that it at least allows for moral consensus within a single culture. But this view appears to be no longer tenable in a pluralistic society. The criterion of intersubjective consensus, then, provides no solution.

Two approaches which seek to address the problems inherent in Critical Theory, as well as the problems of relativism, will be discussed in the next section and in the final chapter. Deconstruction seeks to do this by enquiring, among other things, into the philosophical and political implications of Freud's thinking. In this way a certain 'standard' is invented against which the plurality of political views in society can be measured. Political liberalism (Sections 10.4 and Section 10.6) seeks the solution in a narrow liberal ethics. In the absence of generally shared substantive standards, everyone must observe the rules which are necessary for peaceful and fair social interaction. For the rest, tolerance and freedom should prevail.

9.5 Deconstruction

9.5.1 *Psychoanalysis Radicalised*

Jacques Derrida (1930–2004) in the 1960s gave the French word 'deconstruction', which was largely unknown at the time, a new impetus in his attempt to overcome the metaphysics of presence which, according to him, has characterised Western philosophy since its commencement. Derrida is known for his 'deconstructive' readings of the texts of philosophers and other writers, including some of those who

have been discussed thus far, such as Plato, Aristotle, Rousseau, Kant, Hegel, Marx, Nietzsche, Husserl, Freud and Heidegger. Some of his readings are also of novelists, such as Jean Genet, Maurice Blanchot, Franz Kafka, Edgar Allan Poe, Francis Ponge and James Joyce.[11] To have some conception of what deconstruction entails, it is necessary to first elaborate somewhat on what Derrida understands by the notion of a 'metaphysics of presence', as well as the 'notion' of *différance*, which according to him to a certain extent exceeds metaphysics.

According to Derrida, one of the primary features of the *metaphysics of presence* is the hierarchical opposition that it imposes in relation to different terms, such as life/death, original/imitation, normal/abnormal, interior/exterior, infinite/finite, good/evil, reason/madness, and speech/writing. The latter distinction is, amongst others, to be observed in the texts of Plato (Section 2.4). In the *Phaedrus*, by mouth of Socrates, Plato, for example, shows his aversion to writing, indicating instead his preference for the living, breathing purity of speech. Writing is described by Plato as a fallen kind of speech, a mere aid, dangerous and secondary to living memory, as corrupting originary meaning, as dead or empty repetition, and as dead and rigid knowledge. The typical strategy of metaphysics is illustrated here, that is, to take as its point of departure what is regarded as pure and present, and thereafter to consider deviations from such presence as secondary effects. This positing of a presence is derived from a belief in the existence of an original foundation, for example, Plato's Ideas, God as Creator, modern man as subject, or reality. Metaphysics thus constantly erects a structure which in its essential features shows a remarkable similarity across the different ages. Why does this happen? According to Derrida, this is due to a persistent desire for presence, which at the same time reveals the way in which metaphysics views death. A specific strain in the thinking of Freud (Section 8.2) plays an important role here. Derrida, it could be said, seeks to 'analyse' Western philosophy in a way which corresponds to a certain extent with Freud's analysis of his patients and of the structures of law, morality and religion. As we saw earlier, Freud's thinking concerning the unconscious mostly centres on the Oedipus complex which he regards as the nuclear complex of the neuroses. The Oedipus complex, according to Freud, has furthermore had a determining influence on the development of law, morality and religion. Freud's notion of the death drive, upon which he elaborates in *Jenseits des Lustprinzips* (literally: Beyond the Principle of Lust), however, stands in tension with this finding. The death drive, in Freud's view, could explain the observation that patients tend to repeat unpleasant experiences, for example, in analyses and in dreams. The death drive, Freud contends, is a feature of all organisms, and life itself simply amounts to a detour with the ultimate aim of death. This detour is somewhat paradoxically determined by the sole wish of an

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[11]In *Force of Law* (Derrida 2002, pp. 230–298), Derrida, for example, refers to both Kafka and Blanchot. The law and literature movement relies somewhat similarly on literary texts, either in general or in so far as they specifically deal with law, in order to critically reflect on law. Another approach is to view law from a literary perspective, in other words, as itself being a form of literature. Derrida's readings tend to focus on the insight these authors show into man's relation with death.

organism, which is to die in its own fashion, to die its own death or to die 'properly'. In his reading of Freud's text, Derrida shows that death and sexual desire are very closely related, so that these two forces do not stand in opposition to each other, as one often finds in readings of Freud (that is, *Eros* versus *Thanatos* – a typical metaphysical opposition), but that the death drive effectively amounts to a desire for absolute sexual pleasure or final orgasm. This 'desire beyond desire', which will henceforth be referred to as a 'desire for death', exceeds and precedes the unconscious in Derrida's reading of Freud. Viewed thus, the Oedipus complex must itself involve a dissimulation[12] of the desire for death, Derrida contends. The Oedipus complex is, in other words, only one of the possible effects, more precisely, one of the strictest possible effects, of the desire for death. In light of this understanding of the Oedipus complex, Freud's contentions in relation to law, religion and morality, require reconsideration. These products of humanity, it now appears, are not simply reflections of the Oedipus complex. Viewed more rigorously in light of Freud's own insights in relation to death, they entail a dissimulation of the desire for death. In other words, law, morality and religion in the final analysis amount to a search for presence, a restriction of the desire for death. Nietzsche's notion of the will to power (Section 7.5) can consequently, using the terminology of Freud and Derrida, be explained as an expression of the search for presence, or the 'binding' of the desire for an absolute powerlessness.[13] The desire for death can similarly be expressed in the language of Hobbes, who, as we saw earlier (Section 4.1), insists on the characteristic of self-preservation in all living beings: The self-preservation which necessarily accompanies life can now be said to amount to a 'binding' of the desire for death, the latter entailing a complete abandonment of the self. The notion of a desire for death can furthermore explain the reason for the observations of Locke (Section 4.2) and Rousseau (Section 5.5) that self-preservation is not the only characteristic of human beings: the 'altruism' that they identify, it now appears, is made possible by a similar 'binding' of the desire for death, the latter entailing an 'altruism' which exceeds itself in self-destruction.

In the above analysis the 'notion' of *différance* has already been touched on. The binding or dissimulation that is, in Derrida's view, at stake in the relation between the desire for presence and the desire for death, gives expression to *différance*. This 'notion' which, according to Derrida, is not a 'word' or a 'concept' in the strict sense, can be explained as the postponement (deferral) of the desire for death (the different, the absolutely other) until death. This 'notion' and the relation between forces which it describes can be explained further with reference to Freud's dynamic conception of the psyche (Section 8.2.2), which, as we saw, effectively constitutes an economy of forces. In contrast, the desire for death involves a general economy, an aneconomy, or a pure loss of expenditure. Instead of a mnemic system

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[12]Latin: *dissimulare* = to simulate, feign, disguise or conceal by pretence.

[13]It is, therefore, not surprising that Derrida's reading of Nietzsche is somewhat different from the reading in Section 7.5. According to Derrida, Nietzsche's texts also at certain points exceed metaphysics.

(Section 8.2.3), the desire for death entails the annihilation of memory, or forgetfulness. It, in other words, does not involve the recalling of some 'thing' in the psychoanalytical situation, at least not in the same way in which the Oedipus complex can be recalled. For this reason Derrida also refers to the desire for death as an unanalysed, illegible remainder. It, moreover, finds 'expression' in that 'spot' of a dream which, as Freud notes in *The Interpretation of Dreams*, is unplumbable: 'a navel, as it were, that is its point of contact with the unknown' (Freud volume IV 111 fn 1). This 'forgetfulness', by means of dissimulation, leaves traces in language and culture, as we will, for example, see below in the concepts of hospitality and the gift. *Différance* thus clearly plays a role similar to that of the 'origin' in metaphysical thinking, but at the same time subverts it. To distinguish it from the metaphysical conception of origin, Derrida refers to it in terms of a pre- or non-origin which 'precedes' the origin of metaphysics. Since Descartes, philosophy has, for example, been constructed on the basis of the full presence of the subject of consciousness to itself. Freud and Derrida contend that this is an illusion. A certain kind of dislocation from self-present experience always takes place. For Freud, this happens through the unconscious. For Derrida, even more radically, consciousness always has to pass through death in order to arrive at itself. In recalling oneself to oneself, as, for example, happens in thinking, one is, in other words, placed in relation to the (forgotten) memory of death. It is precisely the 'relation' we have to death that enables us to relate to ourselves, to others, and to things, Derrida contends.

According to Derrida, *différance* is constantly at work, and one can see its operation in his *deconstruction* of the texts of the philosophers and other writers referred to above. What is often the focus of attention in Derrida's readings is some seeming contradiction in the text(s) of the writer concerned. Plato, for example, in the *Phaedrus*, not only denigrates writing, but points to its necessity, value and importance. At times the focus in Derrida's deconstructive readings is a text which is treated with suspicion or contempt by commentators, for example, because it is regarded as a 'lesser', 'earlier' or 'immature' work of the specific philosopher concerned. Taking again the example of Plato's *Phaedrus*: it has been regarded as either the work of a young, immature Plato or an old Plato, close to senility. Because of the desire for death, texts are, according to Derrida, not completely dominated by the intentions of their authors. Texts are 'heterogeneous' or marked by tensions, and they tend to 'repress' this desire in dealing with the main thesis. In other words, the author will usually attempt to impose a restricted economy on the text in contrast with the general economy implied by the desire for death. By rigorously analysing this 'repressed' desire and its relation to the rest of the text, Derrida shows that what was 'repressed' actually makes the text possible and exceeds the restricted economy of the text. The notion of *différance*, in other words, lies behind this peculiar 'hermeneutics' of Derrida.

The operation of deconstruction can also be explained with reference to Derrida's analysis of 'ethical' concepts in some of his texts. The concept of the gift, for example, as it finds expression in different cultures, always involves some kind of (expectation of a) return. Yet, as Derrida points out, the concept itself seems to imply something which exceeds economy: a gift should not expect a return, because if a

return is expected it no longer, strictly speaking, constitutes a gift. The concept of the gift, in other words, implies the giving of some 'thing' without expecting any return to the self, an absolute expenditure, therefore, without economy. Something similar can be said of hospitality. A hospitality which is restricted, which imposes limits on the guests who may enter or on their behaviour, does not do justice to the concept of hospitality. Derrida, therefore, contrasts absolute hospitality, which would impose no limits on the hospitality that is being offered, with restricted hospitality. The notions of 'meaning' and 'sense' are strictly speaking no longer applicable here, because the gift and hospitality as understood thus entail a meaninglessness, which must now be understood as an 'essential' part of the structure of these erstwhile concepts. The effects of *différance* can, in other words, be detected in traditional metaphysical concepts; it can in a sense be said to 'haunt' these concepts. The metaphysical understanding of concepts such as these is, in Derrida's view, dominated by the idea of presence to the self of consciousness. They, in other words, especially since Descartes (Section 3.4), reflect a belief in a subject, both in an individual and in a collective sense, which is fully present to itself. Actions of such a subject (such as the giving of a gift or offering hospitality) are consequently also understood in terms of a restricted economy or as characterised by a return to the self. A constitution that is enacted is, for example, traditionally understood as the expression of a fully conscious act of a people and/or their delegates which returns to itself, that is, in terms of the notion of democracy as self-government. The concepts of freedom, equality, and fraternity are traditionally understood in a similar manner.[14] If the 'subject' is, however, 'constituted' by a desire for death, all politico-legal concepts implicitly also give expression to this relation. In Derrida's later texts, the notion of the desire for death is then also translated into a quasi-transcendental ethics and politics through an analysis of, amongst others, justice, the gift, hospitality, forgiveness, friendship and democracy. Derrida can be said to 're-conceptualise' these concepts so as to give expression to the desire for death.

9.5.2 Legal Philosophy

The above should make it easier to understand Derrida's reflections on justice and law, as set out in his essay 'Force of Law: The "Mystical Foundation of Authority"' (Derrida 2002, pp. 230–298). The notion of *différance* clearly influences Derrida's

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[14]Derrida would possibly contend that the conceptual schema invoked in Section 1.4 places the bearer or the conscious subject (X), whether individual (liberalism) or collective (perfectionism), at the centre of the enquiry whereas by virtue of the thinking of Freud in relation to the unconscious (Section 8.2) and Heidegger on Being (Section 8.1.2) the subject has been displaced from the foundational position it has occupied since modernity. Deconstruction thus cannot easily be made to fit into this conceptual schema, unless we no longer hear it as a propositional statement describing the state of being of a subject, but as a promise of the 'freedom' of the subject (X) from the restrictions (Y) which life and it goals (Z) inevitably impose on him. Freedom is here to be understood in terms of the Freudian death drive.

description of justice as an experience of the impossible, a certain madness, a responsibility without limits, a responsibility before memory, a heteronomy, as well as a certain desire. These are all in a sense synonyms for the desire for death. This also appears from his description of justice as a –

> demand of gift without exchange, without circulation, and without rules, without reason and without economic circularity, without calculation and without rules, without reason and without theoretical rationality, in the sense of regulating mastery (Derrida 2002, p. 254).

One could regard justice as described here as a 'higher law' which provides a 'measure' for positive law. Justice, in other words, in a certain way transcends positive law and serves as a measure for it. Why, and in which way, do we refer to justice as a higher law? At this point we need to return to Kant, and especially to the point made earlier as to the consequences of Freud's thinking regarding the super-ego for the categorical imperative (Section 8.2.3). We saw above that Derrida reads Freud's *Beyond the Pleasure Principle* as saying that the Oedipus complex is itself formed through a dissimulation of the death drive. This means that behind our (culturally influenced) 'conscience' lies a more 'radical' demand of which the categorical imperative is actually a dissimulation. The demand, to paraphrase Freud, is to the following effect: 'No longer desire to die your own death'. Like Kant's conception of the categorical imperative, this higher law has a non-causal, unconditional and supra-sensory nature, but cannot be said to depend on cultural influence or individual make-up. Although there are resemblances between this 'higher law' and the tradition of natural-law thinking, there are important differences too. The 'foundation' of this higher law is not the essence of man (Section 1.2), but his 'an-essence'. Through this 'notion' of justice Derrida could, furthermore, be said to radically revise the thinking in relation to the state of nature of, for example, Grotius, Hobbes, Locke, Rousseau, and, to a certain extent, Freud. Man, since his inception, finds himself within the tension between a desire for death and a desire for presence or for certainty. The different forms which law or legal systems have assumed through the ages are simply varied expressions of the dissimulation of the desire for death. This dissimulation of absolute desire itself constitutes a 'law', which Derrida expresses with the neologism *différance*, which, as we saw, points to the inevitable deferral or postponement of the desire for death in the life of any organism or organisation. Derrida's notion of justice is, as we saw, no less universal than Kant's categorical imperative, although its practical implementation is less absolute as, in accordance with *différance*, a negotiation is always required between the unconditional and the conditional in concrete circumstances. Differing from the categorical imperative, it, moreover, exceeds rationality, as it involves, in accordance with the desire for death, a certain kind of 'madness'.

Some of Derrida's further contentions in 'Force of Law' are the following. The founding act of a state is neither legal nor illegal, but becomes legal only retrospectively. For this reason Derrida describes law as a groundless power, violence, and force (see also Freud in Section 8.2.4 above). In the United States Declaration of Independence, for example, the delegates of the people gave themselves the power to adopt the Declaration in the name of *the people* of the United States, who of course

actually came into existence only *after* the coming into effect of the Declaration. The founding of law in addition always is accompanied by a 'repression' or dissimulation of self-destruction which threatens at such a moment (see also Section 5.5.3 on the French revolution). The founding of a state thus involves an 'overcoming' or 'repression' of the Freudian desire for self-destruction of the nation (the subject in a collective sense). According to Derrida, justice in the above 'sense' is posed and 'repressed' at the moment of the revolutionary founding of law, as well as in its conservation or enforcement. The desire for self-destruction is, in other words, not something that ceases with the founding of a nation, but continually threatens to destroy it. Derrida furthermore agrees with Walter Benjamin in his *Critique of Violence* that the institution of law does not take place with the aim of eradicating violence, but of monopolising it. Law's primary interest as a consequence lies in preserving itself (see similarly Hart and Hobbes in Sections 1.2.3.2 and 4.1). This does not, however, mean that justice stands opposed to law, because law requires justice and justice requires law, and, as Kant emphasises, also force, in order to be effective (Section 6.4.1). Justice and law, therefore, stand in a continual tension with each other, in the same way in which the desire for death continues to operate in the 'life' of any individual organism. Law, similar to life, ultimately amounts to a postponement of death. This makes the question 'what is law?' with which we started (Section 1.2.1), somewhat out of place in Derrida's thinking. As one can see from the above, law, according to Derrida, has no essence; no pure inside distinguished from an outside: it exceeds itself in a desire for self-destruction.

In Derrida's description of what happens in a court case in 'Force of Law', there are certain resonances with Lyotard's description referred to earlier (Section 9.1.4), but this should not lead to the conclusion that Derrida adopts a relativistic approach. According to Derrida, justice requires that the law not simply be followed, but that it be suspended and in each case be re-invented. A judge is, in other words, required to give effect to justice, whilst at the same time calculating with laws and rules. The judge has to negotiate a relation between law and justice which comes as close as possible to justice. As we saw above, justice requires the absence of calculation and of reason, and involves a certain madness. What this entails can be explained with reference to Derrida's thinking on hospitality, in the context of the long-running European debate on immigration and refugees. Here we return to the tension between absolute hospitality and restricted hospitality referred to earlier. Absolute hospitality, according to Derrida, would demand an unlimited opening of all borders (and of the home), whereas restricted hospitality refers to the legal (and personal) limitations that, for the sake of survival, are necessarily placed on absolute hospitality. These restrictions usually relate to the possibility of integration and the contribution that the person concerned can make to society. Law, in other words, involves a calculation, as well as the imposition of all kinds of restrictions on those who may or may not visit a specific country or region, as well as for how long they are permitted to stay and what they may and may not do. Absolute hospitality or justice, on the other hand, requires that there be no such limitations. If a judge (or a legislature) is, therefore, to do justice in the case of (economic) refugees, there must be a recognition that the limits that law imposes ultimately have no foundation. (The

existing inhabitants of a 'country' are such as a result of invasion, occupation, murder and robbery, often in the long forgotten past.) Everyone should be welcomed without exception. In Europe this evokes images of masses of poor African and Asian immigrants streaming into the region, of the current inhabitants ultimately losing their majority status, as well as their culture, their language, their religion, their identity, their rights, their homes, and even their lives. Absolute hospitality and justice as described by Derrida clearly entail a hyper-ethics and hyper-politics which can only with disastrous consequences be given effect to in law or politics (or on a personal, ethical level). This realisation does not, however, in the least mitigate the demand which deconstruction seeks to affirm. What is required on a politico-legal level is inevitably a negotiation between justice and law, between absolute and restricted hospitality; a negotiation which furthermore (should one in politico-legal decisions follow deconstruction's affirmation of the impossible) will have to come as close as possible to absolute hospitality.

Deconstruction, therefore, in a sense re-introduces the notion of a 'shared standard' which can be 'invoked' in politico-legal debates, even in the case where there are vast differences in points of view between persons and cultures. As appears from, amongst others, Derrida's own advocacy for the abolition of apartheid and of the death penalty, as well as for the recognition of partnerships that go beyond the heterosexual norm, this 'shared standard' is not one which facilitates compromise, but instead provides a 'foundation' for a 'left' politics within a democratic constitutional state. The support which Derrida expresses for democracy stems from the fact that the institution of democracy, in comparison with other state ideals, comes closest to the 'idea' of absolute hospitality or of justice. This is so because the concept of democracy in principle opens itself to its own complete transformation. Derrida similarly expresses himself in favour of human rights (especially on an international level) because of the tension which these rights introduce in relation to the notion of the sovereignty of the nation-state. The same 'radical' openness' that characterises the concept of democracy is to be found in the classical fundamental rights, for example, freedom of expression and freedom of assembly. Nevertheless, Derrida does not simply call for the protection of existing democracies and of human rights, but for a 'democracy to come', and for going beyond the notion of rights (which are inherently tied to the notion of subjectivity and to human beings). This should again be understood in light of Derrida's thinking on *différance* and the demands which the latter imposes. Derrida does not seek in his texts to provide details as to the ideal structure of society, but instead seeks to show whence these structures derive. Through an 'affirmation' of this pre-origin, an opening is created for the transformation of society.

9.5.3 Commentary

To conclude, a brief discussion of some of the responses to Derrida's thinking. The following can be mentioned here: (1) accusations of an alleged lack of intellectual rigour, by Habermas; (2) allegations of a tension in Derrida's thinking between that

of a serious quasi-metaphysical philosopher and a private ironist, by Richard Rorty; (3) accusations of inconsistency and failure, in Derrida's attempt to exceed metaphysics; (4) expressions of doubt as to the practical relevance of Derrida's thinking, again by Rorty; (5) attempts to associate Derrida with Nazism and/or relativism; and (6) appropriation, by those who are in general sympathetic to his thinking.

In so far as (1) is concerned, in *Der philosophische Diskurs der Moderne* (The Philosophical Discourse of Modernity, 1985) Habermas (Sections 1.2.2.3, 9.1.5 and 9.3), who, as we saw, adopts only a few of Freud's ideas in relation to therapy, accused Derrida of getting caught in a performative contradiction, of asserting the primacy of rhetoric over logic and of levelling the genre distinction between philosophy and literature. In response, Derrida commented on the strangeness of the fact that Habermas, who is known as the philosopher of consensus, dialogue and discussion, can attribute these incorrect claims to him, by primarily relying on secondary texts in his attempt to understand and criticise his thinking. There is, for example, no claim in Derrida's texts (as Habermas asserts, relying on Culler) that any understanding is a misunderstanding or that any interpretation is a false interpretation. Derrida also never rejects the importance of logical arguments, although, as we saw, he does extend the notion of logic in conformity with Freud's thinking on the unconscious. What thus appears to be no more than rhetoric, as well as the wordplay and sexual allusions one finds in Derrida's texts, are, as we saw, not simply informed by frivolity, but by the need for philosophy to take seriously the insights of Freud. The third claim, in relation to literature and philosophy, stems from the fact that Derrida thinks that a number of 'novelists', such as Blanchot and Kafka, have succeeded better than many philosophers in exceeding metaphysics by their reflections on death and desire. His reliance on literature can, therefore, more accurately be described as part of an attempt to exceed Western philosophy (that is, metaphysics), rather than as an attempt at levelling the genre distinction between philosophy and literature. The 'intellectual' animosity evident from Habermas's comments on Derrida, and the latter's response thereto, were, incidentally, later brought to an end by them cooperating on a number of projects, such as a plea for a common European foreign policy (which they found absent during the invasion of Iraq in 2003), even though they remained far apart philosophically. This cooperation is not difficult to understand in light of the discussion above of the concern for emancipation from oppression that these thinkers share (Section 9.1.5).

Richard Rorty (2) has a greater appreciation for Derrida's work than many other philosophers, but nevertheless has a problem with the so-called quasi-transcendental nature of Derrida's thinking, that is, the seeking for conditions of possibility in a Kantian style. He also pokes fun at aspects of Derrida's philosophical thinking, noting for example that

> all that supposedly deep stuff about the primordiality of the trace in Derrida's earlier work looks like a young philosophy professor, still a bit unsure of himself, making quasi-professional noises (Critchley et al 1996, p. 41).

Rorty can identify better with what he views as the playful, highly imaginative irony that characterises the later work, in which Derrida abandons all attempts to present a

non-metaphysical alternative to the metaphysical texts he deconstructs. However, as a pragmatist, Rorty asserts that Derrida's philosophy consequently has no political relevancy, because political philosophy presupposes intersubjective argumentation, which is absent in Derrida's non-propositional texts. In this view, Derrida's 'ethical turn' would imply both an inconsistent return to his former transcendentalism and a political philosophy that lacks argumentative underpinning. Rorty's reading of Derrida as a private ironist, and the view that he takes the doctrine that 'all awareness is a linguistic affair' to its extreme, is not, however, convincing. Through a more rigorous reading of Derrida's texts it is easy to show that even in his seemingly playful, self-referential texts, something more serious is always at stake, as Derrida has also repeatedly confirmed in interviews. Such a reading will show that Derrida always concerns himself with pointing to the conditions of possibility of the text he is reading, and that the notion of 'play' in his texts and his own 'playing' are closely tied to the desire for death.

Connected to the previous point is the view that is sometimes expressed (3) that the 'indeconstructables', such as justice and absolute hospitality, which Derrida invokes, simply entail another form of metaphysics. In other words, Derrida's so-called ethical turn in the late 1980s involves a nostalgic return to a quasi-metaphysical approach. Derrida seemingly believes, so the argument goes, that something absolute hides behind the textual constructions he is deconstructing, and that from this certain ethical consequences necessarily follow. It could be pointed out in defence of Derrida, however, that the conditions of possibility which he posits do not serve the function of providing a fixed foundation as in, for example, the thinking of Kant, Husserl and Heidegger, but instead relate to an abyss, which testifies in a radical way to the absence of foundations in the midst of a continuous seeking for foundations. This 'structure' characterises all Derrida's work, so that one cannot speak of an inconsistency or 'ethical turn' in his texts. The sceptic can still argue that Derrida's assumptions are especially problematic in his ethical and political texts where he translates the highly debatable existence of a 'desire for death' into a duty of absolute hospitality. Even assuming that a desire for death can be said to 'exist' in some or other way, this would still not turn it into a norm. An adequate response to these questions would require a detailed discussion of Heidegger's analysis of the question of Being in the attempt to overcome metaphysics, as well as of Derrida's deconstruction of Heidegger in so far as the latter still remains attached to metaphysics. The ultimate line of defence, that is, that Derrida does not so much pose duties, but rather a 'duty beyond duty', is nevertheless not likely to convince all sceptics.

As indicated above under point (2), because of his adherence to pragmatism and his consequent dismissal of 'transcendental' philosophical thinking, Rorty (4) views Derrida's thinking as not politically consequential, at least not directly and immediately. For Rorty, real politics is about finding solutions to opposing viewpoints, for which one does not need 'deep' philosophical reflection. As with the previous point, it is difficult to resolve this debate in a few words. A brief response would be, that avoiding deep philosophical reflection in political matters has the almost inevitable consequence that philosophical (and thus, for Derrida, necessarily

metaphysical) concepts, such as democracy, justice and rights, are engaged with, based on a number of assumptions as to their unproblematic nature. Engaging in such reflection could arguably also have immediate, rather than long term, consequences, as indicated earlier. For those seeking 'practical' guidelines to resolve political conflicts, this approach is nevertheless likely to remain too abstract, even when one takes account of some of Derrida's comments in interviews about immigration and how this relates to the notion of absolute hospitality. The idea of a re-situated subject who is no longer in complete control of his own fate is, again for understandable reasons, unattractive to pragmatists.

The response in relation to Derrida's alleged association with Nazism and/or with relativism (5) can be briefly addressed within the context of the 'scandal' surrounding deconstruction, when a prominent adherent of deconstruction and a close associate of Derrida in the United States, Paul de Man, was found to have written articles, some of them with anti-Semitic overtones, for a pro-Nazi newspaper in his native Belgium from 1940 to 1942. For some this 'scandal', together with Derrida's frequent invocation of Heidegger, made it clear that deconstruction is logically associated with Nazism. Another response was that deconstruction with its supposed (moral) relativism (even the Holocaust can be said to simply be a 'text') made it impossible to criticise something like Nazism. Derrida countered these charges by stressing that deconstruction makes it possible precisely to investigate the conditions of totalitarianism in all its forms (which does not mean equating them) in order to free oneself therefrom as far as possible. It seeks to break with the desire for roots which finds perhaps its strongest expression in Nazism, but which is a fundamental feature of all metaphysical discourse.

In so far as (6) is concerned, Derrida's thinking is often appropriated in such a way as to tone down its 'revolutionary' nature, and in this way make it easier to 'consume' or incorporate it into existing institutions. This happens frequently, also in legal philosophy when Derrida is presented as a political liberal or a postmodernist. In the end, very little remains of Derrida's 'revolutionary' thinking when he is read in these ways. These interpretations are again partly a result of the complexity of Derrida's texts (some would say, their convoluted nature), a feature (amongst others) which is bound to result, at least for the foreseeable future, in its remaining a discourse on the margins, also in political and legal philosophy. The political liberalism of Rawls, which will be discussed in the next chapter, has thus far found much greater acceptance, at least in the Western world.