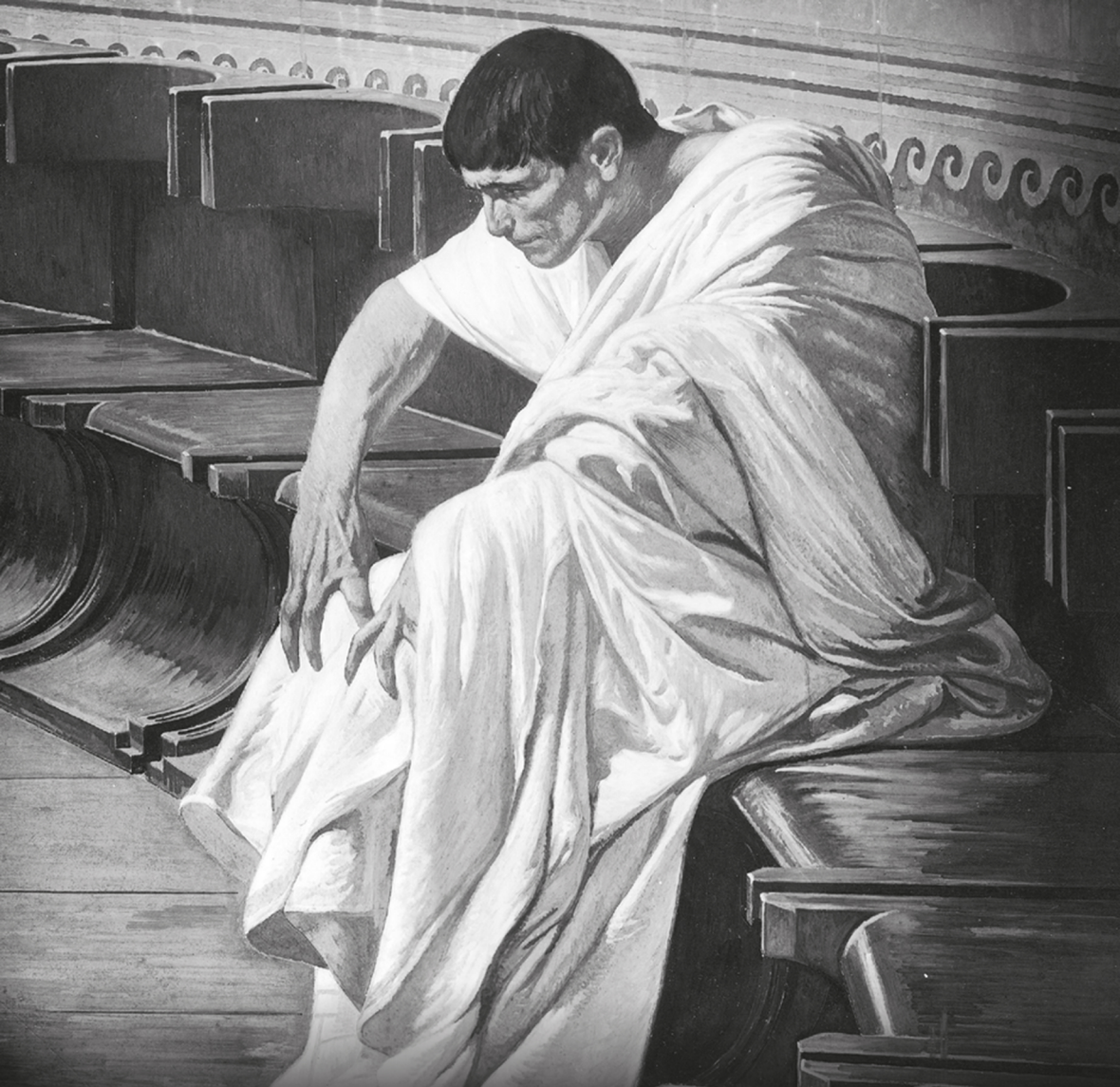

A NEW INTRODUCTION TO JURISPRUDENCE

LEGALITY, LEGITIMACY, AND THE FOUNDATIONS OF THE LAW

Paul Cliteur and
Afshin Ellian

ROUTLEDGE

A New Introduction to Jurisprudence

A New Introduction to Jurisprudence takes one of the central problems of law and jurisprudence as its point of departure: what is the law? Adopting an intermediate position between legal positivism and natural law, this book reflects on the concept of 'liberal democracy' or 'constitutional democracy'.

In five chapters the book analyses: (i) the idea of higher law, (ii) liberal democracy as a legitimate model for the state, (iii) the separation of church and state or secularism as essential for the democratic state, (iv) the universality of higher law principles, (v) the history of modern political thought.

This interdisciplinary approach to jurisprudence is relevant for legal scholars, philosophers, political theorists, public intellectuals, historians, and politicians.

Paul Cliteur is Professor of Jurisprudence at Leiden University, the Netherlands. He is the author of *The Secular Outlook* (2010) and *Theoterrorism v. Freedom of Speech* (forthcoming).

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A New Introduction to Jurisprudence

Legality, Legitimacy, and the Foundations of the Law

Paul Cliteur and Afshin Ellian

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1.1 On June 11, 1776, the American Congress appointed a committee of five members tasked with drafting a declaration of independence. These members were John Adams, Benjamin Franklin, Thomas Jefferson, Robert R. Livingston, and Roger Sherman. In Jean Leon Gerome Ferris's painting (1900), we see the committee at work. In a little over two weeks, Jefferson wrote a first draft, which was presented to Congress on June 29, 1776. 2

1.2 Socrates in his cell. After the Athenian authorities have sentenced him to drinking poison hemlock, he spends his last hours with his pupils, Plato among them. The painting *The Death of Socrates* (1762) is by Jacques-Philip-Joseph de Saint Quentin. 8

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Preface

The book *A New Introduction to Jurisprudence: Legality, Legitimacy, and the Foundations of Law* is a legal philosophy-flavored introduction to the law. It is compulsory reading for freshmen law students at Leiden University, the Netherlands. The book's purpose is to give law students a grasp of the "foundations of law." The course Foundations of Law is part of the wider course Jurisprudence, which consists of three parts in Leiden: (i) Introduction to Positive Law, (ii) Foundations of Law, (iii) and Methods and Techniques of Legal Science.

The course Jurisprudence can be designed in different ways, as the historical development of the course demonstrates. Generally considered the first Professor of Jurisprudence is John Austin (1790–1859), with his book *The Province of Jurisprudence Determined* (1832). He was the first to give the course independent status. Before, there had, of course, also been thinking on law, state, democracy, constitutionalism, just punishment, just war, and other subjects that are covered in Jurisprudence, but it had always (as in Plato, Aristotle, and Thomas Aquinas) been part of a general philosophy. Austin turned Jurisprudence into a legal specialty, although a specialty of the most general nature, because it is the most general course that is taught at law faculties. (Loosely quoting Dutch historian Jan Romein [1893–1962], one could say that a practitioner of Jurisprudence is specialized in the general.)

* * *

Most handbooks in Jurisprudence feature a mix of subjects that are expected to offer jurists an intensification of their study of positive law. In *Jurisprudence: The Philosophy and Method of the Law* (1962), Edgar Bodenheimer (1908–1991), a German scholar who immigrated to the Unites States in 1933 (Berlin, California), presents a historic introduction to legal philosophy that covers the classical movements of "utilitarianism," "analytical positivism," "sociological jurisprudence and legal realism," and "the revival of natural law and value-oriented jurisprudence." This is supplemented by a thematic part in which "the need for order," "the quest for justice," "the rule of law," and "law as a synthesis of order and justice" are discussed.

In *Jurisprudence: The Philosophy and Method of the Law* (1962), the British R. W.M. Diaz (1921–2009) provides an overview and analysis of the core concepts of legal science, such as "justice, power, liberty, custom, values, persons, ownership," supplemented by an overview of the most important philosophical movements in legal thought, such as "positivism," "pure theory of the law," "historical and anthropological approaches to the law," "realism," and "natural law thinking."

The American judge and legal scholar Richard A. Posner (*b*. 1939) presents a multitude of subjects, in which normative and methodological aspects of legal science and legal practice are connected, in *The Problems of Jurisprudence* (1990).

Sometimes books do not mention *Jurisprudence* in their title, but do cover the subjects that other authors deal with under that term, such as the Brits S.I. Benn (1920–1986) and R.S. Peters (1919–2011) in *Social Principles and the Democratic State* (1959). Benn and Peters use a threefold division of (i) rules, (ii) social principles, and (iii) the principles of the democratic state.

A New Introduction to Jurisprudence adopts the approach of other books on the subject of Jurisprudence, but (and here a warning is in order) it also *differs in significant ways*. We will address those differences now.

First, the subject "methods and techniques of legal science" is beyond the scope of this book. The subjects "legal reasoning," "analysis of rules and principles," and "finding of law" are dealt with in a different framework (in another part of the freshman year in Leiden), not in this book. We focus on normative reasoning about the core ideals of the law. It is what Bodenheimer discusses under "quest for justice," "the need for order," and "the rule of law." Of course, the possible number of subjects that could be discussed in this area is greater than we touch on here. We will (somewhat akin to Benn and Peters) focus on the principles of a democratic state. Or rather, the principles of a *constitutional democratic state*, or what is also called *liberal democracy*.

Why pay special attention to this subject instead of something else? Our focus on this particular subject has to with the changing world in which we live. With the theoterrorist attacks of 9/11, the Western world has come to realize that the principles of constitutional democracy are not valued in the same way everywhere in the world. It would be going too far to say that constitutional democracy is a dying product of culture, but it is certainly not an exaggeration to state that it is challenged on several fronts. And theoreticians in the field of international relations and practitioners of international public law (see, for instance, Daniel Philpott in "The Challenge of September 11 to Secularism in International Relations," (2002), and "The Religious Roots of Modern International Relations" (2000)) appear to be incorporating the changing circumstances in their approaches to their fields, but that is much less true of practitioners of Jurisprudence. In our view, Jurisprudence is still too much a continuation of the paradigms that dominated the second half of the 20th century, possibly supplemented with reflections on "identity politics" or "feminist jurisprudence." In this book, we try to bring reflections on the concepts of *constitutionalism, democracy*, and *human rights* to center stage, but viewed against the backdrop of the

new challenges of our time. That means an analysis of the principles of constitutional democracy (or *liberal democracy*), but also an assessment of them. What follows is a short characterization of the chapters in the book.

* * *

Chapter 1 of this book is most akin to other books on Jurisprudence. It starts with a subject that is featured in nearly every introduction to legal philosophy, namely the classical distinction between natural law thinking and legal positivism. The chapter ends, connecting with the work of Lon Fuller (1902–1978), with the thesis that the central ambition of natural law thinking, which is the establishment of a number of principles that can claim universal validity, is important.

Chapter 2 attempts to put that normative approach to the law into practice in a reflection on the ideals of the constitutional democratic state. Are these ideals universal? That is to say, have these ideals become "legal" by mere accident of history in Europe, the United States, and other parts of the world where democracy holds sway, or do they reflect a deeper "legitimacy"? In other words: can, and should, one wish that other parts of the world also embrace democracy, so that theocracies and secular dictatorships become constitutional democracies? Or is this "Enlightenment fundamentalist" zealotry?

Our answer to the first question is affirmative. And if this is Enlightenment fundamentalist zealotry, then it is a zealotry we are ready to defend because we believe that constitutional democracy is a defensible object of culture. Yet, in a following chapter we also try to show *under what conditions* constitutional democracy can be held up as a valid political model, which is when the state keeps its distance from religion and treats all citizens equally.

Chapter 3 attempts to demonstrate what this means for one of the central challenges of our time: the resurgence of the theocratic political model. In 1979, a Shiite theocratic republic was installed in Iran, which then became a competitor for Saudi Arabia in the establishment of a theocratic challenge to the Western model of constitutional democracy. In the third chapter, we try to show that constitutional democracy can only claim to be a universally legitimate political model if it *keeps its distance* from religion. With that, religion is back as an object of theoretical reflection. In the second half of the 20th century, religion was viewed as largely irrelevant. After all, the world was secularizing, and religion seemed to be of importance only for historical research. These days, religion is back, particularly political religion. *Laïcité*, or secularism, means putting up a dam to stem the tide of the effects of political religions. This includes the rejection of not just Islamic state religions (Iran, Saudi Arabia), but Christian ones as well. That is why Chapter 3 ends with a defense of what Thomas Jefferson called a "wall of separation" and what the French know as *laïcité*.

Chapter 4 deals with the critiques of constitutional democracy; not of its principles per se, but of the pretention that it is a universally valid model. Since the presentation of the *Universal Declaration of Human Rights* (1948), cultural

relativists have disputed the universality of democracy, constitutionalism, human rights, or any other normative ideal. That is why this chapter tries to provide an in-depth analysis of the sources and nature of cultural relativism.

Chapter 5 of *A New Introduction to Jurisprudence* addresses the origins of constitutional democracy's ideals. It looks for these in modernity, in modern thought as it has emerged since the Cartesian revolution. This chapter sketches the main threads of thinking on law and the state, as it is also found in other handbooks on Jurisprudence (Bodenheimer, Posner, Benn, and Peters), but with special reference to processes of modernization.

* * *

The basic premises described above give our book the specific character that we believe complements the existing literature. Or, in more ambitious terms: we believe, in truth, that the existing introductions to Jurisprudence no longer connect to the times in which we live. One cannot focus on exactly the same subjects in the 21st century that were central in the second half of the 20th century. The existing introductions bear the stamp of yesterday's challenges.

A quick note on the contrast between natural law thinking and legal positivism and how we use these as the starting point for a reflection on the other topics in this book. The explanations of the contrast between natural law thinking and legal positivism, as they are found in nearly every handbook of Jurisprudence, were all written against the backdrop of the traumatic events of the 20th century. That is, the rise of extremely barbaric and aggressive ideologies such as Nazism and fascism. The search for "higher law" ("*übergesetzliches Recht*", *Radbruch*) was propelled by this. The call for a revival of natural law, as it was defended in the thinking on law and the state by people like Lon Fuller, Gustav Radbruch, and Edgar Bodenheimer (and disputed by H.L.A. Hart and Hans Kelsen) was marked by this. But the world of the second half of the 20th century is not the world of the beginning of the 21st. Nazism was defeated in 1945, communism in 1989. After a brief euphoria over the victory of the liberal project (Fukuyama, 1989), concerns quickly began to emerge about a "clash of civilizations" (Huntington, 1993). However, this change has not yet manifested fully in the choice of subjects and authors in the handbooks on Jurisprudence.

This books aims to fill that void. Where the traditional handbooks were written against the backdrop of the confrontation with Nazism and the Cold War, this introduction was written against the backdrop of emerging theo-terrorism as it has manifested since the attacks of 9/11.

Paul Cliteur, Afshin Ellian

Leiden, September 2018

Acknowledgment of sources

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Chapter 1 first appeared under the title Cliteur, Paul, "Natuurrecht en rechtspositivisme," in: *InLeiden tot de rechtswetenschap,* H. Franken, e.a., Fourth Edition, Gouda Quint, Arnhem 1987, pp. 69–103. Parts of this chapter had also previously appeared in: Cliteur, Paul, "Rechtsbeginselen: tussen natuurrecht en rechtspositivisme," in: *Philosophia Reformata*, Orgaan van de vereniging voor calvinistische wijsbegeerte, Vol. 49, No. 1, 1984, pp. 57–70. Later versions of the material presented here appeared as Cliteur, Paul, "Van klassiek natuurrecht naar cultuurrecht," in: H. Franken, in cooperation with P.W. Brouwer, P.B. Cliteur, and M.A. Loth, *Encyclopedie van de rechtswetenschap,* Tenth Edition, Kluwer, Deventer 2003, pp. 67–99 and Cliteur, Paul, "Is het natuurrecht óf het cultuurrecht een noodzakelijke basis voor het positieve recht?," in: Paul Cliteur, *Rechtsfilosofie*. Een thematische inleiding, Ars Aequi Libri, Nijmegen 2002, pp. 127–157.

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Parts of the argumentation of Chapter 3 were published in: Cliteur, Paul, "De religieus neutrale staat: voor en tegen," in: F.T. Oldenhuis, red., *Een neutrale staat: kreet of credo?,* Protestantse Pers, Heerenveen 2009, pp. 27–77; Cliteur, Paul, "L'Etat laïque face au terrorisme religieux," in: Alain Dierkens, and Jean-Philippe Schreiber, eds., *Laïcité et sécularisation dans l'Union européenne,* Editions de l'Université de Bruxelles, Brussels 2006, pp. 215–227; Cliteur, Paul, "State and religion against the backdrop of religious radicalism," in: *International Journal of Constitutional Law,* Vol. 10, No. 1, 2012, pp. 127–152; Cliteur, Paul, "The multicultural state and the religiously neutral state: a rejoinder to Phil Ryan," in: *International Journal of Constitutional Law*, No. 2, 2014, pp. 464–467. The section on Phineas and Moses is an adaptation of: Cliteur,

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Chapter 1

Legality and legitimacy in natural law and legal positivism

One of the central problems of political and legal philosophy, a quandary that has forced itself on mankind throughout history, is the question of when, exactly, we are justified in suspending our obedience to the laws of the state.[1] This question arises both for groups of people and for the individual.

It can also be formulated this way: a legal system may be *legal*, that is to say: in accordance with the law, but does that also make it *legitimate*? Meaning, is it in keeping with principles of justice?

A classic example of this conflict can be found in the American Declaration of Independence (1776). In this declaration, by which the young American states seceded from Britain, we find the following passage:

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness – That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed …[2]

The declaration asserts that the laws and authority of the state end at a certain point, namely where they conflict with what are called *self-evident truths*. So what are these truths? First, that all men are created equal, and second, that they are endowed by their creator with certain unalienable rights. Clearly, this does not refer to rights derived from man-made legislation but to rights believed to stem from a divine will.[3]

1 Quinton speaks of "the fundamental problem of political philosophy." See also: Quinton, Anthony (ed.), *Political Philosophy,* Oxford University Press, London 1971 (1967), p. 9.

2 Cited in: Brinton, Crane, *The Portable Age of Reason Reader,* edited and with an introduction by Crane Brinton, The Viking Press, New York 1975 (1956), p. 195.

3 On the Declaration of Independence and its ideological underpinnings, see: Corwin, Edward S., *The 'Higher Law' Background of American Constitutional Law,* Great Seal Books, Cornell University Press, Ithaca, New York 1955; Dershowitz, Alan, *Blasphemy: How the Religious Right is Hijacking Our Declaration of Independence,* John Wiley & Sons, Hoboken 2007; Becker, Carl L., *The Declaration of Independence: A Study in the History of Ideas,* Vintage Books, Random House, New York 1970 (1922).

The declaration also has some things to say about the content of these unalienable rights. They are:

1 A right to life
2 A right to liberty
3 A right to the pursuit of happiness.

This is the foundation of the rule of law, so the American revolutionaries believe. No state may violate these rights. It is not that these rights are granted *by the state*, but the state exists in order to effectuate them: "to secure these Rights, Governments are instituted among Men."

Because, in the opinion of the Revolutionaries, the English King George III (1738–1820) had acted in violation of these principles, they believed themselves justified to rebel, to, as we now call it, commit civil disobedience. His government was declared illegitimate.

The situation described above does not only occur in *groups* of people. It also happens in the lives of *individuals*, when the state requires us to do things

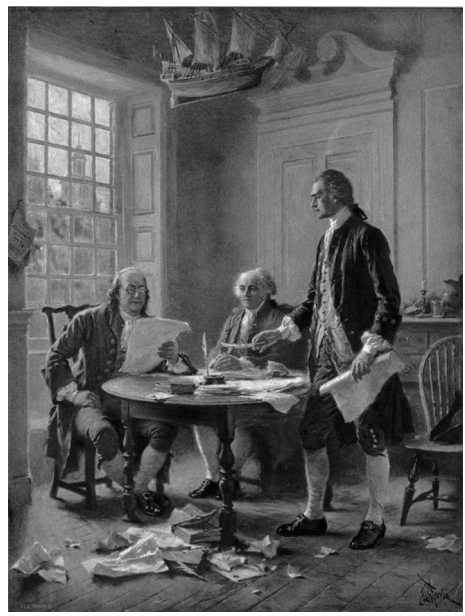

Figure 1.1 On June 11, 1776, the American Congress appointed a committee of five members tasked with drafting a declaration of independence. These members were John Adams, Benjamin Franklin, Thomas Jefferson, Robert R. Livingston, and Roger Sherman. In Jean Leon Gerome Ferris's painting (1900), we see the committee at work. In a little over two weeks, Jefferson wrote a first draft, which was presented to Congress on June 29, 1776.

we are morally unable to tolerate. The problem is as old as the way to Rome. In fact, it is at least as old as the way to Athens.

As early as the fifth century BCE, Sophocles' (497–406 BCE) *Antigone* describes a conflict in which an appeal is made to a higher law than that of the state. Sophocles details how the tyrant Creon had given the order that Polyneices, Antigone's brother, was not to be buried.[4] However, Antigone disregards the earthly ruler's will and appeals to a different, higher law. About Creon's order she says:

> because this was not a law decreed by Zeus, nor by Zeus' daughter, Justice, who rules with the gods of the Underworld. Nor do I believe that your decrees have the power to override those unwritten and immutable laws decreed by the gods.
>
> These are laws which were decreed neither yesterday nor today but from a time when no man saw their birth; they are eternal! How could I be afraid to disobey laws decreed by any man when I know that I'd have to answer to the gods below if I had disobeyed the laws written by the gods, after I died?[5]

"You are only human," Antigone says to the highest source of positive law, the king. Above the law laid down by the state, there is a higher, divine law. She speaks of timeless, godly laws, laws that did not come about yesterday or the day before but that are eternal. No one knows where these laws come from, but they do exist.

Antigone's stance is a progenitor of what will later be called *Divine Command Theory*. This is the theory based on the belief that God or gods have laid down certain norms for us that can be viewed as the highest principles of morality.[6] Why is something good? Because God or gods have prescribed it. Why is something bad? Because God or gods have forbidden it. So Creon is not the highest source of law and morality; the gods are, according to Antigone.

4 See also: Wolf, Erik, *Griechisches Rechtsdenken, Band II, Rechtsphilosophie und Rechtsdichtung im Zeitalter der Sophistik*, Vittorio Klosterman, Frankfurt am Main 1952, p. 248ff., as well as Flückiger, Felix, *Geschichte des Naturrechtes, Erster Band, Altertum und Frühmittelalter*, Evangelischer Verlag AG., Zollikon-Zürich 1954, p. 80ff., and: D'Entrèves, A.P., *Natural Law. An Introduction to Legal Philosophy*, Hutchinson's University Library, London 1951, p. 8.

5 Sophocles, *Antigone,* translated by George Theodoridis, Poetry in Translation, accessed December 19, 2017, http://www.poetryintranslation.com/PITBR/Greek/Antigone.php See also: Weinreb, Lloyd L., *Natural Law and Justice,* Harvard University Press, Cambridge, Massachusetts and London 1987, p. 23ff.

6 See also: Idziak, Janine Marie, "Divine command morality: a guide to the literature," in: Janine Marie Idziak, *Divine Command Morality: Historical and Contemporary Readings,* The Edwin Mellen Press, New York and Toronto 1979, pp. 1–38; Cliteur, Paul, *The Secular Outlook: In Defense of Moral and Political Secularism,* Wiley-Blackwell, Chichester 2010.

And when Creon gives an order that conflicts with divine law, divine law supersedes it. As such, the law of the gods is placed above the positive law, the law decreed by the state.

On the one hand, this is an attractive option because it prevents us from being buffeted every which way by the whims of the state, or so it seems. There is also a danger to it though; any fanatic can disregard the earthly laws with an appeal to the divine. Modern-day theoterrorism provides abundant examples of this. By *theoterrorism* we mean: terrorism based on a particular conception of God or gods.[7] That includes a perfectly good and all-powerful god who lays down certain laws that mankind must follow. This god's laws are so important that, when they are not obeyed, a theoterrorist believes that violence is called for to rectify this situation. Examples of theoterrorists can be found in all three monotheistic traditions.[8] Jigal Amir (*b.* 1975) believes that he has a divine sanction, even a divine obligation, to kill Jitzak Rabin (1922–1995). Scott Roeder (*b.* 1958), the Christian terrorist, thinks it is his heavenly duty to murder the American abortion doctor George Tiller (1942–2009). And Mohammed B. (*b.* 1978) obeyed what he believed to be a godly calling to end the life of Dutch filmmaker Theo van Gogh (1957–2004). All these cases involve murders that the killers viewed as divine commands. Of course, Antigone's appeal to divine law is much more sympathetic in nature: she just wants to bury her brother's remains. Indeed, the tension between Antigone's sympathetic appeal to divine law and the unsympathetic appeals of the theoterrorists is a regularly recurring subject in this book.

Five characteristics of natural law

These examples, one of them drawn from classical culture (Antigone), and the others based in modern thinking (the examples of theoterrorism), confront us with the value of an appeal to a higher law that is offered as a model for the positive, state-issued law.

This higher law is also called *natural law*. The term is meant to convey that this type of law *exists on its own*: it is not of mankind's own making, just like nature, in the form of trees or rivers, does not spring from mankind. The term *natural law* also expresses the *immutability* of the higher law, as well as the fact that *it applies everywhere*. Cicero (106–43 BCE) compares natural law to fire: just as a natural phenomenon like fire burns the same way in Athens as it does in Rome, so there exists a natural law that holds true for all places and

7 Cliteur, Paul, "State and religion against the backdrop of religious radicalism," in: *International Journal of Constitutional Law,* Vol. 10, No. 1 (2012), pp. 127–152.

8 See also: Shukla, I.K., "Theoterrorism as statecraft,", in: *Humanist,* Vol. 61, No. 4 (May/June 2001), pp. 4–5; Cliteur, Paul, "The challenge of theoterrorism," in: *The New English Review,* May 30, 2013; Cliteur, Paul, "The Rudi Carrell Affair and its significance for the tension between theoterrorism and religious satire", in: *Ancilla Iuris,* Vol. (2013), pp. 15–41.

times.[9] The advocates of this tradition in legal thought are referred to as *natural law proponents*.

Although there is variety in the thinking on natural law, there are a few archetypal characteristics we can identify. The features we encounter in different combinations among natural law proponents are:[10]

1 That there exists a law possessed of absolute validity
2 That this law can be inferred from human nature or from the nature of reality
3 That to know this law, man's reasoning abilities suffice
4 That a substantive test in the form of natural law principles is required for the application of positive law
5 That positive law that does not pass this test cannot be considered valid
6 That this substantive test consists of an assortment of speculative and metaphysical ideas.

Characteristic of this natural law are the following elements:

1 Its *status:* absolute validity (1)
2 The *source* from which it springs: nature (2)
3 The *knowledge instrument* by which it is known: reason (3)
4 Its *purpose*: a critical test (4 and 5)
5 Its *contents*: metaphysical ideas (6).

This is natural law in what one might call its purest or most archetypal form. Historically, this type of natural law has been defended by the medieval theologian and philosopher Thomas Aquinas (1225–1274) and mostly Catholic authors who aligned themselves with his work. Incidentally, we have to be clear about what we mean when we talk about natural law "in its purest form." Here, we are discussing its most common incarnation, meaning: a cluster of characteristics we see in different combinations in different thinkers. Some thinkers represent many of the characteristics, others fewer, and yet others fall outside of the definition altogether. The latter, those who cannot be called natural law proponents, are—unsurprisingly—the legal positivists, still to be discussed here. A thinker who, along with Thomas Aquinas, also meets nearly all the aforementioned characteristics is Sir William Blackstone (1723–1780), an author who was influential to American constitutional thought, particularly to the ideology behind the

9 See also: Cicero, *De Republica,* b. III, XXII, 33: "There exists a true law, a pure reason that is one with nature, present in all, unchangeable, eternal."

10 Weinreb, *Natural Law and Justice,* p. 2: "Even within jurisprudence, it is not a distinct theory so much as a family of theories, allied more than anything else by their opposition to another family of theories known collectively as legal positivism."

Declaration of Independence.[11] Then there are thinkers who consider themselves to be part of the natural law tradition, or who are labeled as such by others, but who diverge on crucial points from the description given here of natural law as it is commonly understood.[12] For instance, the modern natural law thinker John Finnis (*b.* 1940) objects to at least the fifth characteristic of natural law, by which a law that conflicts with natural law is declared invalid. Yet another natural law proponent, Rudolf Stammler (1856–1938), posits a natural law whose substance changes, thus abandoning the notion of an immutable natural law. Having said that, we will now focus on the natural law of Blackstone and Thomas Aquinas.

Plato

Thomas Aquinas's philosophy in general, and his natural law philosophy in particular, was inspired by Aristotle (384/3–322 BCE), who in turn was a pupil of Plato (427–347 BCE).[13] Incidentally, Plato and Aristotle do not provide a fully developed philosophy of natural law. Their contribution is its *philosophical foundation*: a view of mankind that might be characterized as *idealistic*. The idealist constructs a contrast between a world of pure, immutable values and ideas, and a world of constantly changing objects, detectable through the senses. Characteristic of the theory of ideas is that the world of ideas is thought of as more real, more "existent" than the world of sense-perceptible objects. For instance, as an idea, *beauty* is more real than the multitude of beautiful things around us.

In the *Phaedo,* named after one of Plato's pupils, Plato introduces his mentor Socrates (470–399 BCE) as a conversation partner. Through Socrates, he gives voice to the philosophical foundations of the theory of ideas. Socrates says: "It seems to me that if anything else is beautiful besides the beautiful itself, it is beautiful for no reason at all other than that it participates in that beautiful."[14]

11 See also: Boorstin, Daniel J., *The Mysterious Science of the Law. An Essay on Blackstone's Commentaries*, with a new foreword, The University of Chicago Press, Chicago and London 1996 (1941).

12 Falling outside of this concept of natural law are authors such as: Cohen, Morris Raphael, *Reason and Law. Studies in Juristic Philosophy*, Greenwood Press Publishers, Westport 1972 (1950); Kaufmann, Arthur, *Rechtsphilosophie im Wandel, Stationen eines Weges, 2*, überarbeitete Auflage, Carl Heymanns Verlag KG, Köln, Berlin, Bonn, and München 1984 (1979); and Fuller, Lon L., "Human purpose and natural law," in: *Natural Law Forum,* Vol. 3, No.1 (1958), pp. 68–77 and *The Law in Quest of Itself,* Julius Rosenthal Foundation Northwestern University, The Foundation Press, Inc., Chicago 1940. Reprint: AMS Press, New York 1978.

13 See also: the fourth chapter, "The heritage of Plato," in: Randall, J.H., *Plato: Dramatist of the Life of Reason,* Columbia University Press, New York 1970, pp. 36–54, and: Piltz, Anders, *The World of Medieval Learning,* Basil Blackwell, Oxford 1981, p. 40ff.

14 Plato, *Plato in Twelve Volumes, Volume 1*, translated by Harold North Fowler, introduction by W.R.M. Lamb., Harvard University Press, Cambridge, Massachusetts,; William Heinemann Ltd., London 1966.

That which makes an object beautiful, Socrates says, is that it partakes of Beauty itself. That which makes something large is the object's participation in Largeness. And, in the same vein, that which makes a thing just is its partaking of Justice.

We call these general concepts *ideas*. In Greek, there are two different words for this, *eidos* and *idea*, which mean basically the same thing.[15] Plato's Socrates calls the assumption of their existence a *safe hypothesis*: it is something he must accept in order to explain reality and our judgment of it.[16] He says: "I … assume that there are such things as absolute beauty and good and greatness and the like."

Of course, this absolute goodness and beauty cannot be observed through the senses. People ask Socrates if he has ever seen such things with his eyes. He answers: "No, never." They ask him if he has ever touched the ideas with some other sense. Again, he answers that he has not.

He explains then that we have to distinguish *two kinds of being*: the visible and the invisible. The first is permanently subject to change, while the second always remains the same.

This distinction in the nature of reality also corresponds to a division that can be made in human understanding. On the one hand, humans have *souls*, of which Plato says they more closely resemble the eternal, the immortal, the unchangeable. On the other hand, humans have *senses*, through which they observe the individual things of the here and now.

Plato does not say that the world of the here and now is just an illusion, but he does consider it to be a lower-level reality.[17] The more the individual things in the here and now participate in the ideas to which they relate, the more real they are.

This is the foundation of classical natural law thinking. So how does it manifest itself in that thinking?

Teleology

Plato believed that it is not the concrete, observable entities that constitute the truly existent, but only the ideal forms to which those entities relate that *exist* in the true sense of the word. We have also seen that, with this view, Plato

15 See also: Friedländer, Paul, *Plato. An Introduction*, Bollingen Series, Princeton University Press, Princeton 1969, p. 16. Of course, the word now has a 2,000-year history and has become weighted with numerous other associations. For instance: Panofsky, Erwin, *Idea, A Concept in Art Theory*, Icon Editions, Harper & Row, New York, Hagerstown, San Francisco, and London 1960. See also: Guthrie, W.K. C., *Socrates,* Cambridge University Press, Cambridge, London, New York, and Melbourne 1979 (1969), p. 33.

16 Burnet, John, *Greek Philosophy. Thales to Plato*, Macmillan, London and Basingstoke 1978 (1914), p. 126.

17 See also: Burnet, Ibid., p. 126.

Figure 1.2 Socrates in his cell. After the Athenian authorities have sentenced him to drinking poison hemlock, he spends his last hours with his pupils, Plato among them. The painting *The Death of Socrates* (1762) is by Jacques-Philip-Joseph de Saint Quentin.

introduced a division between the world of objects and the world of ideas. Aristotle did not agree with this. He was of the opinion that the ideas should not be imagined in a transcendent reality (a realm that exceeds that which can be observed by the senses), but *within* the objects themselves. The acorn, for instance, contains the idea (of the oak) as an immanent impetus. Therein lies the foundation of classical natural law, which will be further developed by Thomas Aquinas: *nature as a teleological order*, an order in which certain values or ideas are said to be immanent.

The word *teleology* is a combination of the Greek τέλος (*telos*), which means *ultimate end*, and λογος (*logos*), which means *reason* or *philosophy*. So teleology is the philosophy of purposes or final ends. A *teleological explanation* attempts to explain certain processes of transformation in the world by referring to the purpose of things. Teleological explanations for human behavior are obvious. For instance, why does Samira study so diligently for her exam? Because she wants to get a good grade and graduate at the top of her class. So a teleological explanation points to the goal, to something in the future.

This explanation sounds plausible. We assume that *people* are able to set goals for themselves. But does that also apply to non-human entities? To animals? To objects? The notion that *all things* have a purpose (telos) is an important element in Aristotle's philosophy, an element that he drew from Plato and that, in turn, Thomas Aquinas adopted from Aristotle.[18]

18 See also: Stace, W.T., *Religion and the Modern Mind,* Macmillan & Co., London 1953.

In this way of looking at things, nature is viewed as a teleological order. Nature is the source from which the natural law springs. According to Thomas, all elements of nature have a purpose. He called this impetus *inclinatio naturalis* (the natural inclination).[19] The universal mechanism by which all things strive toward their own goal, the totality of which exists in God's mind as a divine plan, Thomas calls the *lex aeterna*, the eternal law.[20]

This begs the questions: How is this possible? How can nature exhibit such goal-oriented behavior? Does this not require an intellect directing it all? Indeed, that has to be the case, Thomas says. After all, wherever we detect orientation toward a goal, we assume that an intellect is at work. If we come across a house or a bridge on a desert island, we conclude that there must be other people on the island. The same applies to the universe. If we see a purposeful order in it, it must have been set up that way.[21] But by whom? The answer can only be God, Thomas believes. God is the great architect who created the universe and set all things on the paths toward their goals.

Man as a rational being

Mankind has an exceptional position in the world. Plato gave shape to this exceptional position with his Two Worlds Theory. In it, man stands on the dividing line between two realms. On one side, he is an exalted being whose reason enables him to touch the sphere of ideas, and on the other his physicality binds him to the material world.

Thomas adopts this view of mankind and accentuates that man stands out in nature due to his *reason*. In those things that lack reason, the divine plan manifests as a factual impetus towards the object's goal, without their being aware of it. But, as a rational being, man is cognizant of this impetus. In the Middle Ages, Thomas was the first to once again create a space for rational thought, that is to say, thought that is not directed by Christian revelation.[22]

19 For an eloquent version of this argument, see: Maistre, Joseph de, "Considérations sur la France," in: *Oeuvres de Joseph de Maistre, VII*, Bruxelles 1844, p. 31: "La Providence, qui proportionne toujours les moyens à la fin, et qui donne aux nations, comme aux individus, les organes nécessaires à l'accomplissement de leur destination …."

20 Incidentally, the term *lex aeterna* can also already be found in Augustine. For Thomas: S.Th., I–II, q. 93, a. I: "Lex aeterna nihil aliud est quam ratio divinae sapientiae, secundum quod est directiva omnium actuum et motionum."

21 An important critique of such a line of reasoning can be found in David Hume. See also: Hume, David, *Dialogues Concerning Natural Religion,* edited with introduction by Henry D. Aiken, Hafner Press, Collier Macmillan Publishers, New York and London 1948. A clear discussion of Hume's line of reasoning can be found in: Tilghman, B.R., *An Introduction to the Philosophy of Religion,* Blackwell, Oxford andCambridge, Massachusetts 1994.

22 See also: D'Entrèves, *Natural Law,* p. 40ff., and: Copleston, F.C., *Aquinas,* Penguin Books, Harmondsworth 1977 (1955), p. 47, and: Copleston, F.C., *A History of Medieval Philosophy,* Methuen & Co Ltd, London 1972, p. 185.

Also typical of mankind is his *liberty*. Although man too is oriented toward a natural ideal, his free will allows him to forsake that calling. This exceptional standing in nature means that man takes up a special place in the *lex aeterna*. This part of the *lex aeterna*, the part that applies to mankind, is called the *lex naturalis*, the natural law.

Although there is an ethical imperative for man to conform to the *lex naturalis*, he can also ignore the precepts contained in it. For man, the natural takes the form of *norms*. With this, mankind occupies a special place in the order of creation: below God, but above the animals, plants, and everything else.

Metaphysical principles

Now, having identified the source of natural law (nature as a teleological order) and explained that the individual human, as a rational being, is expected to use his reason to discern the natural law, it is time to ask: what is the actual *content* of this *lex naturalis*?

Its highest principle is: "Doing what is good and not doing what is evil." This in itself is not yet a very informative formulation. After all, what is good? According to Thomas, for man, good is, among other things, the following:

1 The search for truth about God
2 Living in community with others
3 The union of man and woman in matrimony
4 The upbringing of children.

The sum of these rules constitutes the natural law, the law as it naturally exists, which is to say: independent of human legislation. These four principles are called the *primary natural law*.

However, in addition to this, Thomas also identifies a *secondary natural law*, part of which he considers to be the rules set down in the Ten Commandments. To Thomas, natural law consists of a set of ideas that can be deduced *a priori*, meaning before any and all experience. These are metaphysical ideas, just like in Plato. With this, we have also addressed the *content* of Thomistic natural law.

We call these principles *metaphysical* principles because, at least in the opinion of classical natural law proponents, their content can be determined independent of experience, more in particular: independent of our experience of the positive law. It is also expressed this way: these are *aprioristic* principles, meaning: principles that precede any experience, in our case experience of the positive law.

Universal validity

Because natural law is divine law—God's will as it can be discerned from nature—it is universally valid. In this, two dimensions can be distinguished: universally valid in *time* and in *place*. Regarding the first: natural law does not

develop over time. It is a timeless, immutable law.[23] And when it comes to the second: natural law is transcultural in the sense that it applies to all peoples: to Romans as well as to Greeks, to the English as well as to Asians. Just as the gospel is meant for all cultures and peoples, so is natural law, which is based on the will of God, after all.

Natural law's claim to universality was perhaps most poignantly expressed by the Roman natural law philosopher Cicero (106–43 BCE). A famous passage from *The Republic* in which he characterizes natural law reads as follows:

> There is a true law, a right reason, conformable to nature, *universal, unchangeable, eternal*, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, *and is not liable either to derogation or abrogation*. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. *It is not one thing at Rome and another at Athens; one thing to–day and another to–morrow; but in all times and nations this universal law must for ever reign, eternal and imperishable*. It is the sovereign master and emperor of all beings. God himself is its author,—its promulgator,—its enforcer. He who obeys it not, flies from himself, and does violence to the very nature of man. For his crime he must endure the severest penalties hereafter, even if he avoid the usual misfortunes of the present life. (Emphasis added; PC and AE)[24]

Especially the sections rendered in italics here express well classical natural law's claim to universality: it seeks to be a law for all times and places.

A touchstone

How can we use natural law? And does natural law not render positive law completely redundant? Starting with the latter: Thomas thinks not, because natural law's precepts are so general that a certain concretization in the form of

23 Some, D'Entrèves and Arthur Kaufmann, for instance (see also their previously mentioned works), deny that this is true in Thomas's thinking. Whatever the case may be, it is clear that, in the Thomist tradition, thinkers have often stressed the unchangeable nature of natural law, and here we are more interested in a representation of classical natural law than in a faithful representation of Thomas's exact words. See also: D'Entrèves, *Natural Law,* p. 44.

24 Marcus Tullius Cicero, *The Political Works of Marcus Tullius Cicero: Comprising His Treatise on the Commonwealth; and His Treatise on the Laws,* translated from the original, with dissertations and notes in two volumes, by Francis Barham, Esq., Edmund Spettigue, London 1841–1842). *Volume 1.* Accessed December 19, 2017, http://oll.libertyfund.org/titles/546

positive human laws is welcome. Positive laws are viewed as conclusions drawn from the general precepts of natural law, or as further specifications of it.[25]

Regarding the function of natural law: to Thomas, natural law is a *touchstone* for positive law.[26] When the ruler issues laws that violate natural law, then they are not lawful, and the citizens are not bound by them. That is the *function* of natural law in relation to positive law: it is a benchmark. So according to Thomas, the earthly authorities are also subject to a higher law.

In the view of natural law proponents, two things should happen when a positive law conflicts with natural law: (1) the norm set by the government is not recognized as a *legal norm* (it reflects only power, not justice); (2) citizens are considered not to be bound by the norm set by the government.

The latter offers a justification for the right to rebel against the government. When the government violates the natural law, citizens are allowed to resist. This may not be legal (after all, it breaks the government's law), but it is legitimate. Thomas Aquinas put it like this: "A tyrannical government is not just, because it is directed, not to the common good, but to the private good of the ruler … Consequently there is no sedition in disturbing a government of this kind …"[27]

That said, Thomas was aware that the greatest care ought to be taken in evaluating positive law in the light of natural law. To prevent chaos, people usually do well to obey laws that conflict with natural law, or legal certainty will suffer. But it is still possible for a situation to arise in which resistance is warranted.

Objections

How useful is natural law as a normative basis of the law?

One thing is certain: classical natural law thinking has come under heavy fire. There are several reasons for this.

First, natural law does not go well with the methodology of the exact sciences that flourished in the scientific revolutions of the 16th and 17th centuries. We have become simply unable to view nature as a teleological order. Darwin's theory of evolution dealt a heavy blow to teleological thinking. All sorts of

25 *S.Th.*, I–II, q.95, a.2.

26 This is not the case in all forms of natural law thinking. See also: D'Entrèves, *Natural Law*, p. 30. D'Entrèves writes: "Nowhere, in fact, do we find in the *Corpus Iuris* an assertion of the superiority of natural to positive law, in the sense that, in a case of conflict, the one should overrule the other. The Roman conception of natural law is anything but a revolutionary principle." See also: Ibid., p. 95: "The recognition of the existence of an ideal law did not necessarily imply that positive law should be overruled by it in cases of conflict. Natural law could serve as well to support revolutionary claims as to justify an existing legal order."

27 *The Summa Theologiæ of St. Thomas Aquinas*, Second and Revised Edition, 1920, translated by Fathers of the English Dominican Province, accessed December 17, 2017, http://www.newadvent.org/summa

seemingly goal-oriented structures could have arisen by means of natural selection.[28]

Additionally, the Theory of Forms, which is at the heart of classical natural law thinking, seems unreal to us these days. We have the tendency to take the concrete, sensory objects in the here and now as our basis for constructing ideas, instead of other way around. For example, we have an idea of *red* because our senses have observed red things and because the human mind is apparently able to create a representation of the abstract notion.

With the advent of the modern sciences, so from the Renaissance onward, classical natural law has increasingly come under pressure. This criticism reached a pinnacle with a view that can be considered the legal-theoretical version of philosophical positivism (Auguste Comte): legal positivism.

Legal positivism is the second great movement in thought on the foundations of the law. Where natural law proponents are strongly focused on the legitimacy of the law, legal positivists are more interested in its legality.

Like natural law proponents, there are many different types of legal positivists. Considered to be among them are the English legal philosophers Jeremy Bentham (1748–1832), John Austin (1790–1859), H.L.A. Hart (1907–1992), and the Austrian Hans Kelsen (1881–1973).

Incidentally, not all legal positivists pay as much attention to the relationship between legal positivism and philosophical positivism. One could say that it is less prominent in the English legal positivists than in the Austrian, Kelsen, but that is neither here nor there for our purposes. It is not our intent to provide a complete representation of the ideals of legal positivist thinkers, but rather to discuss the nature of legal positivism's critique of natural law thinking. Furthermore, we will limit ourselves to a single representative of legal positivism—Kelsen. Kelsen is the ideal legal positivist to focus on because he offers solid criticism of the concept of natural law, but also because his legal positivism is so *radical,* in the sense that he tries to ban every last trace of natural law thinking.

Characteristic of Kelsen's work is that he wanted to develop a pure legal theory. In this, *pure* means: a legal theory that is free from any and all non-legal elements. Especially ideology and politics, he believes, should be kept far from legal thinking. And here we find a prominent critique of the concept of natural law: under the guise of an objective natural law, all sorts of political ideology is smuggled into legal science.

The legal scholar's job, according to Kelsen, is to approach the legal system in a *purely formal* manner. The legal order is constructed of legal norms that

28 The transition from the teleological view of the world to a perspective that did not leave room for goal orientation is eloquently described in: Stace, W.T., "Man against darkness," in: *The Atlantic Monthly,* September 1948, also included in: *Man against Darkness and Other Essays,* University of Pittsburgh Press, Pittsburgh 1967, pp. 3–18; Stace, W.T., *Religion and the Modern Mind,* Macmillan & Co., London 1953.

relate to one another in a hierarchical fashion. The validity of a lower norm depends on a higher one. To envision this, one could think of a mayor and a city council as local authorities. What is the basis for the legality of this arrangement? It is a higher legal norm, namely the stipulations in state law. And from where does state law get its validity? From an authority that is higher still: federal law. And what is the basis of that? The Constitution. At that point though, the regression comes to an end, as it inevitably had to. Now, we could argue that the validity of that highest source of legal authority, the Constitution, is simply a social fact. The Constitution's validity springs from the fact that people accept it as such. However, Kelsen disagrees with this solution, because *Sein* and *Sollen* ought to be kept separate. Validity can never be found in a Sein, but must have the character of a norm, of a Sollen. Kelsen's answer to this dilemma is that the norm (he calls it the *Grundnorm*) that identifies the Constitution as valid is a hypothetical, assumed norm.[29]

But let us not dwell on Kelsen's interpretation of the legal positivist position, because in this context he interests us most as a critic of natural law thinking. We will focus on three objections to natural law formulated by Kelsen: (1) the objection that natural law proponents derive an ought from an is (they derive the normative from the factual); (2) the objection that natural law principles are only formal principles that are practically useless; (3) the objection that natural law principles cannot be legitimized because normative principles are about irrational expressions of emotion.

Sein and Sollen

Kelsen says that science is about knowing, not about feeling and wishing. And as an object of knowledge, the world consists of the two realms of Sein and Sollen, a contrast that is identical to that between *Wirklichkeit* and *Wert* or *Natur* and *Zweck*. In the realm of the Sein, causal laws reign; in the realm of the Sollen, norms hold sway.

This distinction between causal laws of nature as laws of what is and legal rules as laws of what should be is entirely lost in a religious-metaphysical worldview. From the religious-metaphysical perspective (of which natural law theory is a part), the connection between cause and effect is viewed as an analogy of a human law-giving act: the natural laws are interpreted as norms that, assuming a divine will, dictate the behavior of nature. That is also why metaphysical legal theory recognizes a manifestation of divine will in nature, thus

29 In a certain sense, this comes back to Kant's distinction between categorical and hypothetical imperatives. See also: Waldron, Jeremy, 'Why law – efficacy, freedom, or fidelity?', in: *Law and Philosophy,* Vol. 13 (1994), pp. 259–284, p. 259: "The internal morality argument would be a way of establishing what Kant called a hypothetical imperative."

once again turning a Sein into a Sollen. "But that is a fallacy; and it is this very fallacy on which natural law thinking is based," Kelsen says.

Nature, as a collection of factual relationships, can never be the source of a norm.[30] Those who think they see norms in facts deceive themselves, Kelsen writes. One would first have to, be it consciously or subconsciously, project values into nature in order to get them out of it again.[31] After all, value and reality belong to two very strictly separated realms.

Another good illustration of the logical lapses made by natural law proponents is the way Thomas Aquinas writes of the urge for self-preservation that plays such an important role in his theory of natural law. From this urge, Thomas deduces the natural law prohibition against suicide. However, that urge for self-preservation is not always equally strong: the fact that suicide happens proves it, according to Kelsen. So, that being the case, the urge to end one's life under certain circumstances should also be considered "natural."[32] Natural law proponents want nothing to do with this conclusion, although it would be more consistent for them to also open their eyes to more egotistical urges.

Leerformeln

A second objection is that the natural law proponent turns out to be unable, as he claims, to provide us with criteria we can use to test the justice of positive law. After all, natural law thinking produces only empty phrases: "*Leerformeln*." So even if we were to accept natural law principles as universally valid, their practical use would still be limited.

We find a compelling formulation of this critique in the essay *Die Platonische Gerechtigkeit* (1933).[33] Plato, so Kelsen writes, identifies justice with retribution, but what does that accomplish? One could say that it answers the question of what justice is, but that would be unwarranted. The answer is not real, after all: the idea of retribution is just as empty as that of equality. In fact, it *is* equality, and nothing more, insofar as nothing more is said than that evil must be met with evil and good with good. An answer to the question of *what* that good is, exactly, is not to be found in Plato's dialogues.

This position is defended in an even more radical form in *Was ist Gerechtigkeit?* (1953). In it, Kelsen writes: "The determination of absolute values in general and the definition of justice in particular … turn out to culminate in utterly empty formulas by which any random societal arrangement can be

30 Kelsen, Hans, *Reine Rechtslehre, Mit einem Anhang: Das Problem der Gerechtigkeit, Zweite vollständig neu bearbeitete und erweiterte Auflage 1960,* Unveränderter Nachdruck 1976, Verlag Franz Deuticke, Wien 1976, p. 5.

31 Kelsen, Ibid., p. 5.

32 Kelsen, Ibid., p. 410.

33 Kelsen, Hans, "Die Platonische Gerechtigkeit", in: *Kant-Studien*, Vol. 38, No. 1-2, pp. 91–117.

justified."[34] For instance, rationalistic natural law theory teaches the adage *to each his own*. But this formula is entirely without content as long as *his own* remains undefined. A formula such as *to each his own* can be used to justify any societal arrangement, whether it be capitalist, socialist, democratic, or autocratic. All these forms give *each his own*, although *his own* has a different meaning in all of them. As such, *to each his own* is entirely meaningless as a definition of justice.

The principle of equality before the law is an empty shell to Kelsen as well. It only stipulates that the law must be applied according to the principles that it itself sets, so it is of no use as a criterion for just decisions.[35]

And what does one think of the fundamental principle referred to as *the golden rule*? Do unto others as you would have others do unto you. The problem that immediately arises when it comes to this principle is: what to do with people who violate it? In that case, application of the principle would lead to absurd consequences: no one wants to be punished, including those who have committed crimes.

Feelings

Kelsen has a third arrow in his quiver. He also says that even if natural law were to provide meaningful principles, it still would not get us anywhere, because history teaches that there is no consensus whatsoever about them. And that should not surprise us, for these principles are really only subjective expressions of feelings, so they cannot be rationally justified.

In the previously mentioned essay *Was ist Gerechtigkeit?* this position is expounded in its most radical form. Here, Kelsen argues that a need for justice only arises where conflicts of interest exist, which only emerge where one interest can only be satisfied at the expense of the other.

Can a conflict of interests be solved by reasonable means? Kelsen believes not: the answer to this kind of question is always a judgment informed by emotional factors, and thus highly personal. This makes it valid only to the person in question. For instance, the question of whether personal freedom is the highest priority is something on which only a subjective judgment can be made. It is an entirely different question than whether iron weighs more than water or the other way around. In the latter case, we are talking about judgments "über die Wirklichkeit, die verifiziert werden können durch Experiment—keine Werturteile, die eine solche Verifizierung nicht gestatten."

Kelsen also uses the argument that value judgments are only expressions of emotion and cannot be rationally justified in his discussion on the relationship between ends and means.

34 Kelsen, Hans, *Was ist Gerechtigkeit?* Zweite Auflage, Franz Deuticke, Wien 1975, p. 26.
35 Kelsen, Ibid., p. 26.

When human behavior only serves as a means to a particular end, the question arises whether that end is justified, he writes. After all, this is supposed to lead us to the adoption of the highest goal.

We are then faced with the question: Can that final goal be rationally justified? Kelsen is convinced that it cannot: "Alle rationale Rechtfertigung ist ihrem Wesen nach Rechtfertigung als geeignetes Mittel; und ein letzter Zweck ist eben nicht mehr ein Mittel zu einem weiteren Zweck." Absolute values, so he goes on to write, are unattainable to the human mind; to the human mind, only a limited, contingent solution to the problem of justice is available.

So, when all is said and done, natural law theory cannot meet its claim of identifying non-random principles: value judgments are subjective expressions of feelings, after all, and cannot be rationally justified.

Evaluation of the objections

Let us try to evaluate Kelsen's objections to natural law thinking. Has he mounted a convincing attack on it? Or is it still possible, while perhaps conceding that he has rightly brought certain matters up for discussion, to remain committed to the goal of natural law theory, which is to articulate a supernatural foundation for the law?

Lon Fuller

We will deal with the matter of Sein and Sollen first. Whether the natural law proponent makes a thoughtless leap from Sein to Sollen is a much debated question. That such a leap is unjustified, everyone agrees, both legal positivists and natural proponents. However, defenders of natural law have tried to argue that they do not make this unjustified leap. They have said that natural law theory only posits that a legal system simply *cannot survive* without at least making certain procedural requirements of the law. A good example of a natural law theory that does not dirty its hands in mixing Sein and Sollen is the theory put forth by the American legal philosopher Lon Fuller (1902–1978).[36]

Fuller identified the following requirements that ought to be made of any legal system:

(1) justice must take the shape of general rules, not of decisions in individual cases
(2) people must be able to acquaint themselves with the content of the rules
(3) laws must apply to future cases
(4) legal rules must be intelligible

36 See also about him: Witteveen, Willem J., "'Rediscovering Fuller: An introduction," in: Willem J. Witteveen, and Wibren van der Burg, eds., *Rediscovering Fuller*, Amsterdam University Press, Amsterdam 1999, pp. 21–51.

(5) legal rules may not contradict one another
(6) legal rules must not make requirements that people are unable to meet
(7) legal rules must not change too often
(8) the rules must be imposed by the government.[37]

Fuller concludes that a legal system that violates these procedural demands on a large scale *simply cannot survive as a legal system*. Therefore, there is no leap from Sein to Sollen. There would have been one if Fuller had argued that these eight principles are featured in all legal systems and, for that reason, *should* be featured in legal systems, but he does not do that.

Natural law, a form of morality?

The argument that natural law thinking confuses Sein and Sollen, law as it is and law as it should be, is and ought to be, is a regularly recurring critique of natural law theory. It is also one of the most important arguments the English legal positivists posit against the idea of natural law. John Austin (1790–1859) had already stated that the natural law proponent Blackstone committed a fallacy when the latter argued that laws that conflict with natural law are not "law."[38] According to Austin, when laws conflict, we ought to speak of *bad* laws, not say that they are simply *not* laws. In that case, we are confusing is and ought. After all, from the fact that one considers a certain law to be undesirable ("It should not be a law"), one also concludes that it is not a law.

H.L.A. Hart will later lay a similar accusation at the feet of the natural law thinker Gustav Radbruch (1878–1949).[39] Natural law proponents confuse law with morality, so the English-language literature on the subject primarily posits.

However, this critique, so beautifully articulated and devised by Hart, has one problem: it presupposes that people consider the positivist vision of the law to be the correct one. If one is not convinced of the positivist legal vision, this criticism too will not persuade. As the above description of Austin's legal views demonstrates, the legal positivist bases his arguments on two assumptions that are not shared by natural law proponents. First, Austin apparently assumes (as Hart does after him) that it is easy to determine what positive law *is*, without encroaching on the territory of what it *should be*. According to natural law thinkers, however, that is a simplification of reality that does not do justice to the way the law functions in practice. For instance, when a judge is confronted

37 For Fuller's theory about the morality of the law see also: Witteveen, Willem J., "Laws of Lawmaking," in: Willem J. Witteveen and Wibren van der Burg, eds., *Rediscovering Fuller,* Amsterdam University Press, Amsterdam 1999, pp. 312–346, and: Cliteur, "Fuller's faith," Ibid., pp. 100–124.

38 See also: Morison, W.L., *John Austin,* Edward Arnold, London 1982, pp. 154–155.

39 In Hart, H.L.A., "Positivism and the separation of law and morals," in: *Harvard Law Review,* Vol. 71 (1958), cited in: H.L.A. Hart, *Essays in Jurisprudence and Philosophy,* Clarendon Press, Oxford 1983, pp. 49–87.

with a difficult problem, he will not make a distinction between the law as it is written in the legal code and the law as he personally thinks it should be; instead, he will interpret the law as it is written in the form most acceptable to him. That is the essence of an activity we call *interpretation*. [40]

In a way, a judge could be compared to a musical conductor.

Judge and conductor

Say we ask a musical conductor to put on Beethoven's Fifth Symphony with the following additional request: please perform the Symphony as it *is*, not as you personally think it *should be*. What would this conductor say?

He would say that he cannot make the distinction; to him, the Fifth *is* what it is *in his most exalted interpretation*. In other words: the conductor is also unable to make the distinction between is and ought; at least, it would strongly conflict with how he views his own job.

In addition, Austin's criticism of natural law thinking harbors another assumption, that what natural law theory views as natural laws are actually a kind of moral opinions. The natural law proponent *says* that he tests everyday laws by holding them up to a higher law, but that higher law is really nothing more than morality. So the natural law proponent is guilty of muddling the distinction between law and morality.

However, it is clear that this criticism can only persuade if one is prepared to go along with the legal positivist in his assertion that the principles the natural law proponent defines as "law," that is to say natural law, are indeed nothing more than morality. And that willingness will only be present in those who adopt the legal positivist's view of the law, namely that the law exclusively deals with norms that are set by the government (Austin spoke of orders that the sovereign can forcibly make people obey)[41] and that everything that falls outside of this positivist definition of the law ought to be viewed as morality. But that assumption is not shared by the natural law proponent. He says that there is law that was made by God, law that is naturally valid: "This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times."[42] As such, the previously discussed principles of natural

40 See also, among others: Dworkin, Ronald, "How law is like literature," in: *A Matter of Principle,* Harvard University Press, Cambridge, Massachusetts. 1985, pp. 146–166.

41 See also: Austin, John, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence,* with an introduction by H.L.A. Hart, Weidenfeld & Nicolson, London 1954 (1832/1863), Lecture I, pp. 9–33.

42 Blackstone, William, *The Sovereignty of the Law, Selections from Blackstone's Commentaries on the Laws of England,* edited with an introduction by Gareth Jones, Macmillan, London and Basingstoke 1973, p. 29.

law, as identified by Thomas Aquinas, are a kind of higher law, not moral precepts.

Once one has concluded that natural law is indeed a form of law, then the habit, so denounced by legal positivists, of denying the validity of laws that conflict with natural law (denying that they have the character of "law") no longer seems strange. After all, that is entirely in keeping with semantic conventions as they are applied in legal science and legal practice. When a higher law conflicts with a lower law, we say (just like the judge who has to decide on such a contradiction) that the lower law is not law. It may have had the appearance of being law, but that was only *appearance*, the judge will say. A judge who concludes, for instance, that a local ordinance (a rule issued by a lower authority: a municipality) conflicts with a formal law (a law passed down from the legislature) will not say that the local ordinance is a "bad law" and should therefore not be in force, but will instead say that it is "not law." Although the local ordinance had the appearance of law, it turns out it is not law. Here, all the natural law proponent does is apply that argument to the relationship between positive law and natural law, something that is self-evident when one recognizes both types of norms as law.

Ubi societas, ibi ius

Another argument that can be made about Sein and Sollen moves us to a more significant critique of Kelsen's view. One could argue that although Kelsen is right to say that it is possible to maintain the distinction between Sein and Sollen at a conceptual level, we nevertheless have to remain cognizant of its relative value. After all, the law as a normative phenomenon is closely related to certain (factual) regularities in civil life. The Romans were already aware of this: *ubi societas, ibi ius*. Wherever people interact, they develop certain expectations of one another, and when those expectation patterns stabilize, we come to speak of them as law.[43] These are gradual transitions though. A system of norms can also be law to a greater or lesser extent; law is a matter of gradation, not of clear-cut transitions.[44] This, to the phenomenon of the law, highly typical state of affairs cannot be adequately explained by Kelsen's rigid distinction between Sein and Sollen.

Again: empty formulas?

The second point of criticism that Kelsen devised against natural law, namely that natural law proponents present such formal and empty formulas that they are practically useless, seems to stand up better. Thomas

43 See also: Allen, Carleton, Kemp, *Law in the Making*, Clarendon Press, London 1951 (1927).

44 For this position, see also: Fuller, Lon L., "Reason and fiat in case law," in: *Harvard Law Review*, Vol. 59, (1946), pp. 376–395.

Aquinas talked of doing right and not doing wrong as a principle of natural law, but what is right and what is wrong? This will have to be addressed. Yet other natural law proponents have pointed to principles such as *to each his own*, but what is *his own*? The Nazis cynically put this expression on a sign over the entrance to a concentration camp, and one could say that, insofar as the adage does not contain a material norm, this is possible.

Finally, modern natural law thinkers point to *freedom* as the foundation of the legal system, but of course that is of little practical use. No term is as vague as *freedom*.

Alternative natural law

It is difficult, therefore, to overestimate the value of Kelsen's critiques of natural law thinking (at least in this area). Classical natural law is, indeed, vulnerable to his attack. But one can ask: Does he not go too far? His third point of criticism of natural law theory, that it claims to offer a rational justification for values and norms when this is impossible, seems to stray into a form of relativism that is unjustified and that also does not fit with his criticism of classical natural law. Kelsen considers any rational justification for a non-random foundation of the law to be impossible.

However, the question is whether Kelsen is positing criteria that are too strict for this line of reasoning. Is he not laying down criteria that are so precise and exact that, although they might suit the exact sciences, they are impossible to meet in legal science, ethics, and other normative sciences? Aristotle has already saidthat we should not expect the same level of exactness from every subject; for every class of subjects, we have to content ourselves with the level of exactness that suits the subject. An analogous thought, although a bit more mildly phrased, comes from the French legal scholar Pierre de Tourtoulon (1867–1932): there is no reason to throw to the dogs all that is unfit for the altar of the gods.

In the spirit of those words from Aristotle and Tourtoulon, one could wonder if it might not be possible to remain true to the ideal of classical natural law, namely to find a non-random foundation for the law, without falling prey to the immoderation of classical natural law: the proclamation of the existence of universal, absolute, acultural, ahistorical, and perfectly rationally justifiable norms and values.

We believe this to be possible. In doing so though, it is important to learn from the mistakes of classical natural law. This means that, from this moment on, we will: (1) avoid drawing norms from factual states of affairs, something that can indeed be avoided, as Fuller's work shows; (2) try to find a more concrete and practically useful foundation for positive law than the metaphysical abstractions of classical natural law (*freedom, human dignity, to each his own*, etc.); (3) demonstrate that it is possible to replace the

rational justification for classical natural law with a more modest approach—referred to here as *traditionalist*. [45]

Perelman and Hayek

For this perspective, we could look to authors such as Friedrich Hayek (1899–1992), Chaïm Perelman (1912–1984), Karl Larenz (1903–1993)[46], and others who—without making the mistakes of the classical natural law thinkers—believe that it is possible to evade legal positivist skepticism about the normative foundation of the law.

Perelman speaks about the desirability of a more modest type of natural law thinking. This modest natural law thinking has not only manifested in theory formation, Perelman writes, but also in legal practice.[47] After the Second World War and the Nuremberg Trials, courts have increasingly appealed to general legal principles that are common to all civilized peoples, Perelman says.

As examples of these kinds of principles, he names the *nullum crimen, sine lege* principle (without a law that stipulates it, an act cannot be a crime) and the *audiatur et altera pars* principle (there must be a fair hearing). These principles do not involve a random creation, nor a simple determination, but something in between.

What thinkers such as Perelman and Hayek put forth as the normative foundations of the law are what we would call *legal principles, fundamental rights,* and *human rights*. That this is not universally valid natural law is, of course, clear. Instead, it is a normative consensus about the basic values of Western constitutional states, a consensus that is, to a certain extent, time and place dependent. Characteristic of legal principles and fundamental rights, however, is that they represent law that has a greater normative appeal than normal, everyday legislation. For instance, one could say that the above-mentioned principles of *legality* and of a *fair hearing* come close to the status of natural law.

In order to avoid the old associations with the term *natural law* and make clear that this is something other than what Kelsen so effectively attacked on certain points, it might be better to speak of a *cultural law*. In that case,

45 See also: Acton, H.B., "Tradition and some other forms of action," in: *Proceedings of the Aristotelian Society,* Vol. 53 (1952–1953), pp. 1–28; Bréhier, Emile, "The Traditionalist Movement," in: *The History of Philosophy, The Nineteenth Century, Period of Systems, 1800–1850, Volume VI*, translated by Wade Baskin, The University of Chicago Press 1968 (first French edition 1932), pp. 8–27; Krygier, Martin, "Law as tradition," in: *Law and Philosophy,* Vol. 5 (1986), pp. 237–262.

46 Larenz, Karl, *Richtiges Recht, Grundzüge einer Rechtsethik*, Verlag C.H. Beck, München 1979.

47 See also: Abraham, Henry J., *The Judicial Process, An Introductory Analysis of the Courts of the United States, England and France*, Fifth Edition, Oxford University Press, New York and Oxford 1986 (1962), p. 7, and; D'Entrèves, A.P., *Natural Law*, p. 96.

cultural law is the totality of legal principles, fundamental rights, and human rights about which we in Western societies have been able to reach a certain measure of consensus.

To Kelsen, situating legal principles in the cultural sphere would of course render them random, manmade products, and as such not universal, as the classical natural law was. However, from the perspective of cultural law (as we will from here on label Perelman and Hayek's views), one could tell Kelsen that he is drawing far too hard a line in the sand between a realm of unchanging nature on the one hand and a realm of utterly changeable human products on the other. The cultural law perspective points to the value of a category in between those two: spontaneously developed order. This can be illustrated by Friedrich Hayek's positions.

Hayek on spontaneous order

Hayek's views[48] on the law are best found in his three-part series *Law, Legislation and Liberty* (1973–1979), the main idea of which is developed in his essay "The results of human action but not of design" (1967).[49]

Hayek proposes that the belief in the superiority of considered construction and planning over the spontaneous forces entered European culture with the rationalist thought of Descartes (1596–1650). Descartes refused to consider true that which could not be logically derived from premises that he held up as clear and beyond any doubt.[50] Any form of order is an order that can be recognized as such by the human mind.

Hayek has serious objections to this view. Many of the societal institutions that constitute an indispensable precondition for a successful pursuit of our conscious goals are the result of habits and ways of doing things that came into being without anyone consciously planning anything. Perfect rationality in the Cartesian sense would require a perfect vantage point and complete knowledge of all the relevant facts. A designer or engineer needs every scrap of information and complete power to control and manipulate it in order to achieve the desired result. But is the same true of society?[51] Hayek thinks not.

48 For an introduction to his work, see also: Klamer, Arjo Teule, Paul, and With, Claudine de, "Friedrich von Hayek," in: Thierry Baudet and Michiel Visser, eds., *Conservatieve vooruitgang: de grootste denkers van de twintigste eeuw*, Uitgeverij Bert Bakker, Amsterdam 2010, pp. 301–317.

49 Hayek, F.A., "The results of human action but not of design," in: Hayek, F.A., *Studies in Philosophy, Politics, and Economics*, The University of Chicago Press, Chicago and London 1980 (1967).

50 Hayek, F.A., *Law, Legislation and Liberty, A New Statement of the Liberal Principles of Justice and Political Economy*, complete edition in new one-volume paperback, Routledge & Kegan Paul, London, Melbourne, and Henley 1982, p. 10.

51 Hayek, *Law, Legislation and Liberty*, p. 12.

Hayek also addresses the historical roots of rationalism. Kelsen and others' misunderstanding of the evolutionary, spontaneous character of certain orders (including the legal order) he relates to an older distinction that harks back to the Greeks: the distinction between natural and artificial.

We have seen that this distinction is indeed at the foundation of the way Kelsen distinguishes natural law theory from legal positivism. After all, Kelsen holds natural law to be a "system of norms … that, in distinguishing the norms of positive law, are not set artificially, by human action, but that have emerged naturally, because they come from nature, God, human reason, or another basic principle." Kelsen distinguishes nature as a realm of being that is completely different from manmade products, which are variable.

Hayek, however, believes that we ought to identify an in-between category. In his work, he gives many examples of orders that are neither natural nor based on rational human construction. Language, for one.[52] Language has a highly complex grammatical structure: words have to be used consistently, the users of the language have to employ lexical meaning in the way that general usage stipulates, and so forth. Yet no one will claim that language is the product of construction or invention by a rationally thinking being. An order such as that of language simply grew, proving itself in its utility.

Animal societies are also a good example of orders that were not "invented." For instance, the complex cohabitation systems of bees and termites, through their division of labor and coordinated defense in case of attack, among other things, give a highly ordered impression. Who would claim, though, that this order exists because every individual bee and termite is aware of how his behavior contributes to the whole?

This phenomenon also exists in everyday life: a trail can form because people walk in the footsteps of those in front of them. This makes walking easier, so it is purely self-serving behavior. Yet, after some time passes, a path forms.[53] This category in between natural and artificial is also where we ought to place legal principles. Legal principles are not absolute, universal principles of natural law, as natural law proponents believe, but nor are they completely random and constantly changing manmade legal constructions. Legal principles are, contrary to that part of the legal domain we call *rules of law*, "the results of human action but not of design" (Ferguson).

52 This is an example we find in many conservatives. For example in: De Bonald. Vgl. Thonnard, F.-J., *Précis d'histoire de la philosophie,* 5e Edition, revue et corrigée, Société de S. Jean l'évangéliste, Desclée and Cie, Editeurs Pontificaux, Paris, Tournai, and Rome 1966, p. 681. Maiste also points to language here. No one decides to create a language. Language comes into being because people stick to certain conventions across generations. "Yet, the outcome is a masterpiece of orderly cohesion," Talmon says, paraphrasing Maistre's views. See also: Talmon, J.L., *Political Messianism, The Romantic Phase*, Secker & Warburg, London 1960, p. 300.

53 Butler, Eamonn, *Hayek. His Contribution to the Political and Economic Thought of Our Time*, Temple Smith, London 1983, p. 17.

Tradition

We have seen before that, in classical natural law thinking, reason was viewed as the primary instrument of knowledge for natural law. Through reason, man is able to extract himself from fleeting sensory impressions to instead focus on the absolute norms and values that constitute natural law. In that sense, the natural law tradition is also a highly *rationalist* tradition: great power is ascribed to human reason.

Kelsen's legal positivism has leveled criticism against the natural law tradition on this point as well. He points out that natural law proponents overestimate human reason. What do proponents of the cultural law perspective say to that? In this too, they occupy a middle position. Because they situate the higher law in culture, and legal principles are the product of a development within culture, their view can be called *traditionalist*. Free from culture and tradition, individual human reason cannot compile a list of fundamental norms and values. To claim that it can would indeed be an overestimation of the human mind. But that is not to say that a cultural community as a whole cannot, by trial and error, by continually tinkering with its legal system, uncover a number of principles that could be called *cultural law*. Therefore, the normative foundation of the law is viewed as a product of the cooperation of many people over time. Characteristic of the natural law perspective is that it considers mankind *as a group* to be capable of things that *individuals* would not be able to do.

The Scottish philosopher David Hume (1711–1776) once gave the following example: Say, a stranger, a being from another planet even, is shown a ship. At first sight, he would be terribly impressed with the craftsmanship of the man who built it. *We* know, though, that: (1) such a ship is not built by a single craftsman, and what is more, that (2) one should not overestimate the craftsmanship of the builders, in the sense that it is distributed across all those involved in the construction. One carpenter, for instance, could simply be a mindless worker who operates mechanically, doing nothing but imitating and copying the work of others, "an art which, through a long succession of ages, after multiplied trials, mistakes, corrections, deliberations, and controversies, had been gradually improving," Hume writes.[54] Imitating, copying, correcting—that is the reality of it. Never has such a ship been brought into being from one moment to the next; it has always come about through a process of improvement, by trial and error, "through a long succession of ages."

What Hume is trying to show us is that perfection in cultural products (such as a ship, but the same goes for the normative foundation of the law within a larger whole of legal principles) comes out of many people cooperating for a long time.

54 Hume, David, *Dialogues Concerning Natural Religion,* edited with introduction by Henry D. Aiken, Hafner Press, Collier Macmillan Publishers, New York and London 1948, p. 39.

Figure 1.3 The Scottish philosopher David Hume, 1711–1776, painted here by Allan Ramsay in 1766, mostly became famous for his skeptical approach to the principle of causality. We do not see the cue's thrust causing the roll of the snooker ball, but we do interpret reality in that way.

Yet another philosopher, the Irish political thinker Edmund Burke (1729–1797), succinctly expressed it with the words: *the individual is foolish, the species is wise*. So: the individual is stupid, limited in what he can do, never able to compile or recognize a list of legal principles and human rights on his own, but the human species as a whole, through all of history, can come to such a list. Characteristic of this view is that it does not (unlike natural law theory) take nature as a starting point, but culture, that it does not consider the individual's reason as the knowledge instrument for normative matters, but the tradition of the community.

A touchstone for the law?

We have now discussed the status, source, knowledge instrument, and content of natural law, as well as legal positivism's critique of it. One issue still needs to be addressed, however, and that is the question of whether it is desirable to subject positive law to a touchstone in the form of basic principles.

We have seen that Thomas Aquinas believed that natural law principles ought to play this role. If the legislator creates a law that blatantly violates natural law, it *is not law*, and citizens are not obliged to obey it. Of course, the legislator will not

habitually violate higher principles. Yet from time to time it does happen. The situation that arose in Germany during the Third Reich is particularly interesting in this regard: can we say that the Nazi government was producing "law"? Or were its rules nothing more than orders from a criminal organization that people ought not to recognize as "law"?

On initial inspection, it seems like an armchair problem: after all, what's in a name? But that is premature, as the following case will demonstrate. After the Second World War, German judges were confronted with a precarious problem: cases were brought against people who had done morally reprehensible things, things that were illegal under post-War German law and German law as it had been before the Nazi days, but *not* under Nazi law. A well-known case is that of a woman seeking damages from a Dr. V.

Dr. V. had been appointed by the Nazis in 1945 to combat defeatism and desertion, obviously a common problem in those days. When the Germans began to realize that the war was a lost cause, some soldiers began to desert. To stop that process, the German government issued a so-called *Katastrophenbefehl* in which all those who owned a weapon were authorized, even ordered, to kill deserters on sight. Dr. V. did this, and now, after the War, he was being sued by the mother of the deserted young man he had killed.

What was the judge to do in such a case? Was this a murder? Dr. V. offered the defense that he had acted in accordance with the German law of the time. Would it not be fundamentally wrong to later convict him for something that had not been illegal, better yet, that had been *mandatory* at the moment he had committed the act? A conviction would only be warranted if it could be successfully argued that the legislation to which V. referred was, for some reason, not valid when it was issued. But why would it not be? The legislation was issued by the competent authority, that is to say the German government of the time. And is law not the rules issued by the government?

These practical problems suddenly enlivened the age-old argument between legal positivists and natural law proponents. A natural law proponent believes that the law has a certain moral quality; a legal positivist holds that this need not be the case. The latter argues that the law is the entirety of rules that the competent authority has issued according to the prescribed procedure.

What was the judge to do? Should he honor this man's appeal to the legislation of the time or rule that this legislation lacked all legal force due to its content? The German judge chose the latter. Assuming such an order existed, he says, it is not valid: the law's legitimacy ends where it starts to violate generally accepted principles of international law or natural law.

Gustav Radbruch

In this judgment, the judge was heavily influenced by the ideas of the German legal scholar Gustav Radbruch (1878–1949). Radbruch was initially a proponent of the legal positivist view. That is to say, he believed that: (1) Sein and

Sollen ought to be strictly separated, from which it follows that unjust law can nevertheless be called "law," and that (2) the judge ought to apply the law without evaluating it (*Lex dura, sed lex:* the law is harsh, but it is the law). With the latter, Radbruch expounds the legalist position that the judge ought to stick to the law without assessing its value or moral content.[55] Radbruch prefaces his position with a few remarks about the judge's mission. The judge, so he says, has the professional duty to "bring the intent of the law to fruition." That means he has to subordinate his own sense of justice to the legal rule. What it comes down to for the judge is the question of what the law *is*, not whether the law is just.[56] In this context, Radbruch even speaks of sacrificing the intellect *(sacrificium intellectus),* a surrender of one's own personality to the legal order. He points out that it is the judge's job to apply the law, not to weigh it. We despise the preacher who preaches contrary to his own beliefs, but we revere the judge who does not let his sense of justice lead him astray but applies the law faithfully.[57]

But after the Second World War, people were suddenly confronted with cases like that of V., who argued that the *Katastrophenbefehl* had been issued by the government of the time and was therefore "law" he had to obey. From the legal positivist perspective, this line of reasoning is entirely correct, according to Radbruch, but from this he did not conclude that those like V. ought to just go free. On the contrary, he instead saw it as an argument to abandon legal positivism!

In a 1945 article, *Fünf Minuten Rechtsphilosophie,* he accuses legal positivism of making both the people and legal scholars defenseless against random, horrendous, and criminal laws.[58] When laws lack all justice, Radbruch has now learned, jurists and judges ought to have the courage to deny them validity. In another article, *Gesetzliches Unrecht und übergesetzliches Recht* (1946),[59] he writes that National Socialism was able to get the jurists on its side because two principles were wholly embraced: an order is an order (*Befehl ist Befehl)* and the law is the law *(Gesetz ist Gesetz).* We now also see Radbruch abandoning his earlier opinions about judges. A situation may arise in which the difference between positive legislation and justice become so great that the law, being unjust law (*unrichtiges Recht*), should give way to justice.

The question that arises at that point is: what constitutes this extralegal law (*übergesetzliches Recht*) with which positive legislation ought not to conflict too much? Radbruch is not very clear about this, but he does point to "human rights" and "natural law." He does not mean an unchangeable natural law, but a natural law whose content changes.[60] So, regarding the content of the

55 See also: M. Tullius Cicero, *De Legibus,* iii.
56 Radbruch, *Rechtsphilosophie,* p. 178.
57 Radbruch, Ibid., p. 178.
58 Included in: Radbruch, Gustav, *Vorschule der Rechtsphilosophie, 2,* Auflage, Vandenhoeck & Ruprecht, Göttingen 1959 (1947).
59 Also included in *Vorschule.*
60 The notion of natural law with changing content gained fame mainly through: Stammler, R., *Die Lehre von dem richtigen Rechte,* J. Guttentag, Berlin 1902;

normative foundation of the law, Radbruch comes close to the views we have seen from Perelman and Hayek and that we have labeled *cultural law*.

H.L.A. Hart

Radbruch's views have not remained unchallenged from the legal positivist side. It was not Kelsen, though, who took the lead in this, but an English legal positivist, H.L.A. Hart. Hart came to prominence largely due to the book *The Concept of Law* (1961),[61] but for our purposes an essay from 1958 titled *Positivism and the Separation of Law and Morals* [62] is more relevant.

The title already indicates the nature of the argument: a defense of the separation of Sein and Sollen, of law and morals, as it is propagated by legal positivists. In this context, Hart's most important argument against Radbruch is that the latter wrongly links the two above-mentioned points that Radbruch sees as characteristic of legal positivism. Indeed, Hart acknowledges, the separation of law and morality, of Sein and Sollen, is characteristic of legal positivism. This implies that one cannot deprive a grossly unjust legal system of the qualification "law" for this reason. *But it does not mean that, based on the impetus to separate Sein and Sollen, one is obliged to preach loyalty to malicious legislation*. It is possible, in other words, to say that a certain system of norms must be called "law" (on the grounds of certain factual criteria, for instance that the norm is a product of cooperation between the executive and the legislature), but that it is such a (morally) despicable law that there exists an obligation to disobey it. There have been types of legal positivism that took the determination "this is law" to automatically mean "and so it should be obeyed," but these are outdated types of legal positivism, and there is not much point in endlessly criticizing them.

Back to Dr. V. What does Hart's position mean for the precarious situation we find ourselves in with Dr. V.? Hart believes that if we are of the opinion that people like Dr. V. ought to be punished, the best way to accomplish this is by means of a law that criminalizes his actions *retroactively*. This not ideal, of course, but it still the best option available to us in such a dilemma.

Stammler, R., *Lehrbuch der Rechtsphilosophie,* Dritte, vermehrte Auflage, Walter de Gruyter, Berlin and Leipzig 1928. This tradition also includes: Cohen, Raphael, *Reason and Law, Studies in Juristic Philosophy*, Greenwood Press, Westport 1972 (1950) and Kaufmann, Arthur, *Rechtsphilosophie. Stationen eines Weges, 2*, überarbeitete Auflage, Carl Heymans Verlag, Köln, Berlin, Bonn, and München 1984.

61 Hart, H.L.A., *The Concept of Law,* Oxford University Press, Oxford 1961.

62 Hart, H.L.A., "Positivism and the separation of law and morals," in: *Harvard Law Review*, Vol. 71 (1958), cited here in: H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Clarendon Press, Oxford 1983, pp. 49–87. For Hart generally, see also: Loth, M.A., "H.L.A. Hart," in: P.B. Cliteur and M.A. Loth, eds., *Rechtsfilosofen van de twintigste eeuw,* Gouda Quint, Arnhem 1992, pp. 119–137.

The Hart-Fuller debate

We are discovering that the problem of what to do with Nazi criminals brings out a whole series of legal philosophical problems. We cannot discuss them all here, let alone solve them. It might be useful, though, to lay out five positions that one can take on this issue. Fuller presented these beautifully in his story "The grudge informer," which is included as an appendix to his book *The Morality of Law*.

In the early 1960s, Fuller had a famous discussion with Hart on the question of what was to be done with (minor) war criminals, or so-called *grudge informers* (people who informed on others out of spite). In this discussion, Fuller offers the example of a woman who, during the Nazi era, reported her husband to the authorities because he had reportedly made jokes about Hitler (which was punishable by death). In truth though, she had wanted to rid herself of her husband. People also sometimes reported others because they held grudges against them (hence the label *grudge informer*), accusing them of things that would incur the death penalty in those days, but which we now consider to be wholly innocent (caricatures of Hitler and the like). In a kind of philosophic fairy tale titled "The grudge informer," Fuller distinguishes five positions that can be taken with regard to unjust law: (1) one can, looking back, respect Nazi law as valid at the time and release the grudge informers; (2) one can posit that the Third Reich in fact had no legal system but represented an "interregnum in the rule of law," a "lawless chapter of our history," a time of "anarchy and terror"; (3) one can judge each individual case on to what extent it violates modern-day law; (4) one can adopt Hart's earlier-mentioned solution "to deal with it by duly enacted law"; (5) one can let citizens themselves come up with a solution; that also prevents the government from getting involved in the issue.

A synthesis

Returning to the discussion between Hart and Radbruch, we have to conclude that matters have not become any simpler. To his credit, Hart at least demonstrated that Radbruch's belief that the law's validity and people's obligation to obey it are directly linked is *not* a logical necessity. However, it is possible for natural law sympathizers to retreat to a slightly weaker position and argue that, although the fact that something is law might not automatically mean that it must also be obeyed, this *is the most obvious consequence*. For instance, the German author Walter Ott said that a judge will be more inclined not to apply unjust law when he is also (in line with the natural law view) able to argue that it is not law, than to say (following legal positivism) that although it is law, he *finds it so reprehensible* that he is not applying it (for that reason).[63] More simply put: judges are trained to apply the law, and they will be inclined to do so.

63 See also: Ott, Walter, *Der Rechtspositivismus, Kritische Würdigung auf der Grundlage eines juristischen Pragmatismus*, Duncker & Humblot, Berlin 1976.

Incidentally, it is important to note here that legal positivists like Hart have rightly drawn our attention to the notion that the use of a natural law (or, in our case, cultural law) touchstone should not imply that the moral test of the law is considered superfluous. According to Hart, that is a danger. If it is argued that positive law ought to be evaluated by the principles and fundamental values that form the foundation of that positive law, it could lead to the inclination to employ *only* this test and no others. This is dangerous though, Hart writes. After all, what if the basic principles and fundamental values of a certain legal system are also reprehensible? Would we not still need a moral test of the law?

A natural law proponent could also answer that question in the affirmative though. The fact that one wishes to employ natural law principles as a touchstone for the law does not imply that one cannot also use *something else* for that purpose.

A natural law proponent could argue that the law ought to be judged by two standards: (1) a standard that is immanent to the law (the legal values and principles that form the foundation of the law and that are of a legal nature—as opposed to principles of a moral nature); and (2) an extralegal (that is to say, higher than legal, transcendent) moral standard.

Another issue that has garnered much debate is whether Radbruch is right to say that it was the legal positivist mentality in particular that perverted the German legal field. If that were true, Hart writes, all sorts of unsavory developments would also have occurred in England; after all, legal positivism has always been a dominant philosophy there as well.

What Hart does not address, however, is the fascism that also had quite a following in *England* in the 1930s. Remember the British citizen who said to the leader of the British fascists, Sir Oswald Mosley (1896–1980): "How can I get rid of you, if you don't please me?"[64]

That anecdote brings up two issues. First: in Great Britain, too, there was a danger of fascism coming to power. Fascism had a large following, also outside of Germany and Italy. Not just that, but fascism was popular among intellectuals like Thomas Mann (1875–1955) and H.G. Wells (1866–1946), who would later often be held up as model citizens who incorporated the values of democracy and the rule of law in an exemplary fashion.

All of this does not fit well with Hart's view that legal positivism had a beneficial effect in England. In the 1930s, Great Britain was far from a model of liberal-democratic thought.[65] However—and here comes a point that Hart could interpret as

64 Cited in: Rijpkema, Bastiaan, ed., *Wat te doen met antidemocratische partijen? De oratie van George van den Bergh uit 1936*, introduced by Bastiaan Rijpkema, with a preface by René Cuperus, and an afterword by Paul Cliteur, Elsevier Boeken, Amsterdam 2014, p. 129.

65 We also get an indirect idea of English fascism from Kazuo Ishiguro's (*b.* 1954) *The Remains of the Day,* Vintage International, New York 1989. The novel is about the butler in the house of Lord Darlington, a trusting man who tries to avert the looming war with Germany by maintaining friendly relations with noble amateur politicians from other parts of Europe, but also with the Nazis. After the war it

supportive of his view—it is also true that the attitude of the citizen who asked that question of Mosley won out in the end.

So, the debate between natural law proponents and legal positivists has become refined over time. Although both perspectives of the law are defensible (and are defended), here we will hold to the premise that a system of values that violates legal principles and fundamental rights on a large scale should not be called "law."

Lex iniusta non est lex?

In the legal field and legal science, the phrase "lex iniusta non est lex" ("an unjust law is no law" is not eccentric semantics. We will address this further at the end of this chapter.

We have seen that legal positivists consider the statement that unjust law is not law to be highly unusual semantic practice. But is it really that strange? It is certainly possible for jurists to say, for instance, that a lower law that conflicts with a higher law is not a law. It is "null and void," as the American jurist James Bryce (1838–1922) explained in *The American Commonwealth* (1893), his magnificent work on the American political system. Bryce gives the following account of this.

He makes a distinction between the British and the American system. In England, Parliament (the legislative branch) is all powerful. That is not the case in the United States. In the United States, Congress is constrained by a simple two-pronged instrument. It can only create laws about things that are explicitly named in the Constitution, and when it does exceed the powers granted to it by the Constitution, what it produces is not recognized as valid.

In a sense, this reflects how, in different legal systems, the relationship between the central government and local authorities is viewed. When a local government makes a decision that is not in line with legislation from higher up, the decision is not recognized as law: "These rules are not law, but are null and void."[66] This also has implications for the duty to obey:

> Their validity depends on their being within the scope of the law-making power conferred by the superior authority, and as they have passed outside that scope they are invalid. They do not justify any act done under them

turns out that Darlington misjudged the Nazis' intentions. The butler though, had served Darlington his entire life without asking critical questions. So the book also features the issues prevalent in the Hart/Radbruch/Fuller debate. In 1994, Ishiguro's book was made into a movie of the same title, directed by James Ivory. It would be going too far to say that the butler followed the idea of *Befehl ist Befehl*, but he certainly did not consider it to be part of his job to ask critical questions about what was happening in the house he served.

66 Bryce, James, *The American Commonwealth, Volume I*, The Macmillan Company 1926 (1893), p. 244.

> forbidden by the ordinary law. They ought not to be obeyed or in any way regarded by the citizens, because they are not law.[67]

The position of the United States is that Congress can be compared to that of a local authority in England, Bryce says. The highest legislative power is the people. By means of their highest law, the American Constitution, the people have delegated certain powers to Congress. However, Congress can only operate within certain boundaries.

> Every statute passed under that power conformably to the Constitution has all the authority of the Constitution behind it. Any statute passed which goes beyond that power is invalid, and incapable of enforcement. It is in fact not a statue at all, because Congress in passing it was not really a law-making body, but a mere group of private persons.[68]

The person who probably gave the clearest explanation of the American system was Marshall, when he said:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may, at any time, be passed by those intended to be restrained? The distinction, between government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by any ordinary act.[69]

According to Bryce, this means that a "law" that is issued by Congress but that falls outside of Congress's purview has no more effect than a similar local law would have in the English system. "There is no mystery," Bryce writes. These are simply the "ordinary principles of the law of agency."[70]

This passage is also relevant to the debate between natural law and legal positivism. Once we realize that jurists do not call a lower law that conflicts with a higher law "law," then there is also no mystery in natural law's semantic

67 Bryce, *The American Commonwealth, Volume I*, p. 244.
68 Bryce, *The American Commonwealth, Volume I*, p. 246.
69 As he said in the famous case of *Marbury v. Madison* (1803) that introduced constitutional review in the United States. See also: Melone, Albert P. and Mace, George, eds., *Judicial Review and American Democracy,* Iowa State University Press, Ames 1988, p. 61.
70 Bryce, *The American Commonwealth, Volume I*, p. 247.

convention to say that a regular law that conflicts with natural law is "not a law."

Lex iniusta non est lex has on occasion been described as bizarre semantics and a misapprehension of the distinction between Sein and Sollen. However, natural law proponents posit a natural law that is truly legal in nature, and they view the relationship between a regular law and natural law as analogous to the formal relationship between a regular law and the constitution (that is, in a system of constitutional review).

How one judges Hart's criticism of Radbruch will depend on how one interprets Radbruch. What was Radbruch's purpose in criticizing the German legal field? Did he mean to convey that a certain type of attitude with regard to the law, described by him as positivistic, had negative historic consequences in the case of the Germans?[71] Or was his point that legal positivism, defined as the separation of law and morality, must lead to excesses under all circumstances? Hart apparently took Radbruch to have been saying the latter, and in that case, one could indeed accuse Radbruch of jumping to a hasty conclusion. However, one could also interpret Radbruch in a much more modest fashion, namely in the initial sense offered here. In that case, he could have meant to say that, given the historically unique combination of factors present in the Germany of the 1930s, a positivist attitude, consisting of an uncritical stance towards government-issued law, had unfavorable consequences. The problem with the Hart/Radbruch controversy is that it might be difficult to say something in the abstract (so free from historical circumstances and national character) about the potential danger of a particular ideology. It is possible, for instance, that positivism is dangerous in combination with the German national character, but less so in combination with the English, like a box of matches is dangerous in the hands of a pyromaniac, but almost entirely harmless in those of an ordinary person lighting a cigar.

In conclusion, let us summarize the line of reasoning discussed in this chapter. Primarily, we have evaluated the tradition in legal thought that is referred to as *natural law theory*. We have described a particular form of natural law theory (that of Thomas Aquinas) and shown, on the basis of a number of characteristics, how it is based on Plato's Theory of Forms. Next, we introduced a leading legal positivist, Hans Kelsen, and discussed his criticism of natural law thinking, coming to the conclusion that Kelsen is right in certain respects, but that it is still possible to defend a modest form of legal positivism referred to as the *cultural law perspective*. In explaining this cultural law viewpoint, the ideas of Friedrich Hayek, Chaïm Perelman, and David Hume were brought to the fore.

71 For a clear discussion of such issues, see also: Müller, Ingo, *Hitler's Justice. The Courts and the Third Reich*, translated by Deborah Lucas Schneider (original title: *Furchtbare Juristen: Die unbewältigte Vergangenheit unserer Justiz,* 1987), Harvard University Press, Cambridge, Massachusetts 1991, and the commentary on this book by: Posner, Richard A., "The profession in crisis," in: *Overcoming Law,* Harvard University Press, Cambridge, Massachusetts and London 1995, pp. 145–171.

When we compare cultural law, as it has been accepted in Western societies as the normative foundation of the law, to classical natural law, we could say that, in terms of *status*, it does not have absolute validity, but that it cannot be called entirely random either; that its *source* is not nature but tradition and history; that its *knowledge instrument* is not individual reason but that of society as a whole throughout the centuries; that it can fulfil the same *function* as classical natural law, that is to say, as a touchstone for positive law; and that its *content* is a collection of reasonably delineated principles (so not metaphysical abstractions).

As such, there seems to be a passable middle way between the Scylla of relativism à la Kelsen and the Charybdis of absolutism à la Thomas Aquinas. A legal order must be not only *legal* but also *legitimate*. And this legitimacy is attained through compatibility with the foundational principles of the law. The whole of these foundational principles are referred to here as *cultural law*.

Chapter 2

Constitutional democracy as a legitimate form of government

In 1989, an article by a then wholly unknown civil servant appeared in the magazine *The National Interest*, sparking a widespread discussion in intellectual circles: it was "The end of history," by Francis Fukuyama.[1]

Fukuyama (*b*. 1952) argued that our current time is characterized by a remarkable consensus regarding the legitimacy of liberal democracy as a form of government. Many seem to agree that liberal democracy is the only viable ideological model. Everywhere in the world, in all cultures, it has defeated rivals. Whether this is the hereditary monarchy, fascism, or communism; liberal democracy is no longer faced by any serious challengers. It is the *end of the ideological evolution* of mankind; it is the final form of government. As such, we are living at "the end of history."

This contention by Fukuyama from 1989 was disproved by political developments soon after. Although the Berlin Wall fell, and with it the Soviet Empire, tensions in the Middle East quickly demonstrated that ideological conflicts had not yet disappeared from the world.

In the second chapter of *A New Introduction to Jurisprudence*, we will take Fukuyama's thesis as a starting point for a discussion of the legitimacy of the model he calls *liberal democracy*. We will judge the end of history thesis on its benefits to *constitutional* history by examining whether the societal model of liberal democracy is characterized by *contradictions* that will weaken it in time and subsequently make it give way to other political models.

We speak of *constitutional* history because our perspective is not that of political ideologies but of constitutional models or systems. A *constitution* is defined as the collection of principles that form the basis around which society is organized and that are sometimes codified in writing. These constitutional principles limit the exercise of political power, even if this power has democratic legitimacy.

1 Fukuyama, Francis, "The end of history," in: *The National Interest,* No. 16 (Summer 1989), pp. 3–18.

In 1992, this was expanded into a book titled *The End of History and the Last Man*, The Free Press, Macmillan, New York 1992.

Here, we are concerned with a particular type of state: the constitutional democratic state, a constitutional model that is identical to what Fukuyama calls the *liberal democratic state*. [2] We use the term *constitutional democratic state* as the Anglophone equivalent of what the Germans call "der demokratische Rechtsstaat." The word *democratic* is the same in all these expressions. What is also identical, is that both in the German tradition and in the Anglophone tradition, an idea arose that all power has to be limited in order to prevent abuse of power. But in the Anglophone tradition, one uses words like *liberal* or *constitutional* to express that limitation, while in the German tradition, the word *Rechtsstaat* is used. *Rechtsstaat* means all limitation of state power by means of the law.

This chapter consists of three parts.

First, we discuss in greater detail the ideas of Fukuyama and similar thinkers who speak of the end of history and the end of ideology.

Next, we examine the constitutional model that is dominant at the end of history. This is, as said, the model of constitutional democracy or liberal democracy, a model in which the two central ideals of Western constitutional development, democracy and constitutionalism, are partly realized.

Finally, there is a discussion of the ideological premises of the constitutional democratic model.

Postmodernism

Fukuyama's thesis caused a great deal of turmoil, and that is not surprising. He flies in the face of a number of well-established convictions of the time. Interesting, for instance, is his position on what is referred to as *postmodernism*.

One of the most intriguing elements of Fukuyama's work is that, although it is in some ways similar to what is now called *postmodern thought*, it diverges from it in such critical ways that it is equally possible to label his work a radical critique of certain postmodern ideas. Fukuyama's ideas resemble those of other postmodern authors insofar as he also emphasizes that we are now living in a changed intellectual climate, a time in which all sorts of great ideologies, philosophies of life, and political systems have been set aside. He too proclaims—in the words of the French philosopher J.F. Lyotard (1924–1998)—the "end of the great stories." But he distinguishes himself from other postmodern authors in saying that this is the case *because one of those stories has supplanted all the others*. The story of constitutional democracy has, according to Fukuyama, forced all competing stories into the background.

In light of this, it is an interesting question whether we can truly classify Fukuyama as a postmodern author. In the end, it is a matter of definitions. It depends on what one considers *postmodern* to mean. Fukuyama has modernist traits; after all, the ideal of constitutional democracy is a modernist ideal. When

2 This is explained more fully later.

he observes the dominance of constitutional democracy as a political system, one could say that he is not *breaking* with modern thought but, on the contrary, granting it great importance.[3] On the other hand, he arrives at the same conclusion as modern-day postmodern thinkers, which is that we are living in a time in which great ideologies and philosophies of life no longer set the tone.

This raises an interesting question: how convincing is this thesis about the end of history? Will the political-ideological model that currently sets the tone (that of constitutional democracy) indeed turn out to be the final model? To answer this question, we can take several routes.

The first is the most reliable: wait and see. David Hume (1711–1776) famously said that we cannot be certain that the sun will rise tomorrow (see also Chapter 1 of this book).[4] When we seek to judge the validity of generalizations about the laws of nature, the best method is to wait and see what happens. When we translate this to the political realm, it means that, here too, we should simply wait and observe what occurs in actuality. It is obvious, however, that no one is content to take this approach. When it is posited that we are, at this moment in time, standing at the end of ideology or of history, everyone will be inclined to seek ways to test the merits of this claim rather than simply wait around to see if another ideological surge should happen to occur. In this attempt, various lines of argument are heard. Some say: ideology has been declared dead several times before, but every time it rose from the ashes. Other say: ideology is an integral part of the human condition, a part that man cannot live without.

Fukuyama takes a third road. In investigating the odds that history will make a fresh start, Fukuyama is inspired by Hegel (1770–1831) and Marx (1818–1883). That is to say, he investigates to find out if constitutional democracy is characterized by *internal contradictions* that will, in the short or long term, cause the system to fail. That is the alternative to the most reliable, but undesirable wait-and-see method of testing his end of history thesis.

In this chapter, we will follow Fukuyama's Marxist or Hegelian approach and try to arrive at an analysis of the possible contradictions within the political-constitutional system whose dominance he proclaims. The difference between what follows and the way in which Fukuyama himself addresses the issues involved is that here, in accordance with the aims of these chapters, we will focus on a *political-theoretic* or *constitutional* approach, whereas Fukuyama's analysis is much more *cultural-philosophical* in nature. He addresses the question of whether or not the "last man" will be moved to restart history out of boredom. Evidently, Fukuyama assumes that a period in which ideology has

3 If it did not sound so awful, Fukuyama could be a called a representative of "postmodern modernism."

4 See also Russell, Bertrand, *The Problems of Philosophy*, Oxford University Press, Oxford 1978 (1912), p. 33, and Hume, David, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, Third Edition, with text revised and notes by P.H. Nidditch, Clarendon Press, Oxford 1975, p. 35ff.

ended will herald a time of boredom. It is possible, however, to question this diagnosis.

One may wonder, for instance, if such a view does not ascribe too much significance to the political. The question of whether history is experienced as adventurous or odious has as much to do with people's personal life history as it does with collective historical developments.[5]

Fukuyama's thesis is also challenged by those who deny that the end of mankind's ideological evolution will also mean the end of history. Four years after the publication of Fukuyama's article, Samuel Huntington (1927–2008)[6] argued that, after the death of ideologies—a process that Fukuyama rightly called attention to, Huntington thought—a clash of *civilizations* would once again create historical adventures, thus reintroducing a concept that had been gathering dust since Oswald Spengler (1880–1936).[7] In addition, other critics of Fukuyama argued that the supremacy of capitalism does not mean the supremacy of democracy and constitutionalism.[8]

However, we will not join in this debate. Rather than take a position in a fairly speculative cultural-philosophical discussion, it may be better to change the terms on which the debate is held. The cultural-philosophical discussion will probably always remain undecided, because it involves many subjective factors, such as one's particular view of mankind and society, political preferences, et cetera. Perhaps it is a good idea, therefore, to evaluate Fukuyama's thesis on a less speculative level, a terrain on which there might be a better chance of consensus: that of constitutional theory. Here, an attempt is made to judge whether, on the basis of an analysis of the terms *constitutionalism* and *democracy* as they have been partly realized in Western societies, contradictions can be discovered in constitutional democracy that undermine it. For this, we first have to examine more closely what Fukuyama writes about constitutional democracy in order to then identify the problems with this political-constitutional system. We will try to shine a light on two particular factors, both of which do not receive enough attention in Fukuyama's work.

5 See also, for instance, what Schopenhauer writes about boredom in, among other places: Schopenhauer, Arthur, *Sämtliche Werke, I,* ed. W. von Löhneysen, Cotta/Insel and Frankfurt am Main 1976, pp. 427–430. See also: Wilson, James Q., *American Government, Institutions and Policies*, Fifth Edition, D.C. Heath and Company, Lexington, Massachusetts, and London 1992 (1980), p. 3.

6 See also: Huntington, Samuel P., "The clash of civilizations?," in: *Foreign Affairs,* Vol. 72, No. 3 (Summer 1993), pp. 22–49. See also the commentaries on this essay in: *Foreign Affairs,* Vol. 73, No. 4 (September/October 1993), pp. 2–28.

7 However, in a period in which there was little interest in "civilization" as a concept, this fascinating book appeared: Quigley, Carroll, *The Evolution of Civilizations: An Introduction to Historical Analysis*, Liberty Press, Indianapolis, Indiana 1979 (1961).

8 In the following sense: Macey, Jonathan R., & Miller, Geoffrey P., "The end of history and the new world order: the triumph of capitalism and the competition between liberalism and democracy," in: *Cornell International Law Journal,* Vol. 25, No. 2 (Spring1992), pp. 277–303.

First, we will attempt to give a more specific definition of the political model that Fukuyama says dominates the end of history. When we have done this, it will be possible to ask whether this model contains internal tensions; such significant internal tensions, perhaps, that the end of history will turn out to be a temporary affair after all.

As such, *history* will be understood as *constitutional history*: here the history of ideas on the form of the political system.

Constitutional democracy

As said, Fukuyama identifies constitutional democracy (or as he calls it, *liberal democracy*) as the model that has triumphed at the end of history. In order to judge whether there are (fatal) tensions within this model, we have to examine its parts a little more closely. Fukuyama writes that liberalism—what we call *constitutionalism* here—and democracy are closely related, but that they are different concepts nevertheless.

A regime is *democratic* when it is legitimized by the assent of the ruled.

Political *liberalism* Fukuyama defines as the *rule of law*, which recognizes certain individual rights and freedoms as exempt from government control. A characteristic of liberalism, he wrote in his article of 1989, is that it protects people's freedom. Liberalism imposes restrictions on the power and authority of the state.

A few notes on semantics would be helpful here. The ideal that Fukuyama calls *liberalism*—the limitation of political power by the law—is spoken of in many different ways. It can be referred to as *liberalism* (Fukuyama), the *rule of law* (British), *constitutionalism* (American), and *Rechtsstaat* (Continental Europe), and these terms can be taken to mean slightly different things by different authors.[9] Making a clear distinction between all these terms and analyzing how they are used by different authors is beyond the scope of this book. What matters here is that we will not follow Fukuyama in calling this ideal *political liberalism*, mainly because *liberalism* is too vulnerable to misinterpretation. In Europe, *liberalism* is mainly used to refer to an economic system of free markets and capitalism, and in America it is usually interpreted as the left-oriented political philosophy associated with the Democratic Party. Here, we are discussing the political system in which the law imposes certain restrictions on the power of the state, which, in accordance with the American literature on the subject,[10] we will call *constitutionalism*. As such, Fukuyama's *liberal democracy* we will call *constitutional democracy*.

9 See also on this: Holden, Barry, *Understanding Liberal Democracy,* Second Edition, Harvester/Wheatsheaf, New York 1993.

10 See: Alder, John, *Constitutional & Administrative Law,* Macmillan, Basingstoke 1989, p. 39; Chandler, Ralph C., Enslen, Richard A., and Renstrom, Peter G., *The Constitutional Law Dictionary, Volume. 2: Governmental Powers*, ABC Clio Inc., Santa Barbara, and Oxford 1987; Rosenthal, Albert J., "Afterword," in: Louis

A constitutional democracy tries to grant political primacy to democratic decision making, but it also indicates the limits to democratic rule: the citizen's private domain may not be entered. Indeed, there is a limit to democratic decision making—just like there is to undemocratic decision making—and it is dictated by certain individual rights.

It is of particular importance for us to make a clear distinction between constitutionalism and democracy. Fukuyama emphasizes that the two are not the same. On the contrary, they can be in sharp contrast to one another. Although democracy and constitutionalism have often gone hand in hand, it is possible for a country to be constitutional and undemocratic.[11] This was true of 18th-century England, which upheld a list of rights, the right to vote among them, but these rights were only granted to a small group of elites and denied everyone else. It is also possible for a country to be democratic but unconstitutional, meaning it does not adequately protect the rights of individuals and minorities. The modern-day Republic of Iran is a good example of this, according to Fukuyama. It periodically holds elections that, compared to third-world standards for democracy, can be considered more democratic than in the Shah's time.[12] However, the Islamic Republic is hardly a constitutional state. Not because it lacks a constitution (Iran has one), but because its constitution does not place effective limits on power. "Constitutional" does not mean "having a constitution" but "having effective limits to all governing power, democratic power included." There are no safeguards for freedom of speech or assembly, to say nothing of freedom of religion in the constitution. "The liberal revolution has left certain areas like the Middle East relatively untouched."[13]

By pointing out this contrast between the two elements of the constitutional democratic model, Fukuyama also shows us where the possible tensions within the model are to be found. We will try to pinpoint these tensions between constitutionalism and democracy, but in order to do this properly, we must first develop a more detailed picture of the two concepts.

Henkin and Albert J. Rosenthal, eds., *Constitutionalism and Rights, The Influence of the US Constitution Abroad,* , Columbia University Press, New York 1990, pp. 397–403; Ten, C.L., "Constitutionalism and the rule of law," in: Robert Goodin and Philip Pettit, eds., *A Companion to Contemporary Political Philosophy,* Blackwell, Oxford 1993, pp. 394–403.

11 See also on this: Kägi, Werner, "Rechtsstaat und Demokratie," in: Batelli, Maurice ed., *Demokratie und Rechtsstaat,* Festgabe zum 60. Geburtstag von Zaccaria Giacometti, Polygraphischer Verlag A.G., Zürich 1953, pp. 59–88, and the clear analysis of these terms in: Bobbio, Norberto, *Liberalism & Democracy,* Verso, London and New York 1990.

12 Mohammad Reza Pahlavi (1919–1980) ruled Iran from 1941 to 1979. In 1979, the Iranian Revolution brought Ayatollah Khomeini to power. See on Khomeini and his predecessors: Taheri, Amir, *The Persian Night: Iran under the Khomeinist Revolution,* Encounter Books, New York and London 2009.

13 Fukuyama, *The End of History and the Last Man,* p. 45.

Democracy

If we compare the concept of *constitutionalism* with the concept of *democracy*, then the latter is, of course, the most well-known.[14] In everyday speech, it means a political system in which the citizens can exert influence over the running of the state. The citizenry has the final say on the shaping of society, not a small number of elites (the monarch or an aristocratic elite).

With democracy, we can make a distinction between direct and indirect democracy. These two traditions in democratic thought are aptly expressed in Abraham Lincoln's (1809–1865) characterization of democracy: "government of the people, by the people, for the people."[15] Democracy was to be not just a government *for* the people, that is to say, in accordance with the people's wishes; it would also be a government *of* the people, that is to say, a political system in which the people actively participate in the decision making. The latter expresses the ideal of *direct* democracy. The most democratic is a state in which the citizens run the government themselves. In the daytime, we have jobs that put bread on the table; in the evenings, we run the city and the state.

But for all sorts of practical reasons that is easier said than done. "The trouble with socialism," said Oscar Wilde (1854–1900), "is that it takes too many evenings." The same could be said of a direct democracy. Such a system existed only in Classical Athens[16] and in small political communities, such as Switzerland. In a modern, industrialized society, such direct citizen involvement in governance is no longer possible. We have to settle for *indirect democracy*. [17] Fukuyama, too, makes this assumption when, in his description of democracy, he places particular emphasis on elections, in which parties can participate on the basis of equal suffrage for adults.

14 Some surveys of the concept and history of democracy are: Watson, Patrick and Barber, Benjamin, *The Struggle for Democracy,* W.H. Allen, London 1988; Bobbio, Norberto, *The Future of Democracy,* Polity Press, Oxford 1987; Held, David, *Models of Democracy,* Polity Press/Basil Blackwell, Cambridge 1987; Patterson, Thomas E., *The American Democracy,* Second Edition, McGraw-Hill, Inc., New York 1993.

15 Lincoln, Abraham, *Address at Gettysburg, Pennsyvania* (1863), in: Abraham Lincoln, *Selected Speeches and Writings,* The Library of America, Vintage Books, New York, NY. 1992, p. 405.

16 Direct democracy means that citizens can influence the democratic process without representation, but this says nothing, of course, about the number of citizens who have attained the status of citizenship. Slaves and women had not. See: Kagan, Donald, *Pericles of Athens and the Birth of Democracy,* Simon & Schuster, New York 1991; Klosko, George, *The Development of Plato's Political Theory,* Methuen, New York and London 1986; Sagan, Eli, *The Honey and the Hemlock: Democracy and Paranoia in Ancient Athens and Modern America*, Basic Books/HarperCollins, New York 1991.

17 Well before Schumpeter, Bryce pointed out in *Modern Democracies* (Macmillan, London 1921) that all that is left to do for the people is monitor the leaders. Democracy is more "Government for the people" than "Government by the people."

The most famous advocate of the ideal of indirect democracy is the economist Joseph Schumpeter.[18] In his *Capitalism, Socialism and Democracy,* Schumpeter (1883–1950) exposed the classical theory of democracy as an illusion. The will of the people, general welfare, and the citizen's political choice are just as illusory, according to Schumpeter. He views democracy as nothing more than a competition for the voters' favor.[19]

Schumpeter deals with what he views as illusory assumptions in political thought with great alacrity. First, so he argues, there is no such thing as "general welfare." It does not exist, because everyone pursues his own goals. Second, Schumpeter does not believe in a will of the people which can be expressed as a unified whole. Third, he criticizes the individual citizen's decision-making prowess. This last element in particular is highly relevant in the context of the modern-day discussion about the advisability of involving citizens in politics more. According to Schumpeter, we should not expect too much of citizens' involvement. Most people are more interested in their bridge tactics than in political problems. They care more about the local trivia of family, work, neighborhood, and maybe the local municipality in which they live than about large political issues.

Schumpeter concludes that "another theory of democracy" ought to be developed. The focus should shift from the supposed will of the people to elections. The will of the people is nothing more than the will of the majority.

The reflections of Schumpeter and his many followers are characterized by a high level of realism, and in the case of Schumpeter himself, even a kind of cynicism. For a long time, this line of thought was dominant in political science. Lately, however, we again also come across attempts to rekindle the tradition of direct democracy.

Constitutionalism

We have to make a clear distinction between the ideal of democracy and that of *constitutionalism*. The ideal of constitutionalism came about in connection with the ideas of, among others, Immanuel Kant (1724–1804) and predominantly German authors,[20] whose influence on the development of constitutional theory was significant in the 19th century.

The ideal of constitutionalism is a response to the view, so aptly voiced by Lord Acton (1834–1902) that "all power tends to corrupt; absolute power

18 See on the historical setting of the book: Swedberg, Richard, *Joseph A. Schumpete: His Life and Work*, Polity Press, Cambridge 1991, p. 136ff.

19 Schumpeter, Joseph A., *Capitalism, Socialism and Democracy,* Harper Torch Books, New York 1976 (1942), p. 250ff.

20 Among others, Otto Bähr in *Der Rechtsstaat*, Cassel, Göttingen 1864, and Rudolph Gneist, *Der Rechtsstaat,* Springer Verlag, Berlin, Heidelberg, and New York 2013 (1872). On the concept of *Rechtsstaat* (constitutionalism), see also: the contributions to the special edition of the German magazine *Rechtstheorie,* Vol. 24 (1993).

corrupts absolutely."[21] Constitutionalism aims to restrict power. Only limited power is good power—this is an important part of the constitutional idea.

But that is not all, because power can be limited *in many different ways*. For instance, every type of power comes with natural restrictions. We may speak of an absolute ruler, but true omnipotence exists only in our imagination; we ascribe it to God. For a ruler though, it is always the case that, however effectively he suppresses his people, he will always be at the mercy of the obedience of the palace guard.[22]

Besides these natural limitations to political power, it is also possible to purposefully *create* limitations in order to prevent the abuse of power. One could speak, for instance, of a *cultural* limitation. The ideal of constitutionalism is an example of this. A constitutional state is a state in which *the law* supersedes the state: *the law limits the institutionalized political power of the government, the legislator, and the courts*, although the emphasis is on restricting the power of the government and legislator.

In the American doctrine, so-called *limited government* is at the heart of the constitutional idea.[23] As the aforesaid attests, that is correct, but it is only half the story. Not *all limitations of power* are constitutional. Constitutional limitations are those that restrict power *by means of the law*.

The difference between restrictions of government power *in and of themselves* and restrictions of government power *by the law* can easily be made clear with an example. Say the government of a country faces serious organized crime problems. The mafia is very powerful, and so this criminal organization is certainly something that limits the government's power. Still, no one would argue that this restriction of government power should qualify as constitutional. A limitation is only constitutional when it has a basis in law.

In the course of the 18th and 19th centuries, attempts were made to institutionalize this ideal of constitutional limitations to government power. It was thought that the constitutional ideal would be best realized if:

1 The state would commit itself to the law (the principle of legality).
2 The state would commit itself to fundamental rights.

21 Lord Acton to Bishop Mandell Creighton in 1887, cited in: Rosa, Peter de, *Vicars of Christ,* Corgi Books, Transworld Publishers, London 1992 (1988), p. 11.

22 This had already been pointed out by Hume. See the interesting contemplations on this in: Dicey, A.V., *An Introduction to the Study of the Law of the Constitution,* Tenth Edition, Macmillan, Basingstoke 1987 (1885), p. 77.

23 See: McIlwain, Charles Howard, *Constitutionalism, Ancient and Modern,* Cornell University Press, Ithaca, New York 1947 (1940), p. 23; McIlwain, C.H., "The fundamental law behind the constitution of the United States," *Constitutionalism & the Changing World,* Cambridge University Press, London 1939, p. 244, who says: "All constitutional government is by definition limited government."

3 This law and these fundamental rights would be drawn up in a special document (constitution).
4 This document would only be open to revision by a supermajority (rigid constitution).
5 A special organ would be given the authority to make sure the citizens' rights are not violated by the state (constitutional review).

It is also possible to include a certain measure of *separation of powers* and *balance of powers* in the concept of constitutionalism (something that is indeed done in many descriptions). After all, separating and balancing the state powers of legislation, governance, and the judiciary carries with it a certain safeguard against state abuse of power. In the same vein, *federalism* could also be viewed as an element of constitutionalism; after all, when we have a system in which states in a federation are granted some autonomy relative to the central government, it limits the power of the central federated state.[24] It is also possible to include *intermediate structures* between the citizen and the state in the concept of constitutionalism. Thomas Hobbes (1588–1679) called all institutions between citizen and state "worms in the entrails of the state"; after all, they constituted a restriction on the sovereignty of the central authority, Hobbes believed.[25]

Restriction of central state power is an aspiration of constitutionalism, and so it is possible to point to the existence of intermediary structures as a feature of constitutionalism. Not only that, but a *free press* could also be viewed as such. After all, a free press also limits the power of the state.

Still, we will not do this here, because these are, strictly speaking, not limitations of power *by the law*. In the case of the separation of powers we are talking about the limitation of political power by a particular organization principle. The exercise of power is organized in such a way that the power of one state organ is countered by the power of another. Although such a system is laid down in the law, it is not *the law itself* that imposes the limitation.[26] Here, we will try—partly by moving away from common conceptions of constitutionalism—to adhere to a minimalist interpretation of constitutionalism as much as possible. Only in that way can we be certain that the concept will not outgrow its bounds and that it can be sharply contrasted with and compared to the concept of democracy.

Let us now take a closer look at the five principles of constitutionalism as outlined above.

24 See: Bogdanor, Vernon, "The constitution," in: *The Thatcher Effect,* edited by Dennis Kavanagh and Anthony Seldon, Clarendon Press, Oxford 1989, p. 135.
25 Cited in: Bogdanor, "The constitution," p. 138.
26 The terms *constitutionalism* and *democracy* have a tendency to expand that is also described by J. Raz in relation to the term *rule of law*. See on this: Raz, J., "'The rule of law and its virtue," in: Raz, J., *The Authority of Law,* Clarendon Press, Oxford 1979, pp. 210–233.

Five principles of constitutionalism

The principle of legality

A characteristic of a constitutional state is that the state is bound by the law, as we concluded earlier. We could view this in the sense that, in the execution of its functions, the state has to abide by *the laws that it itself creates*. In that case, we could speak of a *formal* concept of constitutionalism.

We can illustrate this by means of an example in the area of criminal law. Criminal law is that part of the law that the government has at its disposal to punish crimes and misdemeanors. When someone steals something, the state—more specially, the government body tasked with this: the Crown prosecution Service in Britain and the Department of Justice, among others, in America—can prosecute them. However, the law states specifically *under what conditions* the state may take action. For instance, the British Theft Act of 1968 specifies in sections 1 and 2 that the state may act when someone:

1 dishonestly appropriates
2 property
3 belonging to another
4 with the intention of permanently depriving the other of it.

Legal stipulations such as this one fulfill an important constitutional requirement: the government may only act if the narrowly specified conditions laid down in the law are met.

This illustrates an important safeguard contained in legal rules. Legal rules do not only restrict the freedom of citizens in relation to one another, as is often believed (and which is also certainly true), but they also create a certain measure of freedom: they protect citizens from an arbitrary restriction on their behavior alternatives by the government.

The predictability of the government's behavior *frees* the citizen. The power of the state is limited by the law. In that sense, the law makes us free, however paradoxical that might sound.

The state submitting to the law fulfills an important constitutional requirement. The principle that reflects this ideal is called the *principle of legality*. In the Netherlands, this principle has a (constitutional) legal basis in article 1 of the Criminal Code and in article 16 of the Constitution, which reads: no act is illegal unless it was criminalized in a lawful provision beforehand.

One could wonder though whether this kind of approach might not be a bit formal. Constitutionalism demands the subjugation of institutionalized political power to law. But what is law? Here too, it is possible to distinguish a minimalist and a maximalist strategy, as well as several intermediate positions that could be taken. The minimalist strategy involves a legal positivist approach in the

tradition of John Austin (1790–1859), who views the law as a collection of orders given by the sovereign that can be coercively enforced (see Chapter 1).[27] However, it is possible to expand on this. Austin also recognized that the order had to be *general*, a point that Hayek was also cognizant of when he spoke of rules that are "general and announced beforehand," enabling the citizen to predict how the government will act.[28] The law's order is not focused on this one person, but on an unlimited class of subjects.[29] General applicability is part of the specific character of the law.

It is clear that outlining a conception of law brings with it the danger that a formal conception will slowly evolve into a material conception, leading to the circumstance in which all sorts of political ideals become part of the chosen terminology, thus rendering it unusable.[30] But however careful one has to be in this, it is not possible to ignore certain implications that are inherent to the conception of law. It has been pointed out, for instance, that a prohibition against laws that retroactively criminalize certain types of behavior is also a part of the specific nature of law—and thus constitutionalism—something that seems to be hard to argue with.

We cannot engage in a full analysis of the concept of law here as it has intrigued generations of legal philosophers. We only refer to the eight principles that the American legal philosopher Lon Fuller sketched out and that were offered in Chapter 1 as the central requirements needed to be able to speak of law. Fuller's principles delineate a conception of law that seems to find a balance between a minimalist and a maximalist list of characteristics that would enable one to speak of law. As we have seen in the previous chapter, Fuller pointed out the following requirements that must be made of any legal system:

1 justice must take the shape of general rules, not of decisions in individual cases
2 people must be able to acquaint themselves with the content of the rules
3 laws must apply to future cases
4 legal rules must be intelligible
5 legal rules may not contradict one another
6 legal rules must not make requirements that people are unable to meet
7 legal rules must not change too often

27 See: Austin, John, *Lectures on Jurisprudence, or, the Philosophy of Positive Law*, Fifth Edition, revised and edited by Robert Campbell, in two vols, *Volume 1*, John Murray, London 1929 (1861), p. 34: "Every positive law, or every law simply and strictly so called, is set by a sovereign individual or a sovereign body of individuals, to a person or persons in a state of subjection to its author."

28 See: Hayek, F.A., *The Constitution of Liberty,* Routledge & Kegan Paul, London and Henley 1976 (1960), p. 148ff.

29 See: Pollock, Frederick, *A First Book of Jurisprudence,* Sixth Edition, Macmillan, London 1929, p. 37, and Hayek, F.A., *The Constitution of Liberty,* Routledge & Kegan Paul, London and Henley 1976 (1960), p. 15ff.

30 Here, we run the risk of a proliferation of human rights.

8 the rules must be imposed by the government.[31]

Fuller concludes no more or less than that a legal system that violates these principles on a large scale *simply cannot survive as a legal system*. Still, it is a fairly minimalist line, but that is, as said, a good way to approach our goal: enabling a sharp contrast between the concepts of constitutionalism and democracy.

Fundamental rights

So, a constitutional state is a state that (1) binds itself to the law, and we are speaking of *law* when (2) its norms comply with the requirements identified by Fuller. The question now is whether a convincing conception of constitutionalism requires us to go one step further. This is a point of divergence between the British and American traditions in constitutional thinking.

The British tradition limits itself to the requirement that the government is subject to the regular law in the manner described above.[32] The Americans, however, also ask: Would an effective protection of the citizen not also mean that certain laws are singled out, that they cannot be violated even by the *legislator*? When we say that the state's conduct must be lawful, we have not yet said that there are things the state is absolutely not allowed to do. We have only specified that there are things the state can only do *in a certain way*, which is in accordance with the law, which, in turn, we say must meet Fuller's requirements. However, the ideal of this kind of *formal* constitutional state does nothing to stop a law stipulating that, starting in January of 2020, we will no longer have freedom of speech. The notion of the formal constitutional state requires only one thing: that when the state abolishes the fundamental right to freedom of speech, it does so by means of a proper legal provision that applies to everyone equally—that is it. This is why it has been argued that the state is not bound solely by the laws that *it created*, but also by certain rights the state should never be allowed to

31 Fuller, Lon L., *The Morality of Law,* Yale University Press, New Haven and London 1978 (1964), p. 33ff.

32 See on the relationship between the British tradition of legal philosophy (Austin, Bentham) and constitutional law thinking: Mount, Ferdinand, *The British Constitution Now: Recovery or Decline?*, Heineman, London 1992, p. 39ff.; Loughlin, Martin, *Public Law and Political Theory,* Clarendon Press, Oxford 1992, p. 13ff.; Craig, P.P., *Public Law and Democracy in the United Kingdom and the United States,* Clarendon Press, Oxford 1990, p. 12; Ryan, Alan, "The British, the Americans, and rights," in: Michael J. Lacey and Knud Haaksonssen, eds., *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law – 1791 and 1991,* Woodrow Wilson International Center for Scholars and Cambridge University Press, Cambridge 1991, pp. 366–440.

violate, not even if it creates a proper legal basis for doing so. Here, we speak of "higher law" or "inalienable rights."[33]

In his inaugural lecture, George van den Bergh (1890–1966) also refers to these fundamental rights. They were the "inviolable" foundation of many a natural law state structure, Van den Bergh writes.[34] Van den Bergh also refers to other legal scholars who consider fundamental rights to be "inviolable", such as Hauriou (1856–1929) in his *Précis de droit constitutionnel* (1930, Second Edition), and Léon Duguit (1859–1928) in *Traité de droit constitutionnel* (1927, Third Edition). But Van den Bergh does not go along with this. He does not, as he writes, see the fundamental rights as "eternal, unchangeable rights."[35] But neither does he see the fundamental rights as endlessly malleable. It therefore seems justified to view him as a defender of cultural law, as it was described in the previous chapter.

It is principally the Americans who have driven the further development of the conception of constitutionalism, and it has been rightly said that "the story of modern constitutionalism may in many ways be depicted as a great debate between the American and the British principles."[36]

The first incarnation of such a defense of inalienable rights can be found in the natural law tradition.[37] In natural law thinking, as we have seen in Chapter 1, it is assumed that, on the basis of his humanity or on the basis of the nature of reality, man has certain rights that no one, including the state, may violate. A distinction is made between a theological natural law and a secular natural law. In theology-based natural law, it is assumed that God, as the creator of the universe, prescribed certain regularities, not just for nature, but also for mankind.[38] Secular or humanist natural law does not base the application of certain natural rights on the will of a divine creator, but on the autonomous validity of natural laws. The names

33 Which is also covered in Jefferson's Declaration of Independence: "We hold these truths to be self-evident that all men are created equal and in possession of certain inalienable rights." See about this: Becker, Carl L., *The Declaration of Independence: A Study in the History of Ideas,* Vintage Books, Random House, New York 1970 (1922).

34 Rijpkema, Bastiaan, *Weerbare democratie: de grenzen van democratische tolerantie*, Dissertatie Leiden, Leiden 2015, p. 137.

35 Rijpkema, Ibid., p. 137.

36 Friedrich, Carl J., *The Impact of American Constitutionalism Abroad,* Boston University Press, Boston1967, p. 12.

37 Although at first there had been no room for subjective rights in the natural law tradition. See: Weinreb, Lloyd L., "Natural law and rights," in: Robert P. George, ed., *Natural Law Theory,* Clarendon Press, Oxford 1992, pp. 278–309; McInery, Ralph, "Natural law and human rights," in: *The American Journal of Jurisprudence,* Vol. 36, No. 1 (1991), pp. 1–14.

38 About the history of natural law thinking, see: Flückiger, Felix, *Geschichte des Naturrechtes,* Evangelischer Verlag A.G., Zürich 1954; Weinreb, Lloyd L., *Natural Law and Justice,* Harvard University Press, Cambridge, Massachusetts and London 1987; Welzel, Hans, *Naturrecht und materiale Gerechtigkeit,* Vandenhoeck & Ruprecht, Göttingen 1980 (1951).

William Blackstone (1723–1780), already discussed in Chapter 1, and Hugo de Groot (1583–1645) have been linked to these conceptions, respectively.

It was an attractive thought. And natural law thinking has had a great influence on Western legal thought, an influence almost no legal philosopher who has acquainted himself with the nature of the law has been able to ignore.[39] However, two questions kept recurring: first, the question of whether such a thing as natural law actually exists. Because imagine if the whole thing were nothing more than imagination? This may be a disturbing thought, but it could still be true. There has been no lack of skepticism on this point: from Bergbohm (1849–1927)[40] to Kelsen (1881–1973),[41] the existence of natural law has been denied (see also Chapter 1).

The second question was: What could be the meaning of such natural rights, if they were not recognized in positive law? We will only concern ourselves with the second question here. Natural law proponents argue that when a state law conflicts with natural law, the state's legislation loses legal validity. An unjust law is not a law, it is said: *lex injusta, non est lex.* [42] However, representatives of the traditional counter to natural law thinking, legal positivism, have rejected such an approach to the law. A prominent legal positivist such as John Austin says, in his analysis of natural law, that such language is pointless. He asks: What does a semantic convention like saying that an unjust law is not a law mean? Such a statement cannot deny laws their power. He writes:

> The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God … the court of justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law which I have impugned the validity. An exception, demurrer, or plea, founded on

39 According to Richard Taylor, "Law and morality', in: *New York University Law Review,* Vol. 43 (1968), pp. 611–650.

40 Karl Bergbohm (1849–1927) was an influential critic of natural law. See: Bergbohm, Karl, *Jurisprudenz und Rechtsphilosophie,* Duncker & Humblot, Leipzig 1892.

41 Kelsen, Hans, *Was ist Gerechtigkeit?,* Zweite Auflage, Franz Deuticke, Wien 1975.

42 See: William Blackstone: "No human laws are of any validity, if contrary to this, and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original." Blackstone, William, *The Sovereignty of the Law, Selections from Blackstone's Commentaries on the Laws of England,* edited with an introduction by Gareth Jones, Macmillan, London and Basingstoke 1973, p. 29. About Blackstone's somewhat ambivalent position in natural law thinking, see: Barker, Ernest, "Blackstone on the British constitution," in: *Essays on Government,* Clarendon Press, Oxford 1965 (1945), pp. 120–154, and Cairns, John W., "Blackstone, an English institute: legal literature and the rise of the nation state', in: *Oxford Journal of Legal Studies,* Vol. 4 (1984), pp. 318–360.

> the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.[43]

What Austin shines a light on here is a point that has often been made against the natural law tradition. What good does it do to appeal to a higher law than everyday legislation? If I break a law, and during the trial I argue that the law I broke was in conflict with natural law, the judge will still convict me. The "inconclusiveness of my reasoning" is demonstrated by "hanging me up." Austin, and countless others after him, concluded from this that natural law is nonsense;[44] it is useless; it is a giant with feet of clay, a toothless tiger. But is he rushing to judgment here?

What Austin says here as a critique of natural law thinking has also been said by thinkers who are more positive about natural law than he is. However, they have concluded from the ineffectiveness of appealing to natural law that natural rights ought to be *codified*, laid down in written texts that should be prescriptive to everyday legislation. And this is how something that may have started as rhetoric, as "nonsense upon stilts," as Austin's mentor Jeremy Bentham (1748–1832) put it, became one of the most powerful weapons against absolutism and tyranny. Natural rights were increasingly written down. From "natural" rights, they became "cultural" rights; from the natural law tradition, human rights emerged. That is how we have arrived at the ideal of *constitutionalism*: setting down higher law in constitutions and treaties. One could speak of the second phase in the development of human rights: higher law is not just recognized (first phase), but also positivized in constitutions and treaties (second phase).[45]

Constitutionalism

Before delving deeper into the codification of higher law, we need to say something about the meaning of the word *constitutionalism*. Unfortunately, like so many terms used here, constitutionalism is also semantically ambiguous. In American vernacular, it often refers to the aim of binding the state's power to the law. As such, it matches what is called *Rechtsstaat* in Europe. However, the term *constitutionalism* is also used in the European context, but in a more limited, and partly different sense than in the American usage, namely to refer to the goal of setting down higher law (human rights or

43 Austin, *The Province of Jurisprudence Determined,* cited in: Hart, H.L.A., *Essays in Jurisprudence and Philosophy,* Oxford University Press, Oxford 1993, p. 73.

44 See: Waldron, Jeremy, *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man*, Methuen, London and New York 1987.

45 In the first phase of the development of human rights, higher law is recognized as natural law; in the second phase, higher law is set down in treaties and constitutions; in the third phase, it is enforced by the judiciary (judicial review; I will return to that under "Judicial review").

fundamental rights)[46] in written texts. So, *constitutionalism* in the European sense is the pursuit of codification of higher law. As such, we could call the American version *constitutionalism in the broad sense* and the European version *constitutionalism in the narrow sense*. The characteristic discussed here under "Constitutionalism" is constitutionalism in the narrow sense.

Higher law, that is to say, law that is accorded a higher status than everyday law, consists of administrative law and fundamental rights or human rights. Classified under administrative law would be the fundamental rules about the democratic functioning of the constitutional system, as well as the rules about the separation and balance of powers.

Distinct from this first type of higher law are the fundamental rights or human rights, which involve fundamental rights that the individual can compel the state to honor. Higher law, as it can be found in constitutions, is generally called *fundamental rights*. If it is laid down in treaties, we usually call it *human rights*. [47] However, there is no fundamental difference between these two types of rights. They are both higher law, more fundamental than everyday law, and they deserve special protection.

The history of human rights has been told often, and we will not repeat it here. From Roman stoicism to the Magna Carta[48]; from the work of Grotius to modern human rights declarations such as the 1776 Virginia Declaration of Rights; from the American Declaration of Independence and the French *Déclaration des droits de l'homme et du citoyen*, the human rights tradition, especially after the Second World War, went through a great revival.[49]

In the Netherlands, we have a list of fundamental rights that forms the first chapter of the Constitution. These rights can be grouped into two categories. The *classical* fundamental rights, or freedom rights, are almost all negative in nature. It means they delineate a realm in which the citizen is free from the power of the state. On the other hand, in recent decades, particularly since the rise of the welfare state, a whole different type of rights has emerged, generally referred to as *social* fundamental rights. The social fundamental rights are not about limitation of the state, but about the active involvement of the state in social life. They are about promises the state makes to the community and the citizen. The state guarantees that it will do certain things. "Not freedom from

46 So the concept of higher law is completely denuded of metaphysical associations here. Every legal system that does not, like the British system, declare all laws to be of equal power assumes a notion of higher law.

47 See on the codification of higher law: Lacey, Michael J., and Haakonssen, Knud, eds., *A Culture of Rights,* Cambridge University Press, Cambridge 1991; Nino, Carlos Santiago, *The Ethics of Human Rights,* Clarendon Press, Oxford 1991; Villa-Vicencio, Charles, *A Theology of Reconstruction: Nation-building and Human Rights*, Cambridge University Press, Cambridge 1992.

48 See: More, Paul Elmer, *Hellenistic Philosophies,* Greenwoord Press, New York 1969 (1923), pp. 65–94.

49 For a description of this, see: Haines, Charles Grove, *The Revival of Natural Law Concepts,* Russell & Russell Inc., New York 1965 (1958).

government involvement, but freedom because of government involvement is … the catchphrase of the day."[50]

The difference between these two groups is significant, C.H.F. Polak (1901–1981), a Dutch jurist and politician, rightly writes,[51]

> The old fundamental rights are concrete, individual, and enforceable by a judge if needed; the new ones are more of a slogan, a political program; they require elaboration and further specification in laws. They do not guarantee freedom, but create obligations.[52]

Regarding the new Dutch Constitution, the important question is whether or not citizens can truly claim subjective rights from the social fundamental rights that are in it. In other words, can the citizen avail himself of these rights in front of a judge? Some of the fundamental rights are phrased in such a way that they give the impression of being directly enforceable entitlements: the right of the underprivileged to legal aid, for instance (article 18, paragraph 2 of the Dutch Constitution) and the right to social assistance (article 18, paragraph 2). Also belonging to this category is "the right of every Dutchman to freely choose his occupation" (article 19, paragraph 3).

The other social fundamental rights take the form of "instruction standards," meaning they instruct the government to advance the ideals set down in these fundamental rights or to create the conditions for doing so. This category includes creating sufficient employment (article 19); livelihood security, and sharing the wealth of the nation (article 20 of the Dutch Constitution); habitability of the land and protection and improvement of the natural environment (article 21); public health, sufficient housing, social and cultural development, and leisure (article 22).

Besides these fundamental rights, the Netherlands is bound by international fundamental rights as they are found in international treaties. So, in this acknowledgment of higher law, the constitutional character of the Dutch state is clearly present.

Entrenchment

Higher law (fundamental rights and human rights) is so important that it is written down ceremoniously in special documents and protected. For instance, in the Dutch case, the elevated status of the fundamental rights is expressed in the very first articles of the Constitution, referred to by its author, Thorbecke (1798–1872), as the "law of laws," the foundation beneath the edifice of the state. This higher law is not just written down though; it is also made clear that

50 Polak, C.H.F., *Ordening and Rechtsstaat,* W.E.J. Tjeenk Willink, Zwolle 1951, p. 17.
51 Polak, Ibid., p. 4.
52 Polak, Ibid., p. 4.

it *cannot* be changed, at least not *through regular legislative procedures*. The latter refers to the normal way in which bills are passed: through a regular majority, meaning half plus one. This is how we normally make changes to the social environment: we vote. And when 51 out of 100 people vote in favor and 49 against, we go ahead with the change. One could wonder here if the higher law is actually so important that it should not be open to change at all, or only with a majority greater than half plus one. The most far-reaching restriction of normal decision making would be that the higher law *cannot be changed at all*. This is the case in Germany. The German Constitution contains a couple of provisions that may never be altered. These are the foundations of the German system of governance; they are sacrosanct.[53]

But there is also a less far-reaching way to protect the higher law. In this version, the higher law is not proclaimed to be unchangeable, but can only be changed by a special procedure.

1 It is possible, for instance, to include a passage in the constitution that says that fundamental rights can only be altered by a *supermajority* of two-thirds of the votes in the parliament.
2 One could also imagine that fundamental rights can only be changed by a *referendum*, a consultation of the public.
3 Finally, there is the possibility that such a change requires the approval of a *special body* tasked with safeguarding the constitution.

And these are just some of the options. Protecting rules and principles in such a way in a constitution is also called *entrenchment*. A well-known entrenchment is that of article 5 of the U.S. Constitution. It stipulates that amendments (in the United States the Constitution can only be changed by adding amendments to it) can only be passed by a two-thirds majority in both houses of Congress. After that, they still have to be passed by a three-fourths majority of the member states. In Germany, changing the fundamental rights in the Constitution requires a two-thirds majority in both parliamentary chambers (certain principles in the Constitution may never be changed, as we have seen).

In the Netherlands too, the idea that the Constitution contains fundamental values is expressed by the stipulation that it can only be changed by an enhanced amendment process.[54] In that case, we are talking about a *rigid* constitution as opposed to a *flexible* constitution, a constitution that is as easily changed as any other legislation.[55] Changing the Dutch Constitution requires the following steps to be completed:

53 See on this: Maunz, Theodor and Zippelius, R., *Deutsches Staatsrecht,* Twenty-seventh Edition, C.H Beck'sche Verlagsbuchhandlung, München 1988, p. 173.
54 The procedure is set down in article 137 of the Dutch Constitution.
55 See: Bryce, James, "Flexible and rigid constitutions," in: *Studies in History and Jurisprudence, Volume I*, Scientia Verlag Aelen, Aelen 1980 (Oxford 1901), pp. 145–252.

1 The bill to amend the Constitution first needs to pass by a regular majority.
2 When this has happened, Parliament needs to be disbanded and new elections called.
3 Finally, the constitutional amendment must be passed by a qualified parliamentary majority, meaning a two-thirds majority of the votes.

One could say, therefore, that the Constitution is anchored in the judgment of two parliaments and a qualified majority.

What is the rationale behind this system? This is explained by James Bryce. Viscount James Bryce (1838–1922) was a British (more specifically, Scottish) jurist, historian, and statesman. From 1907–1913, he was the British Ambassador to the United States. Bryce wrote an excellent survey of the American political system, *The American Commonwealth* (1898),[56] but he also wrote many essays in which he explains doctrines of statecraft. He was a great stylist, as is demonstrated by his humorous essay "Some hints on public speaking."[57] In an essay on constitutions, he introduces the paired terms *rigid* and *flexible* constitutions.[58] The flexible constitution represents a constitution that can be changed by a normal majority, while the rigid constitution requires an enhanced majority (a *qualified* majority) to do so. He succinctly explains the reasoning behind a rigid constitution:

> It is a recognition of the truth that majorities are not always right, and need to be protected against themselves by being obliged to recur, at moments of haste or excitement, to maxims they had adopted at times of cool reflection.[59]

Judicial review

It is important to stress that these fundamental rights bind both the executive and the legislator. In American constitutional theory especially, that idea has been fully fleshed out. In the United States, Congress is limited in two ways. First, it can only make laws about subjects that are explicitly named in the

56 Bryce, James, *The American Commonwealth,* two volumes, The Macmillan Company, New York 1926 (1898).
57 Bryce, James, "Some hints on public speaking," in: James Bryce, *University and Historical Addresses,* Macmillan & Co., New York 1913, pp. 281–299.
58 Bryce, James, 'Flexible and rigid constitutions', in: *Studies in history and jurisprudence,* Volume I, Scientia Verlag Aelen, Aelen 1980 (Oxford 1901), pp. 145–252.
59 Bryce, James, *Modern Democracies, Volume II*, Macmillan and Co., London 1921, p. 11. On the subject of self-restriction, see also: Friedmann, Lawrence M., *American Law,* W.W. Norton & Company, New York and London 1984, p. 33ff.; Holmes, Stephen, "Precommitment and the paradox of democracy," in: Elster, J., & Slagstad, R., *Constitutionalism and Democracy,* Cambridge University Press, Cambridge and New York 1988; Cliteur, P.B., "Traditionalism, democracy, and judicial review," in: B. van Roermund, ed., *Constitutional Review, Verfassungsgerichtbarkeit, Constitutionele toetsing,* Kluwer/W.E.J. Tjeenk Willink, Deventer/Zwolle 1993, pp. 55–77.

Constitution, and were it to overstep the authority bestowed on it by the Constitution, its products would not be recognized as lawful. In essence, this corresponds to the way the relationship between the central government and lower-level governments is viewed in different legal systems. When a lower-level government makes a decision that conflicts with higher legislation, it is not recognized as a lawful rule. These rules are not law but "null and void," the American literature explains.[60] This also conveys the obligation to obey. Since citizens are only required to obey rules and commands issued by the body or person authorized to issue them, citizens are not bound by legislation issued by a legislator who has overstepped its authority.

The position of Congress in the United States is comparable with that of a lower-level government in Britain or the Netherlands. The highest legislative power is the people. The people have, by means of the highest law, the Constitution, delegated certain powers to Congress. However, Congress can only operate within specified limits. Every law that is passed that is in accordance with the Constitution is recognized as legally binding, but every law that can be viewed as being in conflict with the Constitution is invalid and has no legal force. It is *not* a law, one could say, and the congress that passed it was not a congress in the sense of a legally competent law-making body.

The person who articulated this consequence the most clearly and influentially is the American Supreme Court Justice John Marshall (1775–1835). In the famous verdict of *Marbury v. Madison* (1803), Marshall said that the power of the legislator is clearly determined and delineated.[61] The Constitution was written to make sure these limitations are not forgotten. And why would the founders have placed limitations on power if these limitations could be overridden at any time? "It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by any ordinary act."[62]

In itself, this does not mean that the *courts* therefore have the authority to evaluate laws on the basis of their compliance with the Constitution, but this was the conclusion drawn by Marshall. And with that, in 1803, judicial review was introduced in the United States.

Since then, judicial review has come to be viewed as an important part of the constitutionalist idea. In Europe, it mostly came to the fore after the Second

60 Bryce, James, *The American Commonwealth*, p. 244.

61 See for some commentaries: Clinton, Robert L., "Precedent as mythology: a reinterpretation of *Marbury v. Madison*," in: *The American Journal of Jurisprudence*, Vol. 35, No. 1 (1990), pp. 55–86; O'Fallon, James, M., 'Marbury', in: *Stanford Law Review*, Vol. 44 (1992), pp. 219–260.

62 1 Cranch 137 (1803), p. 8, cited in: Melone, Albert P. and Mace, George, *Judicial Review and American Democracy*, Iowa State University Press, Ames 1988, p. 61, and Heffner, Richard D., *A Documentary History of the United States*, Fifth Edition, Mentor Books, New York 1991 (1952), p. 83.

World War. In some countries, judicial review takes the shape of the courts' ability to check laws against the national constitution. But it is also possible to evaluate laws on the basis of international treaties.

The CCP

We now have a clear picture of what in Europe is called the *Rechtsstaat* and what Americans usually refer to as *constitutionalism*. At its heart is the *institutionalized restriction of political power by laws and rights in which these rights are set down in a formal document and enforced, also with regard to the legislator, by the courts*. We have also become familiar with the ideal of democracy and the alliance between constitutionalism and democracy in the model of the constitutional democratic state.

In this model with the charactersitics mentioned above, we are talking about a model that has a certain internal consistency. This claim of consistency should not be exaggerated. All sorts of conflicts can be imagined. For instance, it is possible to envision a constitution (c) that includes higher law, but the courts' power of judicial review is withheld (e). Also imaginable is a fundamental right with higher law, but that the choice is made not to entrench this higher law (d), so not to place it outside the reach of a normal democratic majority by requiring an enhanced process for constitutional reform. We will return to these matters. At this stage, we will limit ourselves to the observation that the model of the constitutional democratic state, as portrayed here, is a constitutional model that has drawn a significant following. It is to Fukuyama's credit that he has made us all realize this. While we were all struck by plurality, by the inability to justify values, and discomfited at the suggestion of consensus, he said: Look around and observe how uniform the world has become in a constitutional sense. He was right. The constitutional democratic state is the dominant model.

In order to convey the historical meaning of the model, we could introduce a new classification. What we have so far elucidated as the model of the constitutional democratic state, inspired by the work of the Dutch historian Jan Romein (1893–1963),[63] we could call the Common Constitutional Pattern of modernity

63 See: Romein, Jan, "De Europese geschiedenis als afwijking van het Algemeen Menselijk Patroon" (1952), in: *Historische lijnen and patronen,* een keuze uit de essays, Em. Querido's Uitgeverij BV, Amsterdam 1976, pp. 417–446 (first published in: *In de ban van Prambanan,* 1954) and Romein, Jan, "Het Algemeen Menselijk Patroon," Ontstaan, belang and draagkracht van historische theorieën (1955), in: *Historische lijnen and patronen,* een keuze uit de essays, Em. Querido's Uitgeverij BV, Amsterdam 1976, pp. 491–511. Note that this is a very loose translation of Romein's term. Romein's AMP (*Algemeen Menselijk Patroon:* Common Human Pattern) is the model, and Europe is an *exception* to it. However I use a version of the modern-day AMP as the *main thread* of modern constitutional development. So in a way, it is the mirror image of Romijn's term. The way Romijn used it, the AMP is something that Western civilization has grown out of. The CCP as it is used here is something the West has tended to develop towards.

(CCP). It is the model that is viewed in Western societies as the provisional end of constitutional development. It is *common* in the sense of *universal, constitutional* in the sense that it relates to the foundations of how society is shaped, and it is a CCP *of modernity* because it is characteristic of constitutional thinking as it has evolved since the Renaissance and the Enlightenment.[64]

Such a grandiose claim requires a solid justification. Let us begin with a few remarks on the concept of modernity.

The terms *modernity* and *modernism* are very popular these days, but they are not always used in the same way. For instance, we encounter the term *modernity* in the title of the book by the Italian Heideggerian Gianni Vattimo (*b*. 1936) who describes *The End of Modernity*. [65] We also see it in J.F. Lyotard (1924–1998), who speaks of the "tradition of modernity."[66]

Lyotard refers to Erich Auerbach (1892–1957), who recognized modernity in as early a form as Saint Augustine's *Confessions*, and to Bachtin (1895–1975), who linked modernity to Rabelais (1494–1553) and Montaigne (1533–1592). Lyotard himself, not going back quite as far, sees a manifestation of the tradition of modernity in the work of Descartes (1596–1650),[67] especially in his *Discours de la méthode* (1637), in which the narrative genre of the first person is used to present the discourse. Apparently making a comparison with Augustine, Lyotard also mentions that Descartes has written a kind of confession, but it is not a confession of the "dispossession of the self by God" ("dépossession du moi par Dieu"),[68] but the effort the self makes to understand all things, including itself.

Mastery and organization; according to Lyotard, these are the characteristics of the tradition of modernity. He also refers to the organization of time as it unfolds in the 18th century during the *Aufklärung*. From there, a line can be drawn to 19th- and 20th=century thinking, which is dominated by the idea of emancipation, an idea that manifests in what Lyotard calls "grand narratives."

In other discourses on the terms *modernity* and *modernism*, we also find that Descartes and Montaigne (as in Bachtin) are identified as the central figures. For instance, they also play a role in Stephen Toulmin's *Kosmopolis*, which presents a critical view of Cartesian modernism and offers a more sympathetic description of modernism's deeper roots, in which he includes Montaigne. In Toulmin, too, optimism, reason, mastery, and organization return as characteristics of modernity. The

64 On the "modernity" of judicial review, see: Cappelletti, Mauro & Adams, John Clarke, "Judicial review of legislation: European antecedents and adaptations," in: *Harvard Law Review,* Vol. 79 (1966), pp. 1207–1224.

65 Vattimo, Gianni, *The End of Modernity: Nihilism and Hermeneutics in Postmodern Culture*, Polity Press, Cambridge 1991 (1988).

66 For critical treatises on postmodernism, see: Gellner, Ernest, *Postmodernism, Reason, and Religion,* Routledge, London and New York 1992; Pangle, Thomas, *The Ennobling of Democracy: The Challenge of the Postmodern Age*, The Johns Hopkins University Press, Baltimore 1992.

67 As does Gellner in: Gellner, Ernest, *Reason and Culture: The Historic Role of Rationality and Rationalism*, Blackwell, Oxford and Cambridge, Massachusetts 1992.

68 Lyotard, J.F., *Le Postmodern expliqué aux enfants,* Editions Galilée, Paris 1988, p. 44.

project of modernity is a rational project, Stephen Toulmin (1922–2009) writes.[69] It is optimistic at heart and has faith in progress, and not only progress of the natural sciences, but also that of ethical, political, and social thought.

Humanism

At this point it would be good to make the connection between the thinking on constitutionalism and two traditions known as *humanism* and *Enlightenment thinking*. Humanism has faith in human capabilities, especially mankind's ability to rise above the animal through culture and a rational use of the human capacity for reason and morality. We will not attempt to give an exhaustive definition of humanism here, but merely point out some characteristics that are little disputed and that are relevant to this discussion. Of course, it is a challenge to extract just one or a few features as the "core" of humanism from a long contemplative tradition in which many different conceptions of humanism have been on offer.[70] The Dutch philosopher Marcel Fresco (1925–2011) points to the ideal of autonomy and the fact that, for the humanist, taking responsibility is a central value.

Another characteristic of humanism is a certain belief in progress. Think of the possibility of civilization. In humanism, as in Enlightenment thinking, the *ideal of civilization* has always played an important part.

Characteristic of Enlightenment thinking and humanism are an *ideal of civilization* and a related faith in the capacities of mankind. "The central theme of humanism was the potentialities of man, his creative powers," Alan Bullock (1914–2004) rightly writes.[71]

All of this matters greatly to the development of thinking on the state. Humanism and Enlightenment thinking have uncoupled the individual from collective associations, which had formed the frame of reference for the state in the Middle Ages as well as in the polis of antiquity.[72] The political counterpart to Cartesian rationalism and individualism is the work of Rousseau and Hobbes and other contract theorists. The premise is the thought that mankind, through rational use of his mental abilities, is capable of devising and implementing a political structure in which he can achieve self-

69 Translated as: Toulmin, Stephen, *Kosmopolis,* Verborgen agenda van de moderne tijd, Kok Agora, DNB Pelckmans, Kampen 1990, p. 9.

70 See on the different conceptions of humanism: Giustiniani, Vito R., "Homo, humanus, and the meanings of "humanism,"' in: *Journal of the History of Ideas,* Vol. XLVI (1985), pp. 167–195.

71 Bullock, Alan, *The Humanist Tradition in the West,* Thames & Hudson, Wisbech 1985, p. 35. Also see: Passmore, John, *The Perfectibility of Man,* Duckworth, London 1970. For a critique see: Caroll, John, *Humanism: The Wreck of Western Culture*, Fontana Press, Harper Collins, London 1993.

72 At least, according to the views of Benjamin Constant. On his views on freedom, see: Holmes, Stephen, *Benjamin Constant and the Making of Modern Liberalism,* Yale University Press, New Haven and London 1984, p. 28ff.

actualization. This modernist political ideal is so well known that it hardly requires further elucidation.

A second issue is just as important, but as it never garnered sufficient attention in constitutional thinking, it is even more important to emphasize it here. We have seen that a characteristic feature of modernism and humanism is that mankind is not considered a given, but a being that can self-improve. Well-known is the "Oration on the dignity of man" by Pico della Mirandola (1463–1494),[73] in which mankind is placed between the animals and God. The Enlightenment poet Alexander Pope (1688–1744), writing about man in this spirit, later beautifully expressed man's place in existence with the lines: "He hangs between; in doubt to act, or rest;/In doubt to deem himself a god or beast." The quotation, which is from Pope's *Essay on Man* (1734),[74] appears in this context:

> Know, then, thyself, presume not God to scan;
> The proper study of mankind is man.
> Placed on this isthmus of a middle state,
> A being darkly wise, and rudely great:
> With too much knowledge for the sceptic side,
> With too much weakness for the stoic's pride,
> He hangs between; in doubt to act, or rest;
> In doubt to deem himself a god, or beast;
> In doubt his mind or body to prefer;
> Born but to die, and reasoning but to err;
> Alike in ignorance, his reason such,
> Whether he thinks too little, or too much:
> Chaos of thought and passion, all confused;
> Still by himself abused, or disabused;
> Created half to rise, and half to fall;
> Great lord of all things, yet a prey to all;
> Sole judge of truth, in endless error hurled:
> The glory, jest, and riddle of the world!

By not giving in to momentary impulses, to natural urges, but by trying to exert a reasonable measure of self-control, man can *civilize* himself. This also has its dangers, from an unnatural repression of sexual impulses to overly strict

73 See: Giovanni Pico della Mirandola, "Oration on the dignity of man," in: Ernst Cassirer, Paul Oskar Kristeller, and John Herman Randall, Jr., eds., *The Renaissance Philosophy of Man,* The University of Chicago Press, Chicago and London 1948, pp. 215–223.

74 Pope, Alexander, "Know thyself," from *An Essay on Man*, in: Helen Gardner, ed., *The New Oxford Book of English Prose: 1250–1950*, Oxford University Press, Oxford and New York 1972, p. 417.

ascetic demands, but in a moderate form, as it is expressed in the Kantian ideal of self-legislation, it has become a dominant aspiration in Western culture.

Humanism and constitutionalism

Let us now examine what could be the meaning of the humanist Enlightenment ideal of confidence in the human capacity for political philosophy and constitutional thinking.

Characteristic of modern *constitutional thinking* is that it has exported the humanist *Bildungsideal* to the political realm: just as *individuals* can place certain restrictions on themselves in order to meet their moral ideals, so can humans *collectively*. Constitutionalism is an expression of this latter ideal. When people draw up a constitution that stipulates that certain fundamental values are to supersede the regular political process, it is a form of collective self-restriction. Think of fundamental rights. In a certain sense, fundamental rights are rules meant to restrict *ourselves*. During moments of reason, we resolve not to violate fundamental values in times of chaos, and we try to erect institutional frameworks that make it *more difficult* to violate those values.[75]

The parallel between humanist self-restriction as it is known at the individual level and constitutional self-restriction as it is known at the collective level is not drawn often enough. Usually, the notion of constitutionalism is linked to Immanuel Kant (1724–1804), and his idea of self-legislation does clearly reflect a constitutional way of thinking.[76] The connection between humanism and constitutionalism is made even more expressly in the work of representatives of the American "New Humanism": Irving Babbitt (1865–1933) and Paul Elmer More (1864–1930).[77] For instance, in his book *Democracy and Leadership* (1924), Irving Babbitt writes: "The idea that the state should have a permanent or higher self that is felt as a veto power upon its ordinary self rests ultimately upon the assertion of a similar dualism in the individual."[78] With this statement, Babbitt seeks alignment with Edmund Burke (1729–1797), whose vision he regards as closely related to that of the American Constitution, and who we discussed in Chapter 1 of this book.

The "naturalist" tradition challenged by Babbitt is averse to a *frein vital*, to veto power, both when it represents a limitation of the power of the individual and when it means a limitation of the power of the state. On the other hand, in the humanist tradition, with which, in American political life, he

75 See on this: Holmes, Stephen, "Precommitment and the paradox of democracy," in: Elster, J. and Slagstad, R., *Constitutionalism and Democracy,* Cambridge University Press, Cambridge and New York 1988.

76 See: Dietze, Gottfried, *Kant und der Rechtsstaat,* J.C.B. Mohr (Paul Siebeck), Tübingen 1982.

77 See: Babbitt, Irving, "Humanism. an essay at definition," in: N. Foerster (ed.), *Humanism and America,* New York 1930, p. 25ff.

78 Babbitt, Irving, *Democracy and Leadership,* Liberty Classics, Indianapolis 1979 (1924), p. 299.

associates George Washington (1732–1799), the necessity of curtailing "the natural man" is assumed.

> Just as man has a higher self that acts restrictively on his ordinary self, so, they hold, the state should have a higher or permanent self, appropriately embodied in institutions, that should set bounds to its ordinary self as expressed by the popular will at any particular moment.[79]

The contrast Babbitt makes is the distinction between constitutional and direct democracy. There is a sharp contrast between the political philosophy of those who believe that the will of the majority should always prevail and those who think that this will ought, in a sense, to be cleansed of the impulsive and transitory, Babbitt writes.

This brings us back to the tension between constitutionalism and democracy that has also been observed by Fukuyama and other political philosophers and constitutional theorists. To Babbitt, democracy is only acceptable when it is constitutionally held in check. He considers an unbridled democracy a highly dangerous proposition. In it, an incensed mob can violate the rights of the few. That is why certain provisions must be made to somehow curb the will of the majority when it may come into conflict with fundamental values, such as fundamental rights.[80] In the CCP, this curb has been sought in a limitation of even the highest legislator to traditional fundamental values that are protected by the courts.

Tension between entrenchment and democracy

So far, all of this is (or seems to be) a fairly unproblematic affair. The CCP seems to be the dominant constitutional model of modernity, a model in which constitutionalism and democracy, the two most important aspirations of modern times, have entered into a blissful union. When this union is indeed happy, it looks as if it will last for a long time and that the model of the constitutional democratic state will not buckle under the pressures other types of civilizations have suffered. So it seems that Fukuyama's question, if the CCP is the end of history, has to be answered in the affirmative. Or can looks be deceiving here? Can tensions within the model perhaps be found after all? Perhaps such fundamental tensions as the constitutional democratic state having to make way for more stable constitutional systems in the long term? A first point of tension between the ideals of constitutionalism and democracy lies in the notion of an entrenched anchoring of higher law in the constitution. Characteristic of the

79 Babbitt, Ibid., p. 273.

80 See on this tradition: Corwin, Edward S., *The 'Higher Law' Background of American Constitutional Law,* Great Seal Books, Cornell University Press, Ithaca, New York 1955.

constitutionalist idea is the view that the power of the government, including the democratically controlled government, is limited by certain rights (see the second item of the previously listed principles of constitutionalism, p. 00). Such an ideal did not cause many problems in the pre-democratic era (that is to say, from the modern perspective), considering the fact that, back then, higher law only restricted the power of the sovereign. If it can even be called a conflict between principles, it was a conflict between the principle of "*droit divin*" and the idea of the modern constitutional state. However, as the influence of democratically elected majorities on policy increased, the acceptance of higher law as a limitation of government power also became a limitation of the will of the democratically elected majority, a limitation that was felt less or more keenly depending on the level to which higher law was entrenched in the constitution.[81] The German Constitution, which makes some rights absolutely untouchable, forms—an *absolute* restriction on democratic decision making when it comes to the rights specified in it. The American and Dutch Constitutions, which only make fundamental law *more difficult* to change, constitute a less far-reaching limitation of democratic decision making. Here too, though, we are talking about a confrontation between constitutional and democratic demands.

The well-known clash between the traditionalist views of the Irish political philosopher Edmund Burke (1729–1797) and the radical-democratic tradition as championed by, among others, Thomas Paine (1737–1809) clearly exemplifies the contrast between constitutionalism and democracy. We will briefly go into the history of this conflict.

Paine and Burke

It all started with a lecture by the theologian Richard Price (1723–1791).[82] On November 4, 1789, on the anniversary of the 1688 Revolution (also known as the *Glorious Revolution*), Price had given a sermon in which he had praised both revolutions. The panegyric had irritated Edmund Burke greatly because, although he considered the Glorious Revolution to have been necessary and beneficial, he disapproved of the French Revolution. In his famous book *Reflections on the Revolution in France* (1790), we find a more in-depth explanation of his criticism of Price. In Burke's view, the quintessence of Prince's sermon is that, according to Price, the English people had gained three fundamental rights in the Glorious Revolution:

81 See on this: Jackson, Robert H., *The Supreme Court in the American System of Government,* Harvard University Press, Cambridge, Massachusetts 1967.

82 *A Discourse on the Love of Our Country*. A new edition appeared in: Price, Richard, *Political Writings,* ed.. D.O. Thomas, Cambridge University Press, Cambridge 1991, pp. 176–197.

1 to choose their own rulers
2 to depose them in case of misrule
3 to design their own form of government.[83]

To Burke, this lecture was the trigger for an influential campaign against the French Revolution and the Enlightenment legacy that underpinned it, a campaign in which he contrasted the values of traditionally developed principles and institutions with the rationally devised and, to his mind, artificial political philosophy of the Enlightenment philosophers.

Burke denied that the people had the kind of rights that Price had lauded in his sermon. Burke refers to a declaration that Parliament had made almost a hundred years previously vis-à-vis William and Mary: "In the name of the people aforesaid, (meaning the people of England then living) most humbly and faithfully *submit* themselves, their *heirs* and *posterities,* FOREVER."[84] Burke also invokes a provision from a decision that Parliament had taken in the same parliamentary term, in which Parliament says that the declaration bound them (that is to say, the people of the time) as well as their "heirs and [their] prosperity … to the end of time."

As Burke had been riled Price, so Thomas Paine was riled by Burke. If Burke were right, Paine said, it would mean that in the Revolution the English people had *waived* a possible right to abolish the monarchy. The English Parliament had made use of the right to abolish the monarchy to commit itself for the moment, but at the same time it had laid claim to another right, namely the right to bind posterity, according to Paine in his critique of Burke.[85]

In this discourse, we can uncouple judgment of the right of this generation to bind and unbind future generations from the hereditary monarchy, because the subject we are interested in is of a more general nature than the specific problem addressed by Burke and Paine. It is about whether one generation may bind the next; after all, that is what happens when a rigid constitution is proclaimed. It is a problem of great practical significance, since most of the world's constitutions contain rigid clauses.[86]

Paine is categorical and clear about this issue:

> There never did, there never will, and there never can exist a parliament, or any description of men, or any generation of men, in any country, possessed of the

83 Burke, Edmund, *Reflections on the Revolution in France,* ed. Conor Cruise O'Brien, Penguin Books, Harmondsworth 1982, p. 91ff.

84 Paine, Thomas, *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution.* Second Edition, J.S. Jordan, London 1791 (emphasis in original). Accessed February 18, 2018, http://oll.libertyfund.org/titles/798

85 Paine, Ibid.

86 Exceptions to this are the constitutions of New Zealand and South Africa. For more information on this, see: Lijphart, Arendt, *Democracies,* Yale University Press, New Haven and London 1984, pp. 187–197.

> right or the power of binding and controlling posterity to the '*end of time,*' or of commanding forever how the world shall be governed, or who shall govern it.[87]

The kinds of provisions that Burke appeals to are of no value at all, Paine writes. The drafters are trying to do that for which they have neither the ability nor the authority.

Judicial review

So, the first tension within the constitutional democratic state is that between democracy and the characteristic of constitutionalism elucidated under section *d*: the idea of the entrenchment of higher law.

A second tension within the CCP also manifests between the two poles of democracy and constitutionalism, but this time it is between democracy and the element of judicial review as part of the constitutional state (section *e*). When the judge is asked to monitor the constitutionality of ordinary legislation, the judge is in fact placed above the legislator, the critics of the CCP write. That is to say, a non-democratic body is given primacy over a democratically legitimized body.[88]

A fervent opponent of judicial review for this reason is the Dutch constitutional scholar G. van den Bergh, whose work we have already discussed in Chapter 1 of this book. These days, van den Bergh is known for his 1936 inaugural lecture about anti-democratic political parties.[89] Yet, he is also relevant to the question of how to view the relationship between the legislator and the judiciary. In an article in the Dutch *Juristenblad* in 1951, he explained his views on this topic, stressing particularly that judicial constitutional review conflicts with the democratic ideal. The ban on constitutional review is of great importance because, in Van den Bergh's oft-quoted phrase, it is part of "the deepest essence of democracy." (Please note: Van den Bergh views the *ban* on judicial review as the essence of a democracy, not the practice of it.)[90]

Less often quoted but at least as categorically worded is his assertion that every democracy must obey this rule, or at least return to it after having

87 Paine, Ibid (emphasis in original).

88 See on this: Waldron, Jeremy, "A right-based critique of constitutional rights," in: *Oxford Journal of Legal Studies,* Vol. 13, No. 1 (1993), pp. 18–51; Waldron, Jeremy, *Liberal Rights,* Collected Papers 1981–1991, Cambridge University Press, Cambridge and New York 1993.

89 Rijpkema, Bastiaan, ed., *Wat te doen met antidemocratische partijen? De oratie van George van den Bergh uit 1936*, with an introduction by Bastiaan Rijpkema, a foreword by René Cuperus, and an afterword by Paul Cliteur, Elsevier Boeken, Amsterdam 2014; Rijpkema, Bastiaan, *Weerbare democratie: de grenzen van democratische tolerantie*, Uitgeverij Nieuw Amsterdam, Amsterdam 2015.

90 Van den Bergh, G., "Beschouwingen over het toetsingsrecht," in: *Nederlands Juristenblad,* May 26, 1951, pp. 417–425.

strayed.[91] It is unclear if by "must" Van den Bergh means a normative must or if he is simply giving voice to a probability. That he at least means the latter can be deduced from the fact that he posits that judicial review cannot be maintained in a democracy in the long term due to the sharp conflicts that would inevitably arise.

It is no surprise that Dutch constitutional thinkers fulminate against judicial review on the basis of the democracy argument. After all, the Netherlands has had a ban on judicial review since 1848, and it has rarely been contested in Dutch constitutional doctrine. Perhaps more salient is the fact that, from time to time, appeals are made against judicial review in the *American* doctrine. One of the most potent of these is an article written a while ago now by Henry Steele Commager (1902–1998). Commager asks: How do judicial review and democracy relate to one another? This requires but a moment of thought before the relationship becomes unmistakably clear. The purpose of judicial review is to deny legality to a law that was passed by the majority because the judge identifies conflict between the law and the Constitution. This is objectionable though. It may be assumed, after all, that the legislator has also monitored the possible unconstitutionality of the law. The fact that the law was passed indicates that, in the legislator's view, the law was *not* unconstitutional. Why would the *judge* be empowered to elevate his opinion on constitutionality over that of the legislature? "The one non-elective and non-removable element in the government rejects the conclusions as to constitutionality arrived at by the two elective and removable branches."[92] The conclusion that Commager draws is devastating for the American system and the CCP: "The conclusion is almost inescapable that judicial review has been a drag upon democracy and—what we may conceive to be the same thing—upon good government."[93]

Contradictions within the CCP

This brings us back to the question posed at the beginning of this chapter: Is the constitutional democratic state, as it exists in the form of the CCP, so weakened by the tensions within the model that, in the end, it will not be able

91 This remark about returning to it after having strayed is interesting because, in the literature, a trend that is critical of judicial review seems to be discernable. See on this: Waldron, Jeremy, "A right-based critique of constitutional rights," in: *Oxford Journal of Legal Studies,* Vol. 13 (1993), pp. 18–51; Waldron, Jeremy, "The core of the case against judicial review," in: *The Yale Law Journal*, Vol. 115, No. 6 (2006), pp. 1346–1406.

92 Commager, Henry Steel, "Judicial review and democracy," in: *Virginia Quarterly Review,* Vol. 19 (Summer 1943), pp. 417–428.

93 Commager, "'Judicial review and democracy," p. 428. For an attempt at the reconciliation of judicial review and democracy, see: Rostow, Eugene V., "The democratic character of judicial review," in: *Harvard Law Review,* Vol. 66, No. 2 (1952), pp. 193–224.

to survive, and that, consequently, it does not represent the end of constitutional history?

Van den Bergh seems to assume this is the case when he posits that every democracy should have a ban on judicial review, or at least return to it after having strayed. Van den Bergh apparently believes the CCP is not sustainable "in the long run."

Commager seems to be a little less optimistic about the possibility of getting rid of judicial review, which has been solidly anchored in American constitutional law since 1803, but he too points out the contradiction between democracy and judicial review.

The criticism by Commager, Van den Bergh, Paine, and countless other thinkers of the CCP is not something that can be easily brushed aside. The contradictions within the CCP that they point to are indeed significant. Can constitutionalism and democracy be reconciled? If so, how? And if not, will this not eventually cause the CCP to disappear from the world stage, as Marx said all societies characterized by internal contradictions would do?

What the future of the constitutional democratic state looks like is hard to say. It is clear, in any case, that however much continuity characterizes constitutional law, there will still be changes. It is possible, for instance, that as a result of the political discussion that arises around the appointment of American judges, the American system will be confronted with such contradictions that it will be forced to undergo far-reaching changes.[94] In the same vein, bold judicial interpretations with regard to issues like abortion, the death penalty, and other controversial subjects may cause political disagreements to flare up so hotly that the decision is made to no longer have these issues adjudicated by the courts.[95] In recent years, this has been a particular problem in Britain, where dissatisfaction over decisions made by the European Court in Strasbourg was felt so keenly that it became part of the reason the British decided to withdraw from the Treaty.

But judicial review is also under discussion in America. It is heavily criticized there by Jeremy Waldron (*b.* 1953).[96] Considering the important political decisions the Supreme Court has been making, this is not surprising.[97]

94 For the failed nomination of Justice Bork to the Supreme Court, for instance, see: Bronner, Ethel, *Battle for Justice: How the Bork Nomination Shook America*, Doubleday, New York 1989.

95 An entreaty for this in: Bork, Robert H., *The Tempting of America,* The Political Seduction of the Law, Sinclair-Stevenson, London 1990.

96 Waldron, Jeremy, "A right-based critique of constitutional rights," in*: Oxford Journal of Legal Studies*, Vol. 13 (1993), pp. 18–51; Waldron, Jeremy, "The core of the case against judicial review." ", in: *The Yale Law Journal*, Vol. 115, No. 6 (April 2006), pp. 1346–1406.

97 Dworkin writes that the Supreme Court "has the last word on whether and how the states may execute murderers or prohibit abortions or require prayers in the public schools, on whether Congress can draft soldiers to fight a war or force a president to make public the secrets of his office." See: Dworkin, Ronald, *Law's Empire*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts and London 1986, p. 2.

On the flipside, the British system, the last impressive bulwark against the CCP, also faces a number of significant problems. There is a possibility that the British system will develop into such a strong dictatorship of the executive that an anchored Bill of Rights will be the only remedy for safeguarding the constitutional character of the British system.[98]

In the first case, it would lead to a *move away from* the CCP, in the second case to a *move closer* to it. We will not venture a prediction about the possible end or survival of the CCP here, but limit ourselves to discussing two places in which the solution to mitigating the tensions between the democratic and constitutional parts of the CCP might be found. Key words here are *limitation* and *moderation*, a limitation that would have to manifest in two areas. The first is in the legislative arena, the second in the area of judicial interpretation. However, in both cases the key word is *self-restriction*.

Two consequences

The tension within the ideal of the constitutional democratic state can be seen to have two implications. These are implications that could mitigate tension within the model, and they could thus be used as additional demands that could be made of the model, particularly the demands that should be made of the constitutional component of the constitutional democratic state.

One of these demands (i.e. judicial restraint) has received some attention in constitutional theory (and legal theory in general), but that is not sufficiently true of the other demand (i.e. legislative restraint). Still, one could argue that both expansions of the concept of constitutionalism are required to bring it satisfactorily into balance with the concept of democracy.

The additional features of the constitutional state presented here are: (f) self-restriction by the highest interpreting body with regard to the constitution, a demand that comes down to judicial restraint; and (g) limitation of the granting of a constitutional status to rights, a demand that comes down to legislative restraint.[99]

98 See on this: Hailsham, Lord, *The Dilemma of Democracy,* Diagnosis and Prescription, Collins, London 1978; Scarman, Leslie, *English Law – The New Dimension,* Stevens & Sons, London 1974; Dworkin, Ronald, *A Bill of Rights for Britain,* Chatto & Windus, London 1990. For a critique, see: Griffith, J.A.G., "The political constitution," in: *The Modern Law Review,* Vol. 42, No. 1 (1979), pp. 1–21, and for some positions for and against, see: Barnett, Anthony, Ellis Caroline and Hirst, Paul, *Debating the Constitution,* New Perspectives on Constitutional Reform, Polity Press, Cambridge 1993.

99 See the previously discussed five characteristics and principles (pp. 00–00) of constitutionalism.

Judicial restraint

It is necessary to start with a few remarks on the nature of constitutional law. It has been said that constitutional law is law that is derived from, or related to, or interpretively linked to the constitution.[100] In a certain sense, there has always been a recognition that the constitutional ideal has implications for the way in which judicial interpretation will have to take place. Earlier, we discussed the principle of legality. This principle holds that no act is unlawful unless it was expressly forbidden by a legal criminal provision beforehand. Although it seems easy to decide whether the legislator has made something illegal or not, this turns out to be trickier than one would think. After all, the generality of the law means that the judge will always have to *interpret* the law; he will always have to apply the law to the specific case at hand. And while doing so, the applicability of the norm may become greater or lesser than the provision's phrasing, out of context, would lead one to suspect. In this, the judge has a certain measure of freedom, thus introducing unpredictability with regard to the result. This is why an important school in American legal thought, American realism, posited that the law is not what is written down in the legal code but what judges *say* is written there. The law is what judges make of it.[101]

Although modern society is increasingly confronted with the need to make legal provisions without the involvement of the legislator, it remains important for the judge not to encourage this too often. This is true of "normal" cases, but even more so of constitutional and human rights affairs, since the limitation of democratic decision making manifests more strongly there. It is said that the judge has to be particularly careful with regard to extensive interpretation in the field of *criminal law*. After all, *legal certainty* could be in danger here. However, people often do not realize that judicial restraint with regard to *constitutional law* is at least as important, albeit for a different reason. That is that an assertive approach by the judge can unnecessarily and irresponsibly worsen the *democratic deficit* in the constitutional democratic state. A judge who sets aside a law because of perceived conflict with the constitution (but also, of course, with the European Court of Human Rights (ECHR) is authorized to do so because of the importance the CCP places on judicial review of democratic decisions, but he always needs to be aware of the cost: an infringement of democracy. This point has been rightly highlighted by Van den Bergh, Commager, and countless other critics of judicial review. Judicial review is

100 Pritchett, C. Herman, "Constitutional law," in: David L. Sills, ed., *International Encyclopedia of the Social Sciences,* The Macmillan Company and The Free Press, London 1968, pp. 295–300, here p. 295.

101 See: Crozier, J.B., "Legal realism and a science of law," in: *The American Journal of Jurisprudence,* Vol. 29, No. 1 (1984), pp. 151–167.

an impairment of another value of the CCP, and such an impairment may only be done under narrowly specified conditions, conditions that are listed in the constitution, to which the judge is strictly bound.[102]

Just as in criminal law there is a taboo on reasoning by analogy as a subversion of the constitutional idea, there should be more awareness in constitutional law of the dark side of extensive judicial interpretation.[103]

Legislative restraint

A second point that we might have to accept as a feature of the constitutional ideal is that it recognizes as fundamental rights, as truly "higher law," only those rights that reflect such crucial ideals of the constitutional democratic state that they deserve this privileged status.[104]

We should realize not only with regard to judicial, but also with regard to legislative assertiveness that there is a price to be paid for a certain norm being a "human right" or "fundamental right." In a way, Fukuyama had already pointed this out when he argued that he elected to hold to a short list of human rights, as is commensurate with the American Bill of Rights, because he claimed that expansion of the list of human rights (with, for instance, social fundamental rights) would produce tension with property rights.

Although we subscribe to a plea for a careful attitude with regard to recognizing human rights, our reason for doing so is different from Fukuyama's. So what is this reason? The answer is: we ought to be frugal in recognizing human rights, because the recognition of every human right implies a potential if not actual limitation of the democratic element in the model of the constitutional democratic state. The price of recognition of a right as a human right is, after all, that we elevate it above the normal political process. We exclude it from the democratic decision-making process. We *infringe* on the democratic principle in the service of something higher.

Of course it is also part of the essence of the CCP that such a recognition is possible and desirable.[105] However, it would also be desirable for human rights

102 See on this: Black, Hugo LaFayette, *A Constitutional Faith,* Alfred Knopf, New York 1969.

103 We find countless examples of this in American constitutional history. For an overview of the past decades, see: Savage, David G., *Turning Right: The Making of the Rehnquist Supreme Court*, John Wiley & Sons, Inc., New York 1992.

104 See: Nickel, James W., *Making Sense of Human Rights,* Philosophical Reflections on the Universal Declaration of Human Rights, University of California Press, Berkeley, Los Angeles, and London 1987, p. 3. See also: Cranston, Maurice, "Human rights, real and supposed," in: D.D. Raphael, ed., *Political Theory and the Rights of Man,* Macmillan, London 1967, pp. 54–68. Cranston writes that it is characteristic of a human right that it is a universal right "of paramount importance."

105 On this, see also the thoughts of the famous Supreme Court Justice: Brennan, William, "Why have a Bill of Rights?," in: *Oxford Journal of Legal Studies,* Vol. 9, No. 4 (1989), pp. 425–440.

to be viewed as an *exception* to the normal political process and policy making was left in the hands of the everyday, democratically monitored political process.

In this sense, a distinction is made between regular politics and constitutional politics. Regular politics is day-to-day politics. Constitutional politics is the politics we are involved in when we discuss the foundations of the state in the long term, such as when we draft a constitution. The distinction harkens back to one of the American founding fathers. Alexander Hamilton (1757–1804) made a distinction between the *people* in the sense of a constituent assembly and the *representatives of the people*.[106] At the heart of the American experiment (and that of the CCP) lies the idea that the people's representatives are subject to the long-term commitments the people made when they adopted the constitution. As such, constitutional politics restrict regular politics. This is a good system, but it is a system for which a certain price has to be paid.[107] This seems to imply that we need to think very carefully before elevating something to the status of a human right.

Such a hesitant attitude about the proliferation of higher law conflicts with a number of popular notions on judicial review and legislation.[108] The law needs to evolve, it is said, and why should that not also be true of the constitution? American constitutional theorists speak of the "living Constitution," and in the Netherlands Hugo Krabbe (1857–1936), professor in Groningen and in Leiden, is the greatest defendant of "living constitutional law."[109]

It is undoubtedly true that the law, including constitutional law, evolves, but it is also important to realize that constitutional law, as a *limitation to sovereign power*, is structurally different from other parts of the law. For constitutional law, we may not only have to use different methods of interpretation,[110] as was previously suggested, but we may also have to be less eager to adapt it to changing circumstances. This is not due to some imperfection of constitutional law; it is precisely what constitutional law was made for. When the American founding fathers decided that they regarded a number of rights as "self-evident" and that

106 Madison, James, Hamilton, Alexander, and Jay, John, *The Federalist Papers,* Penguin Books, Harmondsworth 1987 (1788), p. 436ff.

107 Hamilton's idea is expanded on by: Ackerman, Bruce, *We the People,* The Belknap Press of Harvard University Press, Cambridge, Massachusetts and London 1991.

108 Other writers also address this point. See: Wolfe, Christopher, *The Rise of Modern Judicial Review: From Constitutionalism to Judge-Made Law*, Basic Books, Inc., Publishers, New York 1986; Berger, Raoul, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, Harvard University Press, Cambridge, Massachusetts and London 1977.

109 Krabbe, H., "De heerschappij der grondwet," in: *De Gids,* 1906, *Volume 4*, pp. 371–407; Krabbe, H., *Ongezonde lectuur,* J.B. Wolters, Groningen 1913. See on his views: Zoethout, C.M., "Hugo Krabbe over recht, staat and staatsrecht," in: *Recht and kritiek,* 1991, pp. 468–481. See for a critique of the concept of the "living Constitution": Rehnquist, William H., "The notion of a living constitution,", in: *Texas Law Review,* Vol. 54 (1976), pp. 693–706.

110 See for a modern theory on this: Bobbitt, Philip, *Constitutional Interpretation,* Blackwell, Oxford and Cambridge, Massachusetts 1991.

they therefore wished to set them down in a formal document, they expressly intended to protect them from the agitations of future times.

> We must leave open the possibility of an appeal from the people drunk to the people sober, if individual and minority rights are to be protected in the periods of excitement and hysteria from which we unfortunately are not immune.[111]

But let us turn to legislative self-restriction. Does this offer better prospects? It seems not. More and more policy objectives are put forth in the form of "rights-talk." From classical fundamental rights we have evolved to social fundamental rights, and since the 1980s there has also been talk of a third generation of fundamental rights, the solidarity rights, among which are counted the right to peace, humanitarian assistance, national self-determination, and other collective rights. This can be viewed as a proliferation of human rights in a quantitative sense: more and more human rights are added all the time (without the abolition or falling into disuse of the old ones).[112]

Besides this quantitative expansion, it is also possible to discern expansion in the area of the number of subjects who can avail themselves of these rights. From adults to children, from children to animals.[113]

These are without a doubt all highly well-intentioned attempts to address urgent social and political problems, but everyone should realize that the actual effectuation of these rights, meaning that they become enforceable in front of a judge, would increase the tension with the democratic element of the constitutional democratic state to an unacceptable point. If these rights are not effectuated in the judicial sense but simply set down in international treaties, there is a danger of the human rights idea losing credibility and human rights being regarded as fine rhetoric, but practically useless.

The end of history thesis again

How pessimistic or optimistic should we be about the application of restraint in both the judicial interpretation of human rights and their legislative inception? As far as

111 McIlwain, *Constitutionalism,* p. 149; McIlwain, "The fundamental law behind the constitution of the United States," p. 245. Also see on this notion: Jacobs, Frans, "Das Paradigma der praktischen Unvernunft," in: Robert Alexy and Ralf Dreier, Hrsg., *Rechtssystem und praktische Vernunft,* ARSP-Beiheft, Franz Steiner Verlag, Stuttgart 1993, pp. 151–153.

112 See on this: Alston, Philip, "A third generation of solidarity rights: progressive development or obfuscation of international human rights law?," in: *Netherlands International Law Review,* Vol. 29 (1982), pp. 307–322; idem, "Conjuring up new human rights: a proposal for quality control," in: *The American Journal of International Law,* Vol. 78 (1984), pp. 607–621; Marks, Stephen P., "Emerging human rights: a new generation for the 1980's?," in: *Rutgers Law Review,* Vol. 33 (1981), pp. 435–452.

113 See: D'Amato, Anthony and Chopra, Sudhir, "Whales: their emerging right to life," in: *American Journal of International Law,* Vol. 85 (1991), pp. 21–62.

judicial interpretation is concerned, both the regular kind and the constitutional variety, a sea of literature has appeared, and in the last few years it has often been discussed. We cannot go into that debate here, and moreover, it is too soon for reliable prognoses on the result of the dialogue between linguists, jurists, and others on the subject of interpretation. Suffice it to say that the popularity of postmodern interpretation theories, like Rorty's, does not inspire faith in the likelihood of a *restriction* on how texts can be interpreted.[114]

The developments in the area of legislation, too, beg the question of which rights we should and should not recognize as fundamental and restrictive of regular politics. For instance, in international law we are seeing the proliferation of higher law reach ever greater proportions. As we have seen, there is talk of a third generation of human rights in the form of "solidarity rights": the right to peace, the right to development, the right to a healthy environment, and the right to share in the common heritage of mankind.[115] Proponents of these kinds of new rights often have the best of intentions, but what is often lacking is reflection on the question of whether such proliferation of fundamental rights undermines the constitutional idea *as such*. After all, when all sorts of claims have to be weighed against each other on an equal footing, the law dissolves into a political debate.[116] When a judge is asked to decide whether legislation is in conflict with constitutionally safeguarded higher law, and the latter consists of a colorful mishmash of policy objectives presented as fundamental rights, it is almost inevitable that the CCP will succumb to internal tensions. In that case, Van den Bergh and other critics of the CCP will be proved right in their assertion that it is an impossible ideal.[117]

As we have seen, Jeremy Bentham, the father of legal positivism, spoke of human rights as "nonsense on stilts." Although the charge may not be entirely justified, it

114 See on this: Rorty, Richard, "The banality of pragmatism and the poetry of justice," in: *Pragmatism in Law & Society,* eds. Michael Brint and William Weaver, Westview Press, Boulder, San Francisco, and Oxford 1991, pp. 89–99. On the meaning of Rorty's ideas on the interpretation of the law, see: Moore, Michael S., "The interpretative turn in modern theory: a turn for the worse?," in: *Stanford Law Review,* Vol. 41 (1989), pp. 871ff.

115 An argument in favor of solidarity rights was made by K. Vasak. See on this: Kooijmans, P.H., "Human rights – universal panacea?," in: *Netherlands International Law Review,* Vol. 37, No. 3 (1990), pp. 315–330, p. 316.

116 According to proponents of the American Critical Legal Studies movement, we ought to abandon the notion that law if different from ordinary political discussion. See: Schwartz, Louis B., "With gun and camera through darkest CLS-land', in: *Stanford Law Review,* Vol. 36 (January 1984), pp. 423–464, and Howarth, David, "Making sense out of nonsense," in: Hyman Gross and Ross Harrison, eds., *Jurisprudence,* Cambridge Essays, Clarendon Press, Oxford 1992, pp. 29–55; Purvis, Nigel, "Critical legal studies in public international law," in: *Harvard International Law Journal,* Vol. 32 (1991), pp. 81–127.

117 Kooijmans also objects to the recognition of these third generation fundamental rights. He writes that the gradual introduction of ever more human rights categories can have the effect that the protection of old categories is no longer ensured. As such, his line of argument differs slightly from what is argued here. See: Kooijmans, "Human rights – universal panacea?," p. 329.

should give us pause for thought. If constitutional politics indeed keeps expanding at the expense of regular politics, a point will come at which the products of constitutional politics are no longer seen as anything out of the ordinary. It is going a bit far to speak of "nonsense on stilts," but people may indeed come to view human rights and fundamental rights as more hot air than substance. What we may be able to learn from Bentham is that we should not try to protect every significant interest by means of a constitutional judicial process. Some crucial issues—and who would deny that the environment or world peace are of vital importance?—might not lend themselves very well to a "constitutional approach." After all, constitutional politics should not swallow regular politics whole.

This brings us back, finally, to Fukuyama's "end of history" thesis. Is the CCP the end of constitutional history? If the proliferation of fundamental rights and the expansion of constitutional politics at the expense of regular politics continues, the suspicion that the CCP is *not* the end of constitutional history may be justified. It would at least induce us to develop alternative models in which the tensions within the CCP are, in the Hegelian sense, "*aufgehoben*" (annulled but also saved). For the foreseeable future, however, we lack a sense of direction in this area, and perhaps a different direction is not even necessary, because the legislature and the judiciary first and foremost, but also others who feel responsible for the CCP, come to understand the preconditions under which the political experiment of the constitutional democratic state might succeed. Still, there is reason to worry about the future development of the CCP. Two developments are particularly alarming. First, as we have seen, influential modern interpretation theories offer no basis for the idea, inherent to the CCP, that the interpreting judge should practice restraint. After all, postmodern theories of interpretation, of which Rorty's can be considered the most influential, hold that these types of ideals are based on illusions. A second troubling development is the seductive logic hidden in the assertion that when something else is required for the preservation of a fundamental right, people also have a right *to that other thing*. There is a certain logic in this line of reasoning, but this way we do run the risk of continually inventing new generations of fundamental rights and human rights whenever the interests at stake feel sufficiently pressing. One human right will automatically produce another, and in time every pressing interest will have been elevated to a fundamental right, so that *de facto* there will no longer be a difference between regular legislation and "higher law."

Taking all of this into consideration, it seems justified to posit that the CCP, although it is the dominant model at the moment, is certainly not without problems. At the moment, it is not under threat from *external* circumstances, by competing models, but by *internal* factors. One could say that the CCP is threatened by its own success.

Chapter 3

The separation of church and state

In April 2013, British Prime Minister David Cameron made a controversial statement. He called Great Britain a "Christian country." He even said that Great Britain ought to become "evangelical" again.

Reactions to the Christian identity he approvingly ascribed to the British state came hard and fast. A group of 25 public figures accused the prime minister of sowing discord in the country.[1] The prime minister should not voice a preference for any religion, his critics argued. That is to say, he should not proclaim a preference on behalf of the British *state* (his *personal* religious preferences aside).

A manifesto against the prime minister's position, drawn up in response to this situation, was signed by prominent figures from the world of science and literature: Philip Pullman, Anthony Grayling, Sir Terry Pratchett, and several Nobel Prize winners.

Some did not mince words in their responses to the prime minister. Cameron had "damaged society," people said. He had painted an "incorrect picture of Great-Britain," one of his critics posited. Professor Jim Al-Khalili, president of the British Humanist Association, spoke of a "disturbing trend."

Discussions such as the one that arose in response to the British prime minister's remarks are no exception these days. Everywhere in Europe, and outside it as well, fierce debates are taking place about how religion and the state should relate to one another. In Italy, there was a battle about whether Christian crucifixes should be allowed to hang on the walls of public schools.[2] In

1 Bingham, John, "David Cameron 'fueling sectarian division by bringing God into politics'", in: *The Telegraph*, April 20, 2014.

2 Annicchino, Paquale, "Winning the battle by losing the war: the *Lautsi* case and the holy alliance between American conservative Evangelicals, the Russian Orthodox Church and the Vatican to reshape European identity," in: *Religion and Human Rights,* Vol,. 6 (2011), pp. 213–219; Zoethout, C.M., "Rethinking adjudication under the European Convention," in: Jeroen Temperman,(ed., *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom,* Martinus Nijhoff Publishers, Leiden 2012, pp. 413–427. In the European Convention on Human Rights (ECtHR), "'Lautsi v. Italy," No. 30814/06, 50, November 3, 2009, (Lautsi I), the ECHR ruled against crosses on the walls of schools. In ECtHR,

France, there are discussions about headscarves in the civil service and in schools, and about burkas in the street.[3] The conversation that Prime Minister Cameron brought to England is, it seems, a trend.

There was also support for Cameron's position. It came, predictably, from the side of the church, in the person of Bishop Michael Nazir-Ali (*b.* 1949). The bishop said: "While some acknowledge the debt which Britain owes to the Judeo-Christian tradition, they claim also that the values derived from it are now free-standing and that they can also be derived from other world-views."[4] Nazir-Ali fears that this is not possible. There is a danger, he writes, "that we are living on past capital which is showing increasing signs of being exhausted."[5] This is why, like Cameron, Nazir-Ali believes that we should return to our culture's Christian roots.

Bishop Nazir-Ali

What David Cameron's and Bishop Nazir-Ali's remarks tell us is that it is not only Middle Eastern and North African states that are contemplating the religious or secular nature of the state. That region was home to the Arab Spring,[6] which has given new life to the debate on whether or not states ought to have an Islamic identity. So there, the question is not about whether the state should adopt a *Christian* character, but whether the constitution should include references to Islam (or to Islamic law: Sharia).[7]

An extra dimension to these discussions is the rise of religious radicalism since the 1980s and 1990s. In Judaism,[8] Christianity,[9] and Islam,[10] it is the

"Lautsi and others v. Italy," No. 30814/06, 54, March 18, 2011 (Lautsi II), the crosses were once again allowed.

3 In ECHR, "Case of *S.A.S. v. France*," July 1, 2014 the European Court in Strasbourg upheld French legislation banning clothing that covers the face. See on face covering: Chesler, Phyllis, "Ban the burqa? The argument in favor', in: *The Middle East Quarterly,* Fall 2010, pp. 33–45.

4 Nazir-Ali, *Triple Jeopardy for the West: Aggressive Secularism, Radical Islamism and Multiculturalism,* Bloomsbury, London 2012, p. 12.

5 Nazir-Ali, Ibid., p. 12.

6 Which, unfortunately, was partly hijacked by Islamic forces. See about this: Gozlan, Martine, *Les rebelles d'Allah: Ils ont défié l'ordre islamiste*, préface de Jean-François Kahn, l'Archipel, Paris 2014.

7 Zee, Machteld, 'Five options for the relationship between the state and Sharia councils', in: *Journal of Religion and Society,* Vol. 16 (2014), pp. 1–18; Zee, Machteld, "Choosing Sharia: multiculturalism, Islamic fundamentalism and British Sharia councils," PhD dissertation Leiden, Leiden 2015.

8 Elizur, Yuval and Malkin, Lawrence, *The War Within: Israel's Ultra-Orthodox Threat to Democracy and the Nation,* Overlook Duckworth, New York and London 2013.

9 Linker, Damon, *The Theocons: Secular America under Siege,* Doubleday, New York 2006.

10 Bawer, Bruce, *While Europe Slept: How Radical Islam is Destroying the West From Within,* Doubleday, New York and Auckland 2006.

orthodox and fundamentalist currents that are on the rise. Not moderate religiosity (a "loose" interpretation of the holy book and a critical attitude with regard to religious authority), but the strictest and most intolerant forms of religious thinking seem to have the wind in their sails, in particular the extremely violent Islamic State. How should the state respond to this?

One example among many. In June 2014, a discussion arose about how growing Islamic extremism in schools could be countered.[11] It was sparked by accusations that Islamic fundamentalists had been planning to infiltrate and even take over schools in Birmingham. These discussions gained an extra dimension against the backdrop of an event that took place on May 22, 2013, on a street in South London, a British soldier, Lee Rigby, was murdered by two jihadists.

An element of this discussion is also the degree to which schools ought to tolerate symbols and clothing associated with religious convictions, such as the Islamic headscarf. What makes these discussions interesting is that the traditional arrangements and institutions within a certain culture are no longer regarded as self-evident. It is no longer self-evident that the British state has a Christian identity. Nor do British schools self-evidently allow religious symbols anymore (French schools do *not*, nor do some Belgian schools).[12] States can change their identities—at least, that is what these discussions seems to suggest. It appears that all states are trying to reinvent their identities.

In Chapter 3, we want to discuss five models for the relationship between the state and religion. That is because there are five positions the state can take with regard to religion. In other words, every country can choose from these five options to organize its relationship with religion. These models are:

1 The atheist state
2 The theocratic state
3 The state with a state-religion
4 The multicultural or multireligious state
5 The secular or agnostic state.

As will become clear in these pages, we, too, have a preference. We believe that the last model, the model of the religiously neutral state, the secular state, or the "agnostic state" is best suited to organize this relationship in the current circumstances.

11 Castle, Stephen and Freytas-Tamura, Kimiko de,"'Rift deepens in Britain over claims of school infiltration plot by Islamic extremists," in: *New York Times*, June 8, 2014.

12 On September 1, 2009, the Royal Athenaeum in Antwerp introduced a ban on the wearing of religious symbols. Students of 65 nationalities attended the school, and many were surprised that the school board had dared to take such a drastic measure, but gradually, the measure came to be accepted and even appreciated. Religiously neutral clothing became the norm at the school. See on this case: Hermans, Karin, *Een tip van de sluier*, Houtekiet, Antwerpen and Utrecht 2010.

As such, the criticism against David Cameron, Nazir-Ali, and others who seek to give the state a religious identity (or establish that the state already has this identity, to then argue that it can and should be reaffirmed) seems to be justified.

We will also argue that this not only has implications for Britain or the Netherlands, but, in principle, for all the states in the world (see also Chapter 4).

In order to make this point, we not only examine the most conventional models that regulate the relationship between state and religion in Europe and the Western world, but also the model of *theocracy* (using Saudi Arabia as an example). We do this because this model has great influence on the radicals. The theocracy that only appeared to exist in Iran and Saudi Arabia 10 years ago seems to be gaining ground in the world of the Middle East, and as such it can be considered a serious competitor to the more traditional models.

But first, by way of introduction and to offer a little context, let us continue the discussion on the Christian character of the British state that Cameron sparked. His views were comparable to those of Bishop Nazir-Ali. Let us therefore have a closer look at the bishop's opinions.

Nazir-Ali under criticism

There are several ways in which Nazir-Ali's position that the British state should adopt a Christian identity can be challenged. Cameron and Nazir-Ali's position is also defended by others, and the *way in which* this is done often reveals an identical pattern. We will discuss this position now by offering four ways of looking at the matter.

Cultural diversity

An initial question one could ask of Nazir-Ali is whether his position leaves enough room for cultural diversity. It is oftentimes said, by Nazir-Ali as well, that we owe much to the Judeo-Christian tradition. But, one could then ask, why only the Judeo-Christian tradition? Why not the heathen traditions? They also had a significant influence—especially in Great Britain. Or to Greek philosophy? Or to Roman law? And why is the impact of the Vikings not mentioned?

We are not saying this out of some virtuous multiculturalist reflex, but because we believe that no one could seriously assert that the Judeo-Christian tradition was as massively influential as some commentators claim (and, perhaps, hope).

Historical causality

A second problem with a position such as Nazir-Ali's is that, oftentimes, all sorts of assumptions are made about historical causality that are far from obvious. An example. It is often said that democracy, constitutionalism, and

human rights evolved from within Judeo-Christian culture. This, it is argued, is not a coincidence! And it cannot be assumed that democracy, constitutionalism, and human rights can be maintained if we allow *their foundation*, the Judeo-Christian tradition, to erode.

What makes this view unconvincing is that it is *assumed* that democracy, constitutionalism, and human rights were *caused* by the Judeo-Christian tradition. But is that really true? One could also say that the worldview of Galileo Galilei (1564–1642) evolved from within the Judeo-Christian culture, but we know that Galileo's worldview survived *in spite of* Christianity rather than because of it.[13] Could the same not also be true of democracy, constitutionalism, and human rights?[14]

Underestimation of modernity

A third point that often surfaces in the type of view that Bishop Nazir-Ali espouses is what could be considered an underestimation of the meaning of modernity. Since the Reformation, the Enlightenment, and the modern perspective that emerged in the wake of these cultural movements, another way of thinking, one we could describe as "relativizing religion," came to prominence.

Europe is the continent that has experienced the most secularization, and it is also a continent in which democracy, constitutionalism, and human rights evolved. Is it not possible, therefore, that many of our political institutions are products of secularization, rather than of our Judeo-Christian cultural roots?[15]

And is it not also hard to deny that modernity has *cast off* many Judeo-Christian elements? For instance, many have left behind Christian sexual mores these days.[16]

This brings us to an important point relating to the meaning of criticism. Casting off elements from our cultural heritage—a crucial act of criticism—has

13 See the sections on Galileo in: White, A.D., *A History of the Warfare of Science with Theology in Christendom,* two volumes, Dover Publications, New York 1960 (1896); Russell, Bertrand, *The Scientific Outlook,* Routledge, London and New York 2001 (1931); Draper, John William, *History of the Conflict between Religion and Science,* D. Appleton and Company, New York 1897 (1874).

14 In our view, this point is also overlooked by: Siedentop, Larry, *Inventing the Individual: The Origins of Western Liberalism*, Penguin Books, London 2014.

15 This is the main argument of: Grayling, A.C., *Towards the Light: The Story of the Struggles for Liberty & Rights that Made the Modern West*, Bloomsbury Publishing, London 2007.

16 See, for instance: Ranke-Heinemann, Uta, *Eunuchen für das Himmelreich: Katholische Kirche und Sexualität von Jesus bis Benedikt XVI,* 5. Auflage, Wilhelm Heyne Verlag, München 2012 (1988); Russell, Bertrand, *Marriage and Morals*, Unwin Paperbacks, George Allen & Unwin, London 1929; Endsjø, Dag Øistein, *Sex and Religion: Teachings and Taboos in the History of World Faiths,* Reaktion Books, London 2011; Taylor, Richard, "Religion and the debasement of goodness," in: John Donnelly, ed., *Reflective Wisdom: Richard Taylor on Issues That Matter*, Prometheus Books, Buffalo, New York 1989, pp. 182–192.

to be done on the basis of a *criterion*, and that criterion *cannot be the tradition itself*. [17]

So in that sense, the claim that moral ideas have to be *independent*—which Nazir-Ali resists—seems to be more fruitful than the claim that these ideas need to be connected to one specific religious tradition.

Religious legitimization of morality and politics

But perhaps the most principled argument, the fourth and last, against his apologia for the Christian tradition as the source of our modern-day values is that religion cannot "ground" values, as Nazir-Ali claims it can.[18]

In order to properly understand this, we have to make some clear distinctions. First of all, it is very possible that there is a *psychological* relationship between religion on the one hand and morality and politics on the other, in the sense that religion can influence moral and political ideas. That happens often. No one will dispute that.

Secondly, there can also be a *sociological* relationship between religion and morality, in the sense that a country's dominant religion can influence the collective morality, culture, and governance of that country. That is often the case as well.

But these psychological and sociological relationships tell us nothing about the *philosophical relationship* between religion and morality. We mean by this that it is in no way proved that a religious basis for a moral position renders this position more "morally acceptable." In other words, a religious foundation cannot provide morality with *legitimacy* (although it is *experienced* that way by religious believers).

What we often see in reflections like Nazir-Ali's is that the issue of legitimacy is "smuggled in" on the backs of the first two points (psychology and sociology). Because there is a psychological and sociological connection between religion and morality, many believe that morality "requires" religion. Otherwise, it is said, morality is "up in the air."

17 This is a mistake of communitarian tradition, reflected in thinkers such as: Alisdair McIntyre, Charles Taylor, and Michael Walzer. We refer to the critique of communitarianism developed by Jeremy Waldron, especially in: Waldron, Jeremy, "Minority cultures and the cosmopolitan alternative," in: *University of Michigan Journal of Law Reform,* Vol. 25 (1992), pp. 751–793; Waldron, Jeremy, "One law for all? The logic of cultural accommodation," in: *Washington & Lee Law Review,* Vol. 59, No. 3 (2002), pp. 3–34; Waldron, Jeremy, "Rushdie and religion,"' first published under the title "Too important for tact" in: *The Times Literary Supplement,* March 10, 1989, pp. 248 and 260, and reprinted in: Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991,* Cambridge University Press, Cambridge and New York 1993, pp. 134–143. See also: Nielsen, Kai, 'Morality and God: some questions for Mr. MacIntyre', in: *The Philosophical Quarterly,* Vol. 12, No. 47 (April 1962), pp. 129–137.

18 Nazir-Ali, *Triple Jeopardy for the West*, p. 24.

Those who ascribe to this view, however, are laboring under a misconception. After all, *philosophically*, morality is always "up in the air." By *philosophically* we mean that the *legitimization* of morality does not require religion. There may be a psychological connection between morality and religion, a sociological connection, but not a philosophical one.

Not surprisingly, Nazir-Ali criticizes evolutionary biologist Richard Dawkins (*b*. 1941) for seeing God as an "unnecessary hypothesis."[19] These words, "*unnecessary hypothesis*," refer to the French scientist Simon Laplace (1749–1827). In a perhaps apocryphal anecdote, Laplace rejected the idea of the creation of the world from nothing. When Napoleon visited him and asked how Laplace's discoveries related to the idea of a creator, Laplace replied: "Sire, I had no need of that hypothesis." In the terminology we introduced earlier, one could say that, for Laplace, astronomy is "up in the air," because it is not based on religion. But Dawkins believes that this is also true of morality. And in a meta-ethical sense (meaning, when it comes to the foundations of ethics), Dawkins is perfectly right: religion cannot ground ethics.

This brings us to another point. In the section on"Cultural diversity" above, we have seen that one reason to challenge Nazir-Ali's position has to do with his pointing to "past capital" as homogenous, as something that can and should be approved of *en bloc*. But this is impossible. We are living in a world of considerable cultural diversity. This cultural diversity forces us to make certain choices. We can and should decide which cultural traditions we wish to continue and which we do not. These days, an overwhelming majority does not want to continue the religious-cultural practice of female circumcision (however difficult it has turned out to be to put an end to it). The often religiously legitimized practice of discriminating against homosexuality is also a cultural phenomenon that many do not wish to maintain. The taboos against apostasy and conversion to another faith are two more things that many criticize and hope to eradicate. In other words, cultural criticism and religious criticism (used here not as criticism of the dominant pattern *from* a religious perspective but as criticism *of* religion) is an important element of the process of civilization.

The question then is: How can this criticism be levelled effectively?

The answer is: because morality is acknowledged as a critical agency that stands *apart from* and *opposite* religion and culture people maintain those parts of their religious traditions that can pass the test of morality. This means that morality is not based on religion, but religion is based on morality. Or, in other words, we use morality to critically evaluate religious traditions. "Test everything; hold fast to what is good," the Apostle says (1 Thessalonians 5:21).[20]

19 Nazir-Ali, Ibid., p. 26.

20 We quote a passage from the Bible to illustrate that the Bible, just like any other religious text, sometimes contains good advice. However, to repeat the point that is emphasized here, it is not good *because* the apostle says it; the apostle says it because it is good.

This is well put, and it is in perfect agreement with critical morality (we will discuss this more extensively in Chapter 5).

So, when Nazir-Ali says that a significant Christian influence will "remind" the nation of its obligations, for instance to inalienable human dignity, because all men are made in God's image, one could answer that everyone is free to choose his own heuristics, but the Christian tradition is not required to legitimize human dignity. Human dignity is a good principle. We also find it in the Universal Declaration of Human Rights as it was issued by the United Nations in 1948. But human dignity often came to the fore as a result of the *decoupling* of specific religions and the universal moral vocabulary of human rights.[21]

If we take the Universal Declaration of Human Rights seriously, it is hard to avoid the conclusion that the separation of church and state, political secularism, or political agnosticism (and the secular or agnostic state that goes with it) is preferable to other models of the relationship between state and religion.[22]

Theoterrorism and the agnostic state

What the United Nations did in 1948, which was to build moral agreements on a non-religious and thus universal foundation, is also an option for individual states. This means: just as an *individual* can decide not to base his values on religion, so can an *individual state*. Every single state (there are roughly 200 independent states in the world) can decide to adopt a religiously neutral (or "secular," or "agnostic," as we hope to make clear in these pages) attitude (or not). Adopting such a religiously neutral stance means that the state does not speak to its citizens in a religious language and cannot claim to fulfill religious duties, but that it is focused on purely secular goals (for instance, keeping the budget balanced, but not ensuring that legislation is in keeping with holy law).

Theoterrorists[23] and religious fundamentalists are, of course, strongly opposed to this ambition. The jihadist Mohammed Bouyeri (*b*. 1978, raised in

21 Robertson, Geoffrey, *Crimes against Humanity: The Struggle for Global Justice*, Fourth Edition, Penguin Books, London 2012 (1999), pp. 1–49.

22 We will treat the terms *political secularism, political agnosticism*, and *separation of church and state* as identical here. See on this: Zee, Machteld, "Choosing Sharia: multiculturalism, Islamic fundamentalism and British Sharia councils," PhD dissertation Leiden, Leiden 2015; Cliteur, Paul, "State and religion against the backdrop of religious radicalism," in: *International Journal of Constitutional Law*, Vol. 10, No. 1 (2012), pp. 127–152.

23 The term *theoterrorism* can be used to refer to a specific form of religious terrorism that is based on an interpretation of the monotheist god (i.e. the god of Judaism, Christianity, and Islam). There are much more refined and completely harmless interpretations of the monotheistic tradition available. See on this: Scruton, Roger, *The Soul of the World*, Princeton University Press, Princeton and Oxford 2014, p. 1ff. But these harmless interpretations (such as Sufism within Islam) are not relevant to this chapter. Important to this chapter are the *political* interpretations of religion. If that is "hijacked religion," then the focus of this chapter is hijacked

the Netherlands) who murdered Dutch filmmaker Theo van Gogh (1957–2004) on November 2, 2004, declared that Ayaan Hirsi Ali, who had co-created a controversial film with van Gogh, had become an "apostate" the day she had set foot in the Dutch Parliament (she was a Member of Parliament for the Liberal Party at the time). An apostate deserves a death sentence, not just a death sentence as executed *by the state*, but also as executed by individual militants (of which he was one).[24]

As we have seen, this line of reasoning makes perfect sense from the perspective of a religious fundamentalist. After all, the religious fundamentalist is committed to the idea that there is but a single legitimate circumstance: a state that is based on his religious convictions. For an Islamist, this is, of course, a state based on Islam (that is to say, as he perceives it). In other words, only an *Islamic state* is a legitimate state.[25] Any other state ought to be resisted, just like Antigone had to resist Creon (see Chapter 1).

The same goes, *mutatis mutandis*, for other religious terrorists. In 1995, Jewish extremist Jigal Amir (*b*. 1970) murdered the Israeli politician Jitzak Rabin (1922–1995) because the latter had held peace talks with the Palestinians in which he had—at least from Amir's Jewish extremist perspective—"given away" to the Palestinians land that God had promised to the Jews.[26] From the perspective of a Jewish fundamentalist, the territory of Israel is not something democratically elected politicians can make decisions about; that is *God's* prerogative. No one can deviate from the will of God, and that includes a "democratic consensus."

If we think about politics in the way indicated, religion plays a significant role in modern politics. There is no, and can be no "separation" of church and state, from the religious fundamentalist perspective. A good example here is Saudi Arabia.

religion, not religion in its purest form. See on theoterrorism: Cliteur, Paul, "The Rudi Carrell Affair and its significance for the tension between theoterrorism and religious satire," in: *Ancilla Iuris,* Vol. 15, No. 5 (2013), pp. 15–41.

24 Mohammed B. said during his trial that Hirsi Ali became an apostate the moment she became active in Dutch politics, and then "you know what happens." See: Berman, Paul, *The Flight of the Intellectuals,* Melville House, Brooklyn, New York 2010, p. 246; Shore, Zachary, *Breeding Bin Ladens: America, Islam, and the Future of Europe,* The John Hopkins University Press, Baltimore 2006, p. 3.

25 See on this: Tibi, Bassam, "From old jihad to new jihad," in: Gelijn Molier, Afshin Ellian, and David Suurland, eds., *Terrorism, Ideology, Law, and Policy,* Republic of Letters Publishing, Dordrecht 2011, pp. 35–65; Tibi, Bassam, *The Sharia State: Arab Spring and Democratization,* Routledge, London, and New York 2013; Fatah, Tarek, *Chasing a Mirage: The Tragic Illusion of an Islamic State*, John Wiley & Sons Canada, Mississauga, Ontario 2008; An-Na'im, Abdullahi, *Islam and the Secular State: Negotiating the Future of Shari'a,* Harvard University Press, Cambridge, Massachusetts, and London 2008.

26 Halkin, Hillel, "The case of Yigal Amir," in: *New York Sun,* November 6, 2007.

The Saudi rulers say they have founded an Islamic state. And not just "an Islamic state," but the *only legitimate* Islamic state. Since the unification in 1932, the Kingdom of Saudi Arabia has been controlled by the Al Saud family.[27] The Saudi royal family rules in partnership with Wahhabi clerics, who represent a particularly strict and fundamentalist form of Islam. Anyone who forms an opinion based on anything other than the Quran is a *kafir*, an unbeliever, in the view of Sheik Abd al Wahhab (1703–1792).[28]

This can have dire consequences, as we hope to make clear. The Saudi legal system is based on one of the strictest schools of Sharia law: the Hanbali school.[29] The Quran and the Sunnah *are* the constitution.[30] The official religion is Islam, and all citizens are Muslim *by birth* (so not by choice). Changing religions is impossible, because apostasy carries the death penalty. Christians and Jews enjoy some protections as people of the Book (they have *dhimmi* status: inferior to Muslims, but not entirely without rights),[31] but Hindus, Buddhists, Sikhs, and also Shiites and Sufis are seen as polytheists, which grants them an even lower status. Saudi Arabia does not have a penal code, nor a code of criminal procedure.[32] Together with the Republic of Iran, the Saudi monarchy comes closest to a religious extremist utopia.

Naturally, an important question is: How should we respond to the fundamentalist Islamist's claim to the state? One answer is: it is better *not* to respond by arguing that the only legitimate state is actually Christian, or Jewish, or Hindu, or whatever religious basis can be imagined for a state. In other words, it is better not to respond the way David Cameron does to the Islamist challenge (with a Christian counterclaim). And what can be said about Cameron is just as true of Bishop Nazir-Ali (who supported him).

This brings us to the question of the best or most practical relationship between state and religion in modern times. In principle, there are five options.[33] They are (1) the atheist state; (2) the theocratic state; (3) the state with an official state church; (4) the multiculturalist state, and (5) the agnostic state.

27 A vibrant portrait of modern-day Saudi Arabia can be found in: House, Karen Elliott, *On Saudi Arabia: Its People, Past, Religion, Fault Lines—and Future,* Vintage Books, Random House, New York 2013.

28 House, Ibid., p. 16.

29 Marshall, Paul and Shea, Nina, *Silenced: How Apostasy and Blasphemy Codes are Choking Freedom Worldwide,* Oxford University Press, Oxford 2011, p. 22.

30 Marshall and Shea, Ibid., p. 22.

31 Marshall, Paul A., ed., *Religious Freedom in the World*, Rowman & Littlefield Publishers, Lanham 2008, p. 348.

32 Amnesty International, "Document—Saudi Arabia: an upsurge in public executions," May 15, 1993 AI Index: 23/04/93.

33 See on this: Cliteur, Paul, 'State and religion against the backdrop of religious radicalism', in: *International Journal of Constitutional Law,* Vol. 10, No. 1 (2012), pp. 127–152.

The atheist state

First, the atheist state. Atheism, in its most elemental form, is a-theism, i.e. the denial of the claims of theism.[34] Theism is the belief in the existence of a specific god: a personal, transcendent, perfectly benevolent, omnipotent creator of heaven and earth. This god is called *God*. [35]

Atheism has a long history, but because in the past atheists were almost always persecuted and punished, it is difficult to ascertain *how many* atheists actually existed.[36] Usually, *atheism* is a label that philosophers hesitate to adopt to describe their own position in religious matters. (Spinoza and Hume are examples of thinkers who were labeled *atheist* and vehemently tried to refute this accusation.) Because the label *atheist* is considered a stigma and could have serious consequences in some countries, many try to avoid it, which means that we do not know how many atheists actually exist in the world. So, for the same reason that we do not know how many *liberals* there are in North Korea or how many *critics of Islam* there are in Saudi Arabia (most people prefer to keep their heads attached), we also do not know how many atheists there were in 16th- and 17th-century France.[37] As Montaigne (1533–1592) said: "I am willing to go to the pyre for my convictions, but preferably not on it." (His ideas are discussed more extensively in Chapter 5.)

Not until the 19th century, when religious persecution became less severe, did atheists become more vocal. Only then did a large-scale atheist "coming out" occur. In Germany, post-Hegelian philosophy (the "Hegelian Left") was the cradle of much important atheist thought, such as that of Bruno Bauer, Ludwig Feuerbach,[38] and

34 Cliteur, P.B., "The varieties of atheist experience," in: *Philosophy Now,* April/May 2010, pp. 6–8; Cliteur, Paul, "The definition of atheism," in: *Journal of Religion and Society,* Vol. 11 (2009), pp. 1–23.

35 Cooke, Bill, "Atheism," in: Bill Cooke, *Dictionary of Atheism, Skepticism, & Humanism,* Prometheus Books, Amherst and New York 2006, pp. 49–50; Edwards, Paul, "Atheism," in: Paul Edwards, ed., *The Encyclopedia of Philosophy, Vol ume I*, Macmillan and The Free Press, New York and London 1967, pp. 174–189; Nagel, Ernest, "A defense of atheism," in: Paul Edwards and Arthur Pap, eds., *A Modern Introduction to Philosophy,* Revised Edition, The Free Press, Collier-Macmillan, New York and London 1967 (1957), pp. 460–473.

36 Drachmann, A.B., *Atheism in Pagan Antiquity,* Glydendal, London and Kopenhagen, Christiania 1922 (reprinted by: Kessinger Publishing, Whitefish 2005); Bury, J. B., *A History of the Freedom of Thought,* Thornton Butterworth, London 1932 (1913); Hiorth, Finngeir, *Introduction to Atheism,* Indian Secular Society, Pune 1995.

37 Marshall, Paul, ed., *Religious Freedom in the World: A Global Report on Freedom and Persecution,* Freedom House, Nashville, Tennessee 2000, p. 268: "There are small numbers of Saudis of other religions, especially Christian, but they usually remain hidden since, if discovered, they could be executed as apostates." On the ways in which 18th century philosophers tried to escape censorship and persecution, see: Blom, Philipp, *Wicked Company: Freethinkers and Friendship in Pre-revolutionary Paris,* Phoenix, Weidenfeld & Nicolson, London 2012 (2011).

38 Feuerbach, Ludwig, *Das Wesen des Christentums,* Nachwort von Karl Löwith, Philipp Reclam Jun., Stuttgart 1978 (1841).

Karl Marx.[39] In his *A Contribution to the Critique of Hegel's Philosophy of Right* (1843/1844), Karl Marx gives his now famous description of religion as the opium of the people. Religion is both the *expression* of misery and the *protest against* that misery, Marx says.[40] It is "the sigh of the oppressed creature." Marx also speaks of the need to *abolish* religion as a condition for true happiness. We have to shake off our illusions.[41]

One of the most famous atheists of our time, the British-American journalist Christopher Hitchens (1949–2011),[42] offers the following interpretation of this quotation. "Religion," Hitchens says, "is man-made."[43] This concise phrase has far-reaching consequences. As thinkers like Hitchens, Thomas Paine, and Baron d'Holbach emphasized, all transcendence is "mediated by people," meaning it happens because of human intervention. Believers do not follow the commandments of God, but of those who are thought to be God's representatives (often *self-appointed*).

In our time, atheism went through a revival after 9/11 in the form of what is called *the new atheism*, represented by thinkers such as Christopher Hitchens, Richard Dawkins,[44] Sam Harris,[45] Daniel Dennett,[46] A.C. Grayling,[47] Peter Singer,[48] and others.[49] But it is important to stress one thing, and that is that

39 Löwith, Karl, *From Hegel to Nietzsche: The Revolution in Nineteenth-Century Thought,* translated from the German by David E. Green, Constable, London 1964.

40 Marx, Karl, *Zur Kritik der Hegelschen Rechtsphilosophie,* 1843/1844, in: Karl Marx and Friedrich Engels: *Ausgewählte Werke*, Dietz Verlag, Berlin 1977, pp. 9–25.

41 See also commentary on this passage from Marx by: Hitchens, Christopher, *God is not Great: How Religion Poisons Everything,* Twelve, New York and Boston 2007, p. 10.

42 Hitchens wrote one book on atheism: Hitchens, Ibid., and compiled another book on the subject: Hitchens, Christopher, *The Portable Atheist: Essential Readings for the Nonbeliever,* selected and with introduction by Christopher Hitchens, Da Capo Press, Philadelphia 2007. He was most famous for his many debates with believers, many of which can be found on the internet.

43 Hitchens, *God is not Great*., p. 10.

44 Dawkins, Richard, *The God Delusion,* Paperback Edition, Black Swan, Transworld Publishers, London 2006.

45 Harris, Sam, *Letter to a Christian Nation,* Alfred A. Knopf, New York 2006; Harris, Sam, *The End of Faith: Religion, Terror, and the Future of Reason,* The Free Press, London 2005 (2004).

46 Dennett, Daniel C., *Breaking the Spell: Religion as a Natural Phenomenon,* Allen Lane, Penguin Books, New York 2006.

47 Grayling, A.C. *The God Argument: The Case against Religion and for Humanism,* Bloomsbury, London 2013; Grayling, A.C., *Against All Gods: Six Polemics on Religion and an Essay on Kindness,* Oberon Books, London 2007; Grayling, A.C., *To Set Prometheus Free: Essays on Religion, Reason and Humanity,* Oberon Masters, London 2009.

48 Singer has not written a monography about religion, but his meta-ethical position is well known (see, for instance: Hauser, Marc and Singer, Peter, "Morality without religion," in: *Free Inquiry,* December 2005/January 2006, pp. 18–19) as are his thoughts on the practical consequences of a secular ethics for bio-ethics. See: Singer, Peter, *Practical Ethics,* Third Edition, Cambridge University Press, Cambridge 2011 (1980).

49 Stenger, Victor J., *The New Atheism: Taking a Stand for Science and Reason,* Prometheus Books, Amherst, New York 2009; Amarasingam, Amarnath, ed., *Religion and the New Atheism: A Critical Appraisal,* Brill, Leiden 2010.

the new atheism, like the classical atheism of previous generations, is a *private atheism*. This means that it is a personal conviction of individuals that does not have any ambition to exert political power. On the contrary, Karl Marx's atheism became the basis of a *state doctrine*. In the Soviet Union, from 1917 onwards, the spreading of atheism became a goal of the state, the "atheist state." Marx's remark that religion ought to be abolished was interpreted as a directive *for the state*. It was considered the job of the state to try to destroy religion as a dangerous societal perversion. The former Soviet Union and Albania were the most famous examples of this.[50]

The claim that atheism as a private doctrine inevitably leads to state atheism is clearly false.[51] It can be compared to smoking. People can decide that smoking is unhealthy and therefore not smoke, or quit smoking. People can also *advise others* not to smoke. But it would be unjust to accuse the doctor who gives a person health advice of trying to "force" that person to adopt a healthy lifestyle.

We can compare Hitchens and Dawkins with the doctor from this example. Lenin and Stalin, on the other hand, favored "involuntary commitment" to a theism rehab clinic. This is an essential difference.

The theocratic state

Having discussed the first model of the relationship between state and religion, the atheist state, we now move to the *prima facie* opposite model (although also comparable: *les extrêmes se touchent*): the religious fundamentalist or theocratic state, as we see it in, for instance, Saudi Arabia and Iran.[52] These countries are theocracies, in which *theocracy* literally means *government by God*.[53] But just as a *democracy* is often governed by *representatives of the people*, a *theocracy* is also a government of *representatives*, in this case of *God*.

In the case of a theocracy, the representatives are not ordinary politicians but clerics with a powerful political ambition. In a theocracy, religion is unavoidably political.

It is possible to distinguish two types of religion:

1 Religion as a framework of meaning for individual life
2 Religion as a shared point of departure for the political community as a whole.

50 Luehrmann, Sonja, *Secularism Soviet Style: Teaching Atheism and Religion in a Volga Republic,* Indiana University Press, Bloomington, Indianapolis 2011.
51 But often resurfaces. See, for instance: McGrath, Alister, *The Twilight of Atheism. The Rise and Fall of Disbelief in the Modern World,* Doubleday, New York 2004.
52 Raddatz, Hans-Peter, *Iran: Persische Hochkultur und irrationale Macht,* Herbig Verlagsbuchhandlung, München 2006.
53 Taheri, Amir, *The Persian Night: Iran under the Khomeinist Revolution,* Encounter Books, New York and London 2009.

It sounds a bit strange, and that is why this terminology is not common, but it would clarify matters to distinguish between:

1 Religious religion
2 Political religion.

The first certainly does not need to lead to the second (contrary to what is often argued). When Spinoza (1632–1677) identifies nature with God ("deus sive natura") in his *Ethics* (1678, published posthumously), it could be viewed as a religious position. But in his *Theological-Political Treatise* (1670), that same Spinoza also develops a scathing criticism of any political religion.[54]

In the following paragraphs, we will provide an extensive analysis of the theocratic state. This model of the relationship between state and religion deserves more time than the first model, because the theocratic state is a kind of ideal for modern-day theoterrorists. Jihadist murderers like Mohammed Bouyeri (of Theo van Gogh, † 2004) and Michael Adebolajo (of Lee Rigby, † 2013), but also their ideologues, such as Osama Bin Laden, Ayman al-Zawahiri, and Ayatollah Khomeini, all seem to be inspired by the idea of a theocratic state, a state ruled by God himself, which is contrasted with a state ruled by mere mortals. That is why it is highly relevant to study this model, just as it was relevant to study the model of the Soviet Union before the fall of the Berlin Wall.[55] Those who say that the radicals' interpretation of Islam is not Islam in its truest form may be right, but they also totally miss the relevant point.[56] From a social-science perfective, it does not matter what Islam *is* rather what it is *perceived* to be. To quote Bishop Berkeley (1685–1753), "To be is to be perceived" (although the phrase is used very differently here than the famous Irish philosopher intended it to be).

As is extensively discussed in *Freedom of Thought 2014. A Global Report on the Rights, Legal Status, and Discrimination Against Humanists, Atheists, and the Non-religious,* there is no freedom of religion or belief or

54 Spinoza, Benedict de, *Theological-Political Treatise*, L. 1670, edited by Jonathan Israel, Cambridge University Press, Cambridge and New York 2007.

55 As was done by: Acton, H.B., *The Illusion of the Epoch: Marxism-Leninism as a Philosophical Creed,* Routledge & Kegan Paul, London and Boston 1962 (1955); Bochenski, Joseph M., *Marxismus-Lenisnismus: Wissenschaft oder Glaube,* 3e Auflage, Günter Olzog Verlag, München and Vienna 1975 (1973); Wetter, G.A., *Sovietideologie Heute, I*, Dialektischer und historischer Materialismus, Fischer Taschenbuch Verlag, Frankfurt am Main 1962.

56 That is also why the work of, for instance, Karen Armstrong cannot be viewed as a relevant critique of the ideas developed in this chapter. See: Armstrong, Karen, *A History of God: From Abraham to the Present: the 4000-Year Quest for God,* Heinemann, London 1993; Armstrong, Karen, *Islam: A Short History,* Random House, Toronto 2002; Armstrong, Karen, *The Case for God: What Religion Really Means,* The Bodley Head, London 2009.

freedom of speech in Saudi Arabia.[57] There is also no separation of church and state, or anything that might be called *political secularism*. The royal family, in cooperation with the religious establishment, forces all citizens to abide by the official Wahhabi interpretation of Islam.[58] Blasphemy and apostasy are punishable by death, although this ultimate punishment is not often carried out. Lesser-known crimes are "witchcraft" and "sorcery."[59] These are punishable by beheading or crucifixion.[60] Not much is known about most of these cases because, as Amnesty International has said, wrongdoers are convicted by special courts to which the general public does have access.[61]

Saudi Arabia as a theocratic state

For a proper understanding of the Saudi theocracy, we have to know more about the country's history. It was King Abd al-Aziz Al Saud (1876–1953) who, in 1932, united the regions Nejd and Hejaz on the Arabian Peninsula into the Kingdom of Saudi Arabia.[62] His son, King Fahd Bin Abd Al-Aziz Al Saud (1921–2005), ascended to the throne in 1982. When King Fahd died in 2005, King Abdullah (*b*. 1924) came to power. Under King Fahd, a few modest democratic reforms were made, such as the appointment of an advisory council, the *Majlis-ash-Shura*. However, it is only allowed to make proposals. The members of the *Majlis* are not representative of the population.[63] King Abdullah organized local elections in 2005, but women were excluded from the political process, and candidates were subject to approval from the government.[64] Abdullah, like Fahd, was one of the many sons of Ibn Saud, the founder of modern Saudi Arabia. When King Abdullah died in 2015 the kingdom was led by King Salman bin Abdulaziz Al Saud (*b*. 1935) who leaves effective control to the crown prince Mohammed bin Salman bin Abdulaziz Al Saud (*b*. 1985). Initially, Salman acted as if he was a reformer.

57 International Humanist and Ethical Union (IHEU), *Freedom of Thought 2014. A Global Report on the Rights, Legal Status, and Discrimination Against Humanists, Atheists, and the Non-religious,* IHEU, London 2014.

58 See on this: Allen, Charles, *God's Terrorists: The Wahhabi Cult and the Hidden Roots of Modern Jihad,* Little, Brown, London 2006; DeLong-Bas, Natana J., *Wahhabi-Islam: From Revival and Reform to Global Jihad,* I.B. Tauris, London and New York 2007.

59 In 2000, the authorities closed an Ismaili mosque in the south-western region of Najran because it was said that "witchcraft" was practiced there. Marshall, *Religious Freedom in the World* (2008), p. 348.

60 IHEU, *Freedom of Thought 2014.*, p. 176.

61 IHEU, Ibid., p. 176.

62 Marshall, *Religious Freedom in the World* (2000), p. 265.

63 Marshall, Ibid., p. 265.

64 Marshall, *Religious Freedom in the World* (2008), p. 346.

Political parties are illegal in Saudi Arabia, as are unions. There are no general elections. The king rules by decree. There is no independent judiciary. The king appoints all judges, and the royal family serves as the highest court of appeal.[65] The police routinely torture prisoners, and torture as a means of forcing confessions is a common practice. There is a high level of censorship as well as self-censorship.[66] Women are separated from the male half of the population at work, in schools, in restaurants, and on public transport. Until recently, women were not allowed to drive, and they are expected to wear an *abaya* (a piece of clothing that covers the head, face, and body).

In the Islamic world, Saudi Arabia has a special role because it regards itself as the guardian of the two holiest sites in Islam: Mecca and Medina.[67]

The official state religion is Wahhabism. Central to this is belief in the unity of God.[68] This implies a firm rejection and condemnation of any type of polytheist thinking. Polytheistic beliefs are banned in the Kingdom, and illegal practices are severely punished if discovered.

Because of the thorough exclusion of all religions other than the ruling Wahhabi orthodoxy, Saudis rarely come into contact with other belief systems. During the Gulf War, allied troops in Saudi Arabia were instructed to not pray openly out of consideration for the feelings of the population.[69]

Although Wahhabi clerics occupy an important position, they are not allowed to criticize the ruling royal family, a rule that is generally obeyed, as one would imagine, considering the weight of the sanctions that can be imposed.

An important example of the suppression of other faiths is the fact that it is illegal to bring non-Islamic religious texts into the Kingdom. This ban is assiduously monitored by the *Muttawa*, the religious police, an organization that works under the supervision of the Committee for the Promotion of Virtue and the Prevention of Vice, which in turn reports to the Council of Senior Scholars.

Not all Saudi's are Sunni Muslims. There is an indigenous minority of Shiite Muslims which is severely disadvantaged.

In his report *Religious Freedom in the World* (2000), Paul Marshall writes that, in a population of 20.9 million people, adherence to Sunni Islam (i.e. the Wahhabi variety) is 86 percent. There is a 10 percent minority of Shiite Muslims, and 1 percent of the population are Ismaelites.[70] In a similar report, but eight years later, adherence to the majority faith has increased. In a population of 24.6 million people, Marshall estimates an adherence to Sunni Islam of 90 percent and a belief in Shiite Islam of 8

65 Marshall, Ibid., p. 347.
66 Marshall, *Religious Freedom in the World* (2000), p. 265.
67 House, *On Saudi Arabia*, p. x.
68 Allen, Charles, *God's Terrorists*.
69 Marshall, *Religious Freedom in the World* (2000), p. 265.
70 Marshall,., *Religious Freedom in the World* (2000), p. 265

percent.[71] This is in accordance with the general trend that religious diversity is *declining* in the Middle East.[72]

Another minority that is distrusted is the Sufis. The government destroyed Islamic holy sites that have significance to the Sufis on the grounds that these places were a source of idolatry.

Saudi Arabia has no academic freedom, and teachers who are involved in spreading unwelcome information about Islam can get into serious trouble (getting fired being the least drastic sanction).[73]

The regime also tries to block access to websites that are considered indecent or that contain immoral material. Every day, the Saudi Communication and Information Technology Commission (CITC) receives roughly 1200 requests to block certain sites.[74]

As mentioned previously, Saudi Arabia does not have a penal code or a code of criminal procedure. The Kingdom's laws are based on Sharia (or Islamic) law.[75] Sharia law comprises the following elements:

1 The Quran
2 The Sunnah (tradition based on the sayings and deeds of the Prophet)
3 The ijma (consensus of religious scholars)
4 The qiyas (precedents and analogies).[76]

The combination of these sources if seen as divinely revealed. This is laid down in the Saudi Basic Law of Government of 1993. The Ministry of Islamic Affairs monitors the financing and construction of all mosques, including the Shiite mosques. The imams' salaries are paid by the Ministry. The construction of churches is forbidden.[77]

As Karen Elliott (*b.* 1947) writes in *On Saudi Arabia* (2013), individual initiative and free entrepreneurship are almost completely absent in Saudi

71 Marshall, Paul A., ed., *Religious Freedom in the World* (2008),, p. 346.
72 On modern developments, also see: Gozlan, Martine, *Les rebelles d'Allah: Ils ont défié l'ordre islamiste*, préface de Jean-François Kahn, l'Archipel, Paris 2014.
73 Marshall, *Religious Freedom in the World* (2008), p. 346: "Academic freedom is restricted, and informers monitor classrooms for compliance with limits on curriculums."
74 See: Burrows, Peter, "Internet censorship: a community effort," in: *Business Week,* November 24, 2008, p. 68, cited in: Grim, Brian J. and Finke, Roger, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century,* Cambridge University Press, Cambridge 2011, p. 43. This does not mean the internet is no longer a danger to the current regime, as Karen Elliot writes in: *On Saudi Arabia*, p. 8.
75 Amnesty International, "Document—Saudi Arabia."
76 Green, David G., "Editor's introduction," in: David G. Green, ed., *Sharia Law or 'One Law For All',* foreword by Neil Addison, Civitas: Institute for the Study of Civil Society, London 2009, pp. 1–9.
77 Marshall, *Religious Freedom in the World* (2008), p. 349.

Arabia. "Society is a maze in which Saudis endlessly maneuver through winding paths between high walls of religious rules, government restrictions and cultural traditions. Men must obey Allah, and women must obey men."[78]

Persecutions and executions

Despite all this oppression, information does trickle out every once in a while, such as in the case of Hamza Kashgari (*b.* 1989), a poet and blogger who was accused of blasphemy and apostasy in 2012. His crime was posting messages to Twitter in which he conversed with the Prophet Muhammed. King Abdullah ordered Kashgari to be arrested, it was said for "crossing red lines and denigrating religious beliefs in God and His Prophet."[79]

Kashgari tried to flee to New Zealand, but he was arrested when he was getting ready to board a plane in Malaysia and sent back to Saudi Arabia. Late 2012, his family published a poem he had written that can be viewed as a kind of apology. After two years in prison, he was released in October 2013.

Another case is that of Raif Badawi (*b.* 1984), the maker of a website devoted to religious discussions. He, too, was accused of blasphemy and apostasy. He was sentenced to a thousand lashes and seven years in prison. His website was taken down by order of the court.[80] From a German translation of Badawi's blogs, it is clear that he was not even producing atheist or anti-Islamic propaganda.[81] By European standards, Badawi is a liberal: a defender of democracy, human rights, and constitutionalism. Nevertheless, he stands accused of blasphemy and apostasy, and his situation is extremely precarious.

The punishment Badawi received caused a global outcry of solidarity. Professor of Legal Philosophy at Princeton University, Robert P. George (*b.* 1955) offered to take a hundred of Badawi's lashes.[82] George made this request to the Saudi Ambassador in the United States.[83] Together with five other human rights activists, George signed a letter that contains the following paragraph:

78 House, *On Saudi Arabia*, p. ix.

79 IHEU, *Freedom of Thought 2014, Volume I*, p. 177. Gozlan, Martine, *Les rebelles d'Allah: Ils ont défié l'ordre islamiste*, préface de Jean- François Kahn, l'Archipel, Paris 2014, p. 19.

80 IHEU, Ibid., p. 178.

81 Badawi, Raif, *1000 Peitschenhiebe weil ich sage, was ich denke*, Aus dem Arabischen von Sandra Hetzl, Herausgegeben, eingeleitet und kommentiert von Constantin Schreiber, Ullstein, Berlin 2015.

82 Not, by the way, because George entirely agreed with Badawi in an ideological sense. Badawi is a typical liberal, George a conservative Catholic who strongly rejects secularism. See: George, Robert P., *Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism*, ISI Books, Wilmington, Delaware 2013.

83 Ernst, Douglas, "Princeton professor volunteers to take 100 lashes," in: *Washington Times*, January 23, 2015.

> If your government will not remit the punishment of Raif Badawi, we respectfully ask that you permit each of us to take 100 of the lashes that would be given to him. We would rather share in his victimization than stand by and watch him being cruelly tortured. If your government does not see fit to stop this from happening, we are prepared to present ourselves to receive our share of Mr. Badawi's unjust punishment.

Another case is that of Sadeq Abdul Kareem Mallalah (1970–1992), a Saudi citizen who was accused of blasphemy and apostasy. Mallalah was a Shiite Muslim who was initially arrested for throwing rocks at the police in April 1988. He was kept in solitary detention, tortured, and eventually brought in front of a judge, who asked him to renounce his Shiite faith in favor of Wahhabi Islam, the state religion. Mallalah refused. He is also claimed to have called Mohamed a "liar and a fraud." Another charge was that he had accused the Prophet of witchcraft and association with demons. On September 3, 1992, there was a dramatic ending to one of the most gruesome cases of persecution on the basis of religion.[84] Prior to his execution, Mallalah's case had been brought before two courts of appeal and the king (Fahd), to no avail. These days, the king often extends a pardon to alleged blasphemers who have been convicted by the courts. In this way the king can increase his popularity, while at the same time reinforcing his status as the state's highest judicial authority.

An interesting case is that of Mansour Almaribe (*b.* 1967), an Iraqi Shiite who had fled Iraq in the late 1990s and sought asylum in Australia.[85] In November 2012, Mansour decided to do the Hajj, the pilgrimage to Mecca. This is a religious duty that every Muslim must complete once in his life. On November 14, 2012, he was arrested by the religious police for making insulting remarks about members of the Prophet's family. He was sentenced to 500 lashes and a year in prison for blasphemy. Because Mansour suffered from diabetes and high blood pressure, his family feared that he would not survive the 500 lashes. The Australian government appealed to the Saudi king for clemency and was successful. The 500 lashes were reduced to 75 lashes and Mansour was allowed to keep his coat on for them. After the execution of the verdict, Mansour was able to fly back to Australia, where he was greeted by his family, who were tremendously relieved that their father and husband had survived the ordeal. What this story makes clear is that complying with the religious duty to complete the Hajj is not risk-free to those unused to complying with Saudi Arabia's mores.

Another case relates to academic freedom. In 2005, a Saudi Sharia court convicted Dr. Hamza Al-Maziani, a professor of linguistics at King Saud University, of "mocking religion." In fact, he had published an article expressing

84 Amnesty International, 'Document—Saudi Arabia."

85 Genova, Windsor, "Victorian man punished in Saudi Arabia with 75 lashes arrives home," in: *International Business News*, January 13, 2012.

his displeasure at the decline in the quality of education at the university. According to Dr. Al-Maziani, the decline was a consequence of the influx of foreign Islamists.[86] *Prima facie*, one might think that criticism of the Islamists would suit the Saudi authorities. After all, they have a fair amount of theo-terrorist trouble on their own plates. But apparently Dr. Al-Maziani had not taken the right tone, maybe by including the quality of the university itself in his considerations. Luckily, he was not punished by lashings, as had initially been the sentence, but made to pay a fine. It seems to be a trend for the king to convert heavier sentences into milder ones. As far as the king is cincerned the king, besides considerations of justice, this has the added benefit of confirming that he outranks the judiciary. By showing mercy, he demonstrates that he is not only in charge of the legislative and executive power, but also of the judiciary. In 2013, the United Nations' Arab Human Development Report stated: "In Arab countries where the political exploitation of religion has intensified, tough punishment for original thinking, especially when it opposes the prevailing powers, intimidates and crushes scholars."[87]

The words *political exploitation of religion* are well chosen. Vague concepts such as *blasphemy* and *apostasy* have a connotation that transcends the literal meaning of *insulting God* or *leaving a faith*. They are used to suppress any form of criticism, especially criticism of the ruling class. This is all the more grievous because, as Brian J. Grim and Roger Finke write in *The Price of Freedom Denied* (2011), blasphemy and apostasy will remain serious crimes in all schools of Sharia. With regard to apostasy, Grim and Finke write: "Once individuals embrace Islam, they are Muslims for life."[88] That is the basic principle of Sharia. Apostasy is not regarded as an individual choice, but as a danger to the community as a whole. The same is true of blasphemy.[89]

Cruel punishments

Executions in Saudi Arabia can take place by beheading with a sharp sword for men and usually by firing squad for women. The punishment for married women who are convicted of adultery is stoning. Crucifixions are also reported.[90] Executions are public, and usually happen in the big cities on Fridays,

86 Shea, Nina, "'Insulting Islam': one way street in the wrong direction," in: *Hudson Institute*, January 26, 2009.
87 Cited in: Shea, Ibid.
88 Grim, Brian J. and Finke, Roger, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century,* Cambridge University Press, Cambridge 2011, p. 32. See also: Ibn Warraq, ed., *Leaving Islam: Apostates Speak Out,* Prometheus Books, Amherst, New York, 2003.
89 Grim and Finke, Ibid., p. 32.
90 On April 9, 1993, three men were convicted of rape and murder, executed, and then crucified in the city of Haql. See: Amnesty International, "Document—Saudi Arabia."

after the midday prayer.[91] The beheadings are particularly brutal. It is said that beheading is quick and even merciful (think of the arguments in favor of the French guillotine), but in practice, that is not always the case. Sometimes multiple strokes are required to get the job done. Beheadings are cruel, mostly to the victims, of course, but also to those watching, the victims' families, and not least for the executioner.

On April 6 , 1989, the Saudi newspaper *al-Madina al-Munawwara* published an interview with the executioner Said al-Bishi, who had done this job for over 35 years in the province of Mecca. Al-Bishi guessed that, in that period, he had cut off more than 600 heads. He had also cut off the hands of over 90 people (convicted of thievery). In a testimonial, he spoke of one of the most difficult things he had had to do during these years. He had been slated to execute two men. After the sentence of death had been read out, he had severed the head of one of the men in a single blow, directly in view of the second man, who was awaiting execution. After he had examined the second man's dead body, the doctor present declared that his heart had stopped beating when he had witnessed the execution of the first man.[92]

Phineas and Moses

Since the terrorist attacks of 9/11, Saudi Arabia has been closely monitored by the United States and other countries. Domestic terrorist violence (such as the 2003 bombings in the capital, Riyadh) forced the Kingdom to reconsider its approach to religion and civil liberties. In 2004, there was a terrorist attack in Khobar that killed 22 people.[93] After that, the regime was forced to take the terrorist threat seriously.

The fact that religion is not just an instrument used *by* the government but also *against* the Saudi ruling family became clear in 2001. In 2001, Sheik Hamoud bin Oqla al-Shuaibi († 2001) proclaimed a fatwa against the Al-Saud royal family.[94] The sheik, who was also a supporter of Al Qaeda and who had praised the attacks of 9/11, died later that year, but not before he had said that "whoever backs the infidel against Muslims is considered an infidel."[95]

The sheik had not always been a lonely figure, at odds with the state's official leaders. He had been a respected cleric and scholar who once taught the Saudi chief justice. But when the Saudi royal family sided with the Western powers,

91 Amnesty International, Ibid.
92 Amnesty International, Ibid.
93 Marshall, *Religious Freedom in the World* (2008), p. 346.
94 Murawiec, Laurent, *Princes of Darkness: The Saudi Assault on the West*, translated by George Holoch from the French, Rowman & Littlefield Publishers, Lanham 2005, p. 89.
95 "The fatwa against the royal family," in: *The Economist*, October 11, 2001.

they themselves became apostates in the eyes of the exceptionally pious. All Muslims have a duty to wage jihad against those who attack Muslim states.[96]

What this shows is that theocracies are always in a precarious position. In a democracy, any political leader can be replaced by a new leader who gets more votes from the people. In a theocracy, those who claim to rule according to God's dictates can be upstaged by someone who says he knows better what God commands. Every Moses has cause to fear his Phineas.[97]

Neither of the models, the atheist state and the theocratic state (nor the philosophies behind these models: political atheism and religious fundamentalism), seem very attractive. At least, they are not in harmony with what one could call *individual human rights*, such as the right to freely choose one's religion or the right to *reject* a religion that no longer appeals.

Getting back to the main question of this chapter: neither the atheist state nor the theocratic state are convincing models. So what justifies such an extensive discussion of the Saudi theocratic model in particular? And why not spend as much time on the atheist state? The answer to these questions is obvious: because (with the fall of the Berlin Wall) the atheist state has more or less disappeared from the world, while the theocratic state, against all expectations, is enjoying a considerable revival.[98] "Religion and faith in God have made a big comeback. In the past decades, principles of theocratic governance have accrued significant support from the public all over the world," Ran Hirschl writes.[99] This seems to be true. But the quotation does not say what this means, exactly. It also means that now that we know that thousands of young people from Europe were waging a "jihad" to establish a caliphate in Syria and Iraq, they were not fighting for *demo*cracy, but for *theo*cracy.

Exactly what constitutes a theocratic state is, of course, open to debate. From a certain perspective, there are no "true" theocratic states, because God does not involve himself in worldly affairs.[100] However, we can make our definition more specific: a theocratic state is a state in which a large part of the

96 *The Economist,* Ibid.

97 Phineas was a religious fanatic ("zealot") who, on his own initiative, killed two people accused of heresy. God praised Phineas for it. See the story as told in the Bible: Numbers 25. On the meaning of Phineas, see: Collins, John T., "The zeal of Pinechas: the Bible and the legitimation of violence," in: *Journal of Biblical Literature,* Vol. 122, No. 1 (Spring, 2003), pp. 3–21; Feldman, Louis H., "The portrayal of Pinechas by Philo, Pseudo-Philo, and Josephus," in: *The Jewish Quarterly Review, New Series,* Vol. 92, No. 3/4 (Jan–April 2002), pp. 315–345.

98 See on this: Hermann, Rainer, *Endstation Islamischer Staat? Staatsversagen und Religionskrieg in der arabischen Welt*, Deutscher Taschenbuch Verlag, München 2015.

99 Hirschl, Ran, *Constitutional Theocracy,* Harvard University Press, Cambridge, Massachusetts, and London 2010, p. 1.

100 See: Russell, Bertrand, *A History of Western Philosophy,* A Touchstone Book, Simon & Schuster, New York, London, Toronto, and Sydney 1972 (1945), p. 247: "As for the gods, Epicurus firmly believes in their existence, since he cannot otherwise account for the wide-spread existence of the idea of gods. But he is persuaded that they do not trouble themselves with the affairs of our human world."

Figure 3.1 Israel worships the Baal Peor and Phineas kills Zimri and Cozbi, Maerten de Vos. Source: Anonymous, Gerard de Jode, 1585, Rijksmuseum Amsterdam.

population *thinks* that God runs the state, or where the ruling classes *claim* that they run the state on the basis of divine commands. Such countries exist in the world. Many states still uphold apostasy laws by which people who wish to change religions have to be punished. Afghanistan, Bahrein, Egypt, Iran, Iraq, Jordan, Kuwait, Malaysia, Mauritania, Nigeria, Pakistan, Saudi Arabia, Somalia, Sudan, and Yemen, and are examples.[101] Sooner or later, these countries will have to alter their laws if they want to uphold individual human rights. In all probability though, they have no interest in doing so.

Who are we anymore?

Many people who live in Western democracies will consider that last statement to be rather brash. They believe that things are "much more complex." But the question is: *what* is so complicated then?

What makes it complicated for many people is that they believe there is no such thing as universal values. Many people believe that democracy may be right for "us," but not for "them," for people in other parts of the world, with other mores and attitudes. Many people believe that although freedom of religion is important to "us," it is not to "them," the people in other countries and cultures. This attitude runs counter to the perspective the Universal Declaration of Human Rights hoped to establish in 1948. Article 18 of the Universal Declaration of Human Rights, passed by the United Nations in 1948, reads as follows:

101 Theodorou, Angelina, "Which countries still outlaw apostasy and blasphemy?," Pew Research Center, May 28, 2014.

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

So the freedom to change religions is not some sort of vague moral demand, but a basic human right. However, what worries many commentators when, for instance, Saudi Arabia or Iran is criticized in the Western world, is that they believe that *the West* does not have the right to judge. They believe this to be "arrogant," "judgmental," and "intolerant."

The Belgian author David van Reybrouck (*b.* 1971) is a good example by which to illustrate this. Van Reybrouck is the author of a book about the Congo, a former Belgian colony.

Because of the terrible things that happened there, the author believes that the West is no longer in a position to make moral demands. In his Cleveringa Lecture, he phrased it like this: "Moreover, who are we to lecture others? Who are we to claim that we have all the answers? Who are we when it comes to democracy anymore? Who are we anymore?[102] Reybrouck's questions are rhetorical. Apparently, he believes that the answer is obvious: *of course we cannot lecture others*. But would the following not be a much more convincing argument?

> We are morally responsible beings. At least, we try to be. We cannot escape our immense responsibility because previous generations may have made colossal moral mistakes. We are alive now. And no longer making any moral judgments does not help anyone. Especially not the victims van Reybrouck seems to be thinking of. So accept responsibility in the best way you know how.

This answer to van Reybrouck might not convince everyone, perhaps because it is thought that we (the West)[103] do not have the right to speak *first*. In a certain sense, we have forfeited that right. We have to let non-Western ethnic minorities have the first say. What do *they* think?

But this does not help us to make this position internally consistent, one could say, because some members of non-Western ethnic groups keep sending us a fairly universalist (and not particularist) message: Bassam Tibi,[104] Tarek

102 Reybrouck, David van, *De democratie in ademnood: de gevaren van electoraal fundamentalisme,* Cleveringa Lecture 2011, Leiden University, Leiden 2011, p. 10.

103 One of the methodological mistakes in this argument seems to be that there is no longer a "we" in multicultural and pluralist societies. There is a diverse population in which everyone has a right to speak out.

104 Tibi, Bassam, "Europe and the challenge of jihadist Islamism in post-bipolar politics: the jihadization of Islam, its threat to Europe's security, and the need for a

Fatah,[105] Ibn Warraq,[106] Mohamed Sifaoui,[107] Meghnad Desai,[108] just to name a few. And what these authors seem to be telling us is: we (that is, people with a colonial history, the people born in the West) are helping no one with the kind of "modesty" that van Reybrouck thinks would befit us.

Another point of criticism of van Reybrouck's "no judgment" message is that forming an opinion on religious abuses is not limited to negative judgments about other countries and cultures. We also have to take a position on what concessions to radical demands we wish to make in *Western* democracies. And the instruction to *cultiver notre jardin* does not just apply to the demands made by religious fanatics, but also to the emerging state of the world; a world with a decidedly multicultural population makes new demands of our constitutional arrangements. Western countries, or states, also have elements to their laws that, under current circumstances, undermine the legitimacy of the state. For instance, if the state somehow treats citizens unequally on the basis of their religion. The state "discriminates" against its citizens if it privileges one religion over another. For example, if the British law against blasphemy does not protect the reputations of *all* gods, but only of the *Christian* god, that is discriminatory.[109] The same is true of so-called *state religions*. Let us therefore continue our *tour d'horizon* of the models of the relationship between state and religion and turn our attention to countries that have a state religion, the third model.

The state with a state religion

The distinction that is usually made between a theocracy (model 2) and a country that has a state religion (model 3) is that a system with a state religion *allows other religions to exist alongside it*. Proponents of state religions usually claim that their system is a good idea, because members of minority religions are not *persecuted*. And it is true that in a state-religion system, dissenters are

democratic response to totalitarian Islamism', in: *Hellenic Centre for European Studies*, February 2007.

105 Fatah, Tarek, *Chasing a Mirage: The Tragic Illusion of an Islamic State*, John Wiley & Sons Canada, Mississauga, Ontario 2008.

106 Ibn Warraq, *Defending the West: A Critique of Edward Said's Orientalism,* Prometheus Books, Amherst, New York 2007; Ibn Warraq, ed., *Leaving Islam: Apostates Speak Out,* Prometheus Books, Amherst, New York, 2003; Ibn Warraq, ed., *The Origins of the Koran: Classic Essays on Islam's Holy Book,* Amherst, New York 1998; Ibn Warraq, *The Quest for the Historical Mohammad,* edited and translated by Ibn Warraq, Prometheus Books, Buffalo, New York 2000; Ibn Warraq, *Virgins? What Virgins? And Other Essays,* Prometheus Books, Amherst, New York 2010.

107 Sifaoui, Mohamed, *Pourquoi l'islamisme séduit-il?*, Armand Colin, Paris 2010.

108 Desai, Meghnad, *Rethinking Islamism: The Ideology of the New Terror,* I.B. Taurus, London and New York 2007.

109 See on this: Nash, David, *Blasphemy in the Christian World: A History,* Oxford University Press, Oxford 2010 (2007). This British blasphemy law was repealed, but when Britain still had a blasphemy law, it only protected the *Christian* god.

not necessarily persecuted. For instance, in 21st century Britain, no one is persecuted for not adhering to the Anglican Church (as was the case under Henry VIII). But does that make a state religion an appealing idea? Not quite, because the position of minorities, both religious and non-religious, in a country that has a state religion is not ideal because they *are* discriminated against. After all, the state chooses a single religious position and grants it privileges. In other words, although model 3 of the relationship between church and state is better than models 1 and 2, it still is not perfect.

Especially in countries with a high level of secularization and religious pluralism, state religions create inequality in the form of religious privileges for a specific part of the population, and this undermines the legitimacy of the state.

It was for this reason that James Madison (1751–1836)[110] wrote the First Amendment to the American Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." As Brian Grim concludes in a country comparison on the freedom of religion, the First Amendment protects minority religions (and the state) against the tyranny of a dominant religion, and the Second Amendment protects religion against the tyranny of the state.[111]

The waning of state religions has been a gradual process in the Western world. In countless matters, the privileges of a single religion (often Christianity) granted by the state have been challenged. A famous American activist in this area was Madalyn Murray O'Hair (1919–1995). She studied law at the South Texas College of Law and gained great notoriety in the 1960s with the trial of *Murray v. Curlett*, in which she took on the mandatory daily prayer in public schools. The immediate cause of this was the fact that her son William was required to participate in Bible readings in a public school in Baltimore. O'Hair thought this violated the Constitution, which prescribes a separation of church and state, after all. In the end, on June 17, 1963, the Supreme Court ruled in her favor, and the daily prayer in public schools was ended. Consequently she became one of the most controversial people of her day in the United States.[112] In 1964, the magazine *Life* proclaimed her to be "the most hated woman in America," and she even received many death threats. Nevertheless, O'Hair tirelessly continued her activism. In *O'Hair v. Hill* (1984) she won another lawsuit. This verdict abolished the discriminatory practice of making

110 See on Madison's views: Madison, James, *Memorial and Remonstrance Against Religious Assessments,* 1785, in: Madison, James, *Writings,* The Library of America, New York 1999, pp. 29–39.

111 Grim, Brian J. and Finke, Roger, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century,* Cambridge University Press, Cambridge 2011, p. 6. However, what Grim overlooks in his analysis is that the free exercise of religion is no longer limited primarily by states but by private groups and individuals: by "theoterrorism."

112 For an overview of her work, see: Cooke, Bill, "O'Hair, Madalyn Murray," in: Tom Flynn, ed., *The New Encyclopedia of Unbelief,* foreword by Richard Dawkins, Prometheus Books, Amherst, New York 2007, pp. 581–583.

civil servants profess a belief in God in order to be considered for a job in the civil service.

Another subject that has created a big stir is that of religiously neutral education. The American lawyer and human rights activist Clarence Darrow (1857–1938) made a big contribution on this point. Darrow was born in a family that was once religious but had gradually lost its faith. Although Darrow's parents no longer believed, however, they still did not want to expose their children to the social stigma of non-belief. So they feigned adherence to the faith, and the children were sent to Sunday school.

Darrow later became one of the most iconic jurists in the United States. He specialized in labor law, but he also defended many freethinkers and anarchists. The most important case of his career is of significance to the subject of this chapter: the *Scopes Monkey Trial* of 1925. It started with the introduction of a law in Tennessee in 1920 that banned the teaching of Darwinian evolution in schools. The driving force behind it was the fundamentalist William Jennings Bryan (1860–1925), a politician and jurist who had tried (and failed) to become president of the United States three times. On the basis of this law, John T. Scopes (1900–1970), a 21-year-old teacher in Dayton, Tennessee, was prosecuted. He stood accused of corrupting the minds of the young in biology classes, in which he taught evolution. When Darrow learned that Bryan had offered to act as special prosecutor, he decided to offer his services to Scopes. It was a brave decision; public opinion strongly disfavored Scopes. Initially, Scopes was convicted, although the trial had offered Darrow a chance to submit Bryan to pointed questioning. On appeal though, the verdict was overturned, now favoring Scopes (and thus the teaching of evolution). Largely because of the "Monkey Trial," Darrow became a big celebrity in the United States.[113] At the end of his life, Darrow was so famous that Tennessee Williams dedicated a play to him: *Not about Nightingales* (1938). It features this sentence: "This play is dedicated to the memory of Clarence Darrow, the Great Defender, whose mental frontiers were the four corners of the sky." Darrow also worked in the field of criminology, writing *Crime, Its Cause and Treatment* (1925), and he was an activist for the abolition of the death penalty.

In the modern world, a system with a state religion is increasingly viewed as an anomaly, for the reasons mentioned. In May of 2014, Norway decided to separate the Protestant, Lutheran Church from the state.[114] There was a great deal of support for this. In Parliament, there were 161 votes in favor and only 3 against. This looked promising. Unfortunately though, the Norwegian Parliament made a number of reservations that can be viewed as conflicting with the measures being taken. One of these reservations was: "The Norwegian Church will continue

113 See on him: Darrow, Clarence, *The Story of My Life*, Charles Scribner's Sons, New York 1932.

114 "Norway goes secular, removes Lutheran Church as state religion," in: *National Post*, May 24, 2014.

to have a special basis in the Constitution and the state will be built upon 'our Christian and humanistic heritage'."[115] This is odd and inconsistent. If the Norwegian Church is no longer a state church, then there is no reason to mention it in the Constitution. At least, not as long as Wicca, Scientology, Hinduism, and Islam are excluded from the Constitution (which is undoubtedly the case). And references to "our Christian and humanistic heritage" are fine, but they belong in the history books, or in treatises on cultural sociology, not in a constitution. The constitution is a legal document that encodes the legal building blocks of the state, not a textbook about a country's cultural history.[116]

Those who believe that these things are "inseparable" miss the point: they *should* be separated.

Other developments in Norway are equally worrying. The newspapers report that, now that the Evangelical Lutheran Church is no longer the state religion, it will receive public funding "on par with other religious and faith-based communities." Apparently, the Norwegian Church is *still* financed by the state, only now is "on par" with "other religions." So Norway is *still* not treating all citizens equally. It may have given up its privileged treatment of Christianity, but it has replaced it with other privileges. Now, *all* religions can receive preferential treatment over non-belief.

According to the fifth model (the agnostic or secular state), which we will discuss later in the chapter, this is still wrong. But first we will analyze the fourth model of the relationship between religion and state, because that is really what Norway has now become.

The multicultural or multireligious state

The multicultural or multireligious state, the fourth model, tries to avoid the problem of unequal treatment by trying to support *all religions* equally. The state does not have an obligation to a single religion, but to all of them: it has an obligation to treat them all the same. This, apparently, is also the ambition of the Norwegian state, as we saw in the previous paragraph. This model is often inspired by a type of discourse that can be described as *multiculturalist*. [117]

115 *National Post*, Ibid.

116 See on the nature and function of constitutions: Wheare, K.C., *Modern Constitutions,* Oxford University Press, London, New York, and Toronto 1951, and Bryce, James, "Flexible and rigid constitutions," in: *Studies in History and Jurisprudence, Volume I*, Scientia Verlag Aelen, Aelen 1980 (Oxford 1901), pp. 145–252.

117 Taylor, Charles, "The politics of recognition," in: Taylor, Charles, *Multiculturalism: Examining the Politics of Recognition,* edited and introduced by Amy Gutman, Princeton University Press, Princeton 1994, pp. 25–75. See also: Maclure, Jocelyn and Taylor, Charles, *Secularism and Freedom of Conscience,* Harvard University Press, Cambridge, Massachusetts 2011; Maclure, Jocelyn and Taylor, Charles, *Laïcité et liberté de conscience,* La Découverte, Paris 2010, in which Taylor uses the language of secularism to defend a multiculturalist message.

Multiculturalism was developed by theorists like Bhikhu Parekh (*b.* 1935)[118] and Charles Taylor (*b.* 1931),[119] who wanted to give religious and ethnic communities special rights in relation to the state, for instance to resolve their own legal disputes.

Multiculturalists advocate, for instance, for special Jewish and Islamic courts to settle the disputes of members of those religious communities.[120] And the state, or the national community, is expected not to interfere in intercommunal affairs.

As said, the multiculturalist state[121] does not just discriminate against other worldviews, but also against non-believers (agnostics, atheists, humanists—those who do not belong to a religious denomination).[122] Moreover, in a world filled with a plethora of religious beliefs, it is nearly impossible to distinguish religious beliefs from non-religious beliefs. What, for instance, is the nature of Scientology? Or Wicca? Should these, generally regarded as more eccentric, religious belief systems be financed by the state in the same way that the official religions are? And what to do about religions that encourage practices that we view as conflicting with human rights or the foundations of a liberal-democratic order.

With the publication of Susan Moller Okin's (1946–2004) essay *Is Multiculturalism Bad for Women?* (1999),[123] another aspect of multiculturalism came to the fore: the frequent glossing over of bad cultural practices. Although multiculturalists do not approve of them, they also do not explicitly disapprove.

118 Parekh, Bhikhu, *A New Politics of Identity: Political Principles for an Interdependent World,* Palgrave Macmillan, Basingstoke 2008; Parekh, Bhikhu, *Rethinking Multiculturalism: Cultural Diversity and Political Theory,* Macmillan Press, Basingstoke and London 2000. See also: Zee, Machteld, "Choosing Sharia: multiculturalism, Islamic fundamentalism and British Sharia councils," PhD dissertation Leiden, Leiden 2015.

119 Taylor, Charles, "The politics of recognition," in: Taylor, Charles, *Multiculturalism: Examining the Politics of Recognition,* edited and introduced by Amy Gutman, Princeton University Press, Princeton 1994, pp. 25–75.

120 See: Zee, Machteld, 'Five options for the relationship between the state and Sharia councils," in: *Journal of Religion and Society,* Vol. 16 (2014), pp. 1–18; Zee, Machteld, "Choosing Sharia: multiculturalism, Islamic fundamentalism and British Sharia councils," PhD dissertation Leiden, Leiden 2015.

121 As is clear from this passage, we make a distinction between a "multicultural society," in which people with different cultural and religious backgrounds live together, and "multiculturalism" as an ideology, a political philosophy, for the state. A multiculturalist state is a state that furthers multiculturalist policy, such as the establishment and defense of group rights (instead of individual rights).

122 Barry, Brian, *Culture & Equality: An Egalitarian Critique of Multiculturalism,* Polity, Cambridge 2001; Grayling, A.C., "Multiculturalism," in: A.C. Grayling, *Ideas that Matter: A Personal Guide for the 21st Century,* Weidenfeld & Nicholson, London 2009, pp. 246–249.

123 Moller Okin, Susan, "Feminism and multiculturalism: some tensions," in: *Ethics,* Vol. 108 (July 1998), pp. 661–684; Moller Okin, Susan, *Is Multiculturalism Bad for Women*? with respondents, eds. Joshua Cohen, Matthew Howard, and Martha Nussbaum, Princeton University Press, Princeton 1999.

Here, the mechanism we saw in Van Reybrouck is at work: passivity in criticizing bad practices because the critic, or better yet, the tradition in which he is placed ("Western"), is presumed to carry guilt of its own. This multiculturalist nonjudgmentalism prevented all sorts of unsavory practices taking place among ethnic and religious minorities from being addressed. The most famous of these is female genital mutilation.

Again: of course it would be going much too far to claim that multiculturalists *advocate* such practices. Of course they do not. But the problem is they also do not feel it is their place to *judge* these things. Multiculturalism is a philosophy that turns appeasing what is wrong into a virtue.

Here, we have to stress that a clear distinction must be made between a *multicultural society* and a *multiculturalist* state. In everyday language, the word *multiculturalism* is sometimes also used to simply describe pluralism.[124] "You have always cherished multiculturalism," Giles Vanderpooten says to Stéphane Hessel (1917–2013).[125] To which Hessel replies that you "have to be open" to different cultures.[126] Everyone "has a right" to his own culture, Hessel says. This is a truth we have to respect. Only on this basis can we have coexistence instead of conflict, he says.

That sounds good. On the other hand, Hessel wants to stimulate a younger generation to get involved in moral projects. He says he wants to do this "to change the world." He encourages us to be angry, irritated, and furious.

But the problem is that "respect for culture" is not a good point of departure for changing the world. It is a good principle for diplomats, but not for Luther, Voltaire, Martin Luther King, or other great reformers. In other words, with all due respect for Hessel, you should, in truth, not *always* be open to different cultures. You should really only be open to them when they constitute an *improvement* over your own cultural pattern. "Being open" to cultural patterns you should be criticizing is harmful; it undermines cultural heritage that deserves to be defended. It does not stimulate vigilance against evil tendencies in this world.

Perhaps an example can clarify things here. It is an example from the Danish cartoon crisis. The creation of satire of religious figures is a tradition that deserves to survive, we believe. Making jokes about quasi-religious matters keeps religious fanaticism in check.[127] As such, allowing this tradition of satire and mockery to *disappear* would have harmful effects. Nevertheless, we see that satire about religion is defended less and less in the world of today. "Righteous

124 "Le multiculturalisme est quelque chose qui vous tient à cœur. De fait, il est indéniable qu'il faut s'ouvrir aux autres cultures," Gilles Vanderpooten says to Stéphane Hessel. See: Hessel, Stéphane, *Engagez vous!,* entretiens avec Gilles Vanderpooten, Editions de l'aube, Paris 2013, p. 49. Also see on this: Fish, Stanley, "Boutique multiculturalism, or why liberals are incapable of thinking about hate speech', in: *Critical Inquiry,* Vol. 23, No. 2 (Winter 1997), pp. 378–395.

125 Hessel, Ibid., p. 49.

126 Hessel, Ibid., p. 49.

127 Hume, Mick, *Trigger Warning: Is the Fear of Being Offensive Killing Free Speech?,* William Collins, London 2015.

indignation," especially its most violent forms, is gaining ground. On November 15, 2006, at the height of the Danish cartoon crisis, British journalist and intellectual Christopher Hitchens (1949–2011) gave a lecture in Hart House, at the University of Toronto, Canada. Canada is a country where multiculturalism is official government policy, and, unfortunately, it has frequently had serious and often negative consequences.[128] One of the biggest problems seems to be that "tolerance" too often means tolerance for the intolerant, and "respect" means respect for the disrespectful.[129] Hitchens addressed this decadence in his lecture at the height of the crisis. He criticized his audience for the sympathy that existed, not for the Danish cartoonists that had decried the radicals, but for the extremists who were trying to suppress free speech. Hitchens said to the room: "Shame on you, ladies and gentlemen. You are letting this happen." And that is the truth of it: freedom that is not defended is destined to disappear, at least if people *let it happen*.

Unfortunately, multiculturalism as a political philosophy is at the root of respect for disrespectful fanaticism. Still, many of Moller Okin's[130] colleagues at the university found it hard to give up their multiculturalist perspectives. Politics was much more severely criticized in politics than in academia. In 2010, German Chancellor Angela Merkel proclaimed the death of multiculturalism.[131] The same message could be heard from French President Nicolas Sarkozy.[132] Another voice in the anti-multiculturalism choir was that of British Prime Minister David Cameron, who said that state multiculturalism had failed.[133] This makes it sound like multiculturalism is a lost cause, but, as we will see, although Cameron and Sarkozy agreed about what they chose to reject, they differed greatly on what they were willing to accept.

Based on these considerations, we can conclude that it seems the better course to give up all state aid to religion and adopt a religiously neutral posture in everything involving the state. This is the fifth model of the relationship between state and religion, which we will examine now.

128 Astute critics of Canadian multiculturalism are: Bissoondath, Neil, *Selling Illusions: The Cult of Multiculturalism in Canada*, Penguin Books, London 1994; Steyn, Mark, *America Alone: The End of the World as We Know It,* Regnery Publishing, Inc., Washington, DC 2006; Steyn, Mark, *Lights Out: Islam, Free Speech and the Twilight of the West,* Stockade Books, Woodsville 2009.

129 See on this: Baber, H.E., *The Multicultural Mystique: The Liberal Case against Diversity,* Prometheus Books, Amherst, New York 2008; Hasan, Rumy, *Multiculturalism: Some Inconvenient Truths,* Politico's Publishing Ltd, York 2010.

130 Another early critic of multiculturalism along these lines is: Waldron, Jeremy, "Minority cultures and the cosmopolitan alternative," in: *University of Michigan Journal of Law Reform,* Vol. 25 (1992), pp. 751–793.

131 "Merkel erklärt Multikulti für gescheitert," in: *Spiegelonline,* October 16, 2010.

132 "Nicolas Sarkozy declares multiculturalism had failed," in *Telegraph*, February 11, 2011.

133 "State multiculturalism has failed, says David Cameron," in: *BBC News*, February 5, 2011.

The secular or agnostic state

This last state can be called the *secular state* or the *agnostic state*. It is the fifth model of the possible relationships between state and religion. Before we examine this model more closely, we must make a note on semantics.

An *agnostic* is someone who does not adopt a position on the question if God exists. He suspends his judgment about this.[134] Whether agnosticism is a viable position *from the perspective of the individual* is not relevant in the context of this chapter, but we will put the case here that it is a legitimate and even beneficial position *for a state*. A great advantage of the agnostic state is that it does not make a distinction between its citizens. The agnostic state treats all citizens equally. The agnostic or secular state does not *combat* the religious convictions of its citizens, but it does not *defend* any religious position either. The agnostic state allows all citizens to worship the gods of their choice.

As such, agnosticism (or secularism) with regard to religion seems a wise path to take when it comes to government policy. One state that has adopted political agnosticism or secularism as its official governing principle is France.

The French Minister of Immigration and Integration described this open character of the French state in a lecture in 2010, when he said that France is not a people, or a language, or a territory, or a religion, but a conglomerate of people who want to live together ("vivre ensemble").[135] To make this "living together" possible, it is important that the state does not identify itself with what divides people: their religion. But although the French state has always championed this policy of secularism, even devising a special word for it (*laïcité*), it is not an exclusively French principle. The great historian of Islam and Islamic societies, Bernard Lewis (*b*. 1916) pointed to a nearly forgotten American declaration of the same ideal. He quoted the "somewhat neglected John Tyler," who, in a letter of July 10, 1843, gave eloquent voice to the principle of freedom of religion:

> The United States have adventured upon a great and noble experiment, which is believed to have been hazarded in the absence of all previous precedent—that of total separation of Church and State. No religious establishment *by*

134 Cliteur, Paul, "Atheism, agnosticism, and theism," in: Paul Cliteur, *The Secular Outlook: In Defense of Moral and Political Secularism,* Wiley-Blackwell, Chichester 2010, pp. 14–69; Dalgairns, John Bernard, "Is God unknowable?," in: *Contemporary Review,* Vol. XX (1872), pp. 615–630, also in: Andrew Pyle, ed., *Agnosticism: Contemporary Responses to Spencer and Huxley,* Thoemmes Press, Bristol 1995, pp. 20–38; Huxley, Thomas Henry, "Agnosticism and Christianity," 1889, in: Thomas Henry Huxley, *Agnosticism and Christianity and Other Essays*, Prometheus Books, Buffalo, New York 1992, pp. 193–232.

135 Eric Besson, in a speech on January 5, 2010: "La France n'est ni un peuple, ni une langue, ni un territoire, ni une religion, c'est un conglomérat de peuples qui veulent vivre ensemble." Cited in: Finkelkraut, Alain, *L'identité malheureuse,* Editions Stock, Paris 2013, p. 105.

> *law* exists among us. The conscience is left free from all restraint and each is permitted to worship his Maker after his own judgment. The offices of the Government are open alike to all. No tithes are levied to support an established Hierarchy, nor is the fallible judgment of man set up as the sure and infallible creed of faith. The Mahommedan, if he will to come among us would have the privilege guaranteed to him by the constitution to worship according to the Koran; and the East Indian might erect a shrine to Brahma if it so pleased him. Such is the spirit of toleration inculcated by our political Institutions … The Hebrew persecuted and downtrodden in other regions takes up his abode among us with none to make him afraid … and the Aegis of the Government is over him to defend and protect him. Such is the great experiment which we have tried, and such are the happy fruits which have resulted from it; our system of free government would be imperfect without it. The body may be oppressed and manacled and yet survive; but if the mind of man be fettered, its energies and faculties perish, and what remains is of the earth, earthly. Mind should be free as the light or as the air.[136]

So much for the American President John Tyler (1790–1862).

Western?

There is one view that stands in the way of the further spread of secularism, and that is that it is claimed to be a typically Western concept. We disagree. Here, we can refer to Bishop Nazir-Ali, with whom we began this chapter, but this time for a view with which we fully agree.

Bishop Nazir-Ali points to the political philosophy of Pakistan at the time of the state's founding. Religious tensions were resolved peacefully. Women were free to go where they pleased and wear what they wanted.[137] Karachi was a cosmopolitan city that drew a great diversity of visitors, and non-Muslims were a prominent feature of everyday life. As Nazir-Ali writes, all of this was in accordance with what the founder of the Pakistani state, Mohammad Ali Jinnah (1876–1948), had intended: "Religion had little to do with the workings of the state."[138] Jinnah was, in other words, a *secularist*.

136 Lewis, Bernard, "The roots of Muslim rage," in: *Atlantic Monthly,* September 1990, reprinted in: Lewis, Bernard, *From Babel to Dragomans: Interpreting the Middle East,* Weidenfeld & Nicolson, London 2004, pp. 319–331.

137 Nazir-Ali, *Triple Jeopardy for the West: Aggressive Secularism, Radical Islamism and Multiculturalism,* Bloomsbury, London 2012, p. 95.

138 Nazir-Ali, Ibid., p. 95. We quote this passage because it is so astonishing that the same author is also highly negative about modern-day prognoses of secularism. In the subtitle of his book, Nazir-Ali turns against what he calls "aggressive secularism." He does not make clear what he means by this though. See also: Finkelkraut, Alain, *L'identité malheureuse,* Editions Stock, Paris 2013, p. 18.

And secularism is not a kind of colonial vestige of Western thought; in non-Western traditions, too, there are countless countries where a secular vision of the state has taken root.[139] This is especially important in a time and context when states are being challenged to legitimize their own existence. Modern theoterrorism is, in a way, forcing states to formulate answers to the criticism they face. Ignoring the criticism and pretending it does not exist does not seem to be a wise course. So let us end this chapter with the observation that both a religiously neutral political language and a religiously neutral state are the best answers to modern-day theoterrorism and religious extremism. The revival of theocracy is best countered by relinquishing all remnants of religious discrimination in our liberal democratic states.

The French laïcité

But there is a *condition*. The agnostic or secular state is based on the assumption that the state itself is religiously neutral. This means that civil servants are expected not to express their personal religious convictions.[140] In France, this model is realized by means of the principle of so-called *laïcité*.

As a result of the conclusions drawn by a state commission on the matter, the Stasi Commission, the French state created legislation governing the wearing of religious symbols in French public schools and by people employed by the government.[141] The ban on religious symbols in schools (not just crucifixes and yarmulkes but also Islamic headscarves) led to a long and sometimes bitter controversy between opponents and proponents of the neutrality principle.[142] One of the most frequent complaints about the French system is that it targets

139 See for the Indian tradition: Hiorth, Finngeir, *Introduction to Atheism,* Indian Secular Society, Pune 1995; Hiorth, Finngeir, *Introduction to Humanism,* Indian Secular Society, Pune 1996; Sen, Amartya, "Secularism and its discontents," in: Amartya Sen, *The Argumentative Indian: Writings on Indian History, Culture and Identity,* Allen Lane/Penguin Books, London 2005, pp. 294–316; Sen, Amartya, *Identity and Violence: The Illusion of Destiny,* W.W. Norton & Company, New York and London 2006.

140 See on the French system: Akan, Murat, "Laïcité and multiculturalism: the Stasi Report in context," in: *The British Journal of Sociology*, Vol. 60, No. 2 (2009), pp. 237–256; Weil, Patrick, "Why the French laïcité is liberal," in: *Cardozo Law Review,* Vol. 30, No. 6 (2009), pp. 2699–2714.

141 *Laïcité et république,* Rapport au Président de la République, Commission présidée par Bernard Stasi, La Documentation française, Paris 2004; O'Brien, Robert, *The Stasi Report: The Report of the Committee of Reflection on the Application of the Principle of Secularity in the Republic,* William S. Hein & Co., Inc., Buffalo, New York 2005.

142 One of the earliest manifestations was: Badinter, Elisabeth, Debray, Regis, Finkelkraut, Alain, Fontenay, Elisabeth de, and Kintzler, Catharine, "Profs, ne capitulons pas!", in: *Le Nouvel Observateur,* November 2/8, 1989. Een latere selectie van standpunten in: Helvig, Jean-Michel, *La laïcité dévoilée*. Quinze années de débat and quarante Rebonds, Líbération/Editions de l'aube, Paris 2004.

Muslim women. It is their religious right to wear headscarves. When the system denies them this right, the system is inherently discriminatory.

The cultural historian Andrew Hussey (*b*. 1963) writes about the riots in the French *banlieus* and how France reacted to them in his book *The French Intifada* (2014). Most commentators agreed that this was a social justice issue, not a cultural one. Hussey does not believe this is the case. He posits that there is a "very real conflict in modern-day France between the opposing principles of *laïcité* and *communitarianism*, which is expressed in the riots."[143]

Hussey is right, we believe, when he says that these riots reveal an issue of principle (although one cannot agree with his insinuation that, therefore, the French system is illegitimate).

The French ban on full face covering in public drew a great deal of criticism. At the front lines of this debate was the then French president, Nicolas Sarkozy, who declared in June of 2009 that the burka[144] was not welcome in France.[145] In his first presidential address to a joint session of both chambers of the French Parliament (the first in 136 years), he declared his support for a ban. He said: "We cannot accept that, in our country, women live behind nets, cut off from social life, robbed of their identities."[146] The president also referred to human dignity, applied to women: "This is not the idea the French Republic has of the dignity of women."[147] And the most relevant quotation in the context of this chapter: "The burka is not a religious symbol, but a symbol of submissiveness, and it will not be welcome on the territory of the French Republic." In France, there is a broad consensus between left and right about the burka. André Gerin (*b*. 1946), a member of the Communist Party who led the latest investigation into this religious-cultural phenomenon, called the burka a "mobile prison" for women.[148]

But there is also a great deal of criticism of the French system, especially from Anglo-Saxon countries that are more oriented toward multiculturalism. This criticism comes in two forms.[149] First, it is often said that the French authorities *intended* to target the Muslim community. And how could it be

143 Hussey, Andrew, *The French Intifada: The Long War between France and Its Arabs*, Faber & Faber, New York 2014, p. 8.

144 The burka is a garment that covers the face, in contrast with the headscarf, which only covers the hair.

145 Allen, Peter, "Nicolas Sarkozy says the burqa is 'not welcome' in France," in: *Telegraph*, June 22, 2009.

146 Allen, Ibid.

147 Allen, Ibid.

148 Allen, Ibid.

149 Although the French system is rejected almost everywhere in the Anglo-Saxon world, it has some knowledgeable defenders in the French-speaking world, such as: Bougrab, Jeanette, *Ma république se meurt*, Editions Grasset & Faquelle, Paris 2013; Fourest, Caroline, *Quand la gauche a du courage: chroniques résolument progressistes et républicaines*, Grasset, Paris 2012; Pena-Ruiz, Henri, *Dictionnaire amoureux de la laïcité*, Plon, Paris 2014; Finkelkraut, Alain, *L'identité malheureuse*,

otherwise? Christians do not wear religious symbols to school (or in a much more limited way; a cross around the neck is not very noticeable and, moreover, it is easy to wear it even less visibly). Second, it is argued that, although the French state does not intend to discriminate against those who wear headscarves, this *is* the effect.

Let us briefly comment on both objections. First, the argument of discriminatory intent. On March 15, 2004, a French law was announced that stipulated that "in primary and secondary schools, the wearing of symbols or clothing that clearly express a religious faith is prohibited." Cécile Laborde, a commentator with a French background, but clearly no friend of the French system, offers the following commentary on this law: "This law is aimed at Islamic headscarves, although Jewish yarmulkes and Christian crosses are also banned in public schools."[150]

The question is whether this is an overly tendentious description of the situation. What does the quoted sentence mean? Is it possible to say, as this writer does, that this law is primarily "aimed at" Islamic headscarves, if she has to mention in the same breath that it applies to *all* religious symbols? From what does she conclude that is it aimed at the Islamic headscarf in particular? Would it not be better to say that this law is aimed at the wearing of religious symbols in general, and *thus also* at headscarves? That has a very different ring to it, does it not?

Laborde's phrasing seems to suggest that the French legislator has the *explicit intention* of targeting the Muslim community. What are her arguments for this serious accusation? Why does Laborde not say: "The law is aimed at headscarves, yarmulkes, large crosses …, *et cetera*"? If it had been phrased like that, the sentence would have been unnecessary, of course, but also much less tendentious.

Commentators on the French state often feel that they have observed something of great importance when say that the French law banning the wearing of religious symbols was drafted *in response to* the wearing of headscarves. But in reality that is nothing more than a historical fact of very limited relevance to the principle. Perhaps this can be illustrated by an example.

The kirpan is a ceremonial sword or knife worn by Sikhs. In the Sikh community, the wearing of this dagger is viewed as a religious precept. This precept goes back to a command by the guru Gobind Singh (1666–1708) who decided in 1699 that all Sikh's must wear this "religious dagger."

Now imagine that there were not many Muslims living in France, but a great many Sikhs instead. And say the French government had tightened legislation

Editions Stock, Paris 2013; Debray, Régis, *Ce que nous voile le voile: La République et le sacré,* Gallimard, Paris 2004; Kintzler, Catherine, *Qu'est-ce que la laïcité?*, La librairie philosophique J. Vrin, Paris 2007.

150 Laborde, Cécile, "Secular philosophy and Muslim headscarves in schools," in: *The Journal of Political Philosophy*, Vol. 13, No. 3 (2005), pp. 305–329, p. 325.

banning the wearing of religious symbols in public schools. Would it then be possible to say that the French state *had the intention* of targeting the Sikhs in particular?

We think it would be misleading to make that claim. By phrasing it like that, the misconception that the French state has it in for Sikhs in particular is introduced, when the state is doing nothing more than enforcing a constitutional principle, also with regard to Sikhs.

If the state did *not* do that last, if it granted a special *privilege* to a particular religious community, giving it an exemption from the general law, the state would be making a grave mistake. And that is discriminating against religious groups that *are* willing to comply with the law.

The second form of criticism that is often leveled against the French system is that, regardless of the French authorities' motives, the system has the *indirect effect* of primarily impacting the Muslim community. So it is not about the French government's *intention* but about the *unintended effect* of the legislation. For Christians, wearing headscarves is not a religious duty, so they are not impacted by a prohibition against it; Muslims are. So should we not say that *indirectly* Muslims are affected more by the prohibition against wearing evidently religious symbols?

A few things can be said in response to these arguments. The first critique (the "bad intentions" theory) assumes a kind of conspiracy. It tries to accuse those who support a rational political philosophy (and whatever one may say about *laïcité*; it is a clear and consistent position)[151] of darker "true motives" that the people in question, or the state that is taking the action, are keeping under wraps.[152] The second version of this argument, the argument of *indirect discrimination*, has more merit, but does not convince in the end either.[153] The problem with the argument of indirect discrimination is that it fails to recognize that when you make a rule that prohibits a certain behavior there will always be a group (with certain specific characteristics) whose behavior is particularly affected by that rule.

151 For a recent defense, see: Pena-Ruiz, Henri, *Dictionnaire amoureux de la laïcité,* Plon, Paris 2014. Other proponents of the system are: Fourest, *Quand la gauche a du courage*; Debray, *Ce que nous voile le voile*; Finkelkraut, Alain and Lévy, Benny, *Le Livre et les livres: Entretiens sur la laïcité,* textes réunis et annotés par Gilles Hanus, Verdier, Paris 2006; Finkelkraut, Alain, *L'identité malheureuse,* Editions Stock, Paris 2013.

152 This is defended with great vigor in: Scott, Joan Wallach, *The Politics of the Veil,* Princeton University Press, Princeton and Oxford 2007, but also, unfortunately, in: Nussbaum, Martha, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age,* Harvard University Press, Cambridge, Massachusetts 2012.

153 We also encounter this in Laborde: "*Laïcité* was intended as a principle of equality, yet it can be argued that the ban on headscarves constitutes a case of indirect discrimination and thus infringes on equality." See: Laborde, "Secular philosophy and Muslim headscarves in schools," p. 329.

Take the rule that forbids sex with children below a certain age. This rule affects pedophiles. That is hard to deny. But does it make sense to say that the rule "discriminates against people for their sexual orientation" (pedophilia)?

This brings us to the complex question of when a particular rule is "discriminatory." It does not seem unreasonable to us to defend that a rule is "discriminatory" when a type of behavior that is prohibited for one group is allowed for another.

So say that Muslims were not allowed to wear headscarves, but Jews were allowed to wear yarmulkes. In such a situation, complaints about discrimination would be justified (and necessary). But in the case of the ban on the wearing of religious symbols (regardless of whether they are Christian, Jewish, or Islamic in nature), there is no discrimination, even if a particular group is more affected by the ban.

This point is not only made in the context of the wearing of religious symbols, but also, for instance, in the discussion about the death penalty.[154] It is a statistical fact that more black people end up on the electric chair than white people. Does this mean that the death penalty is "discriminatory"? Although there are many convincing arguments against the death penalty, *this* is not one of them. What the death penalty "discriminates against" is murder (or other crimes for which it is imposed), but it does not discriminate against black people. It would be discriminatory if a white man were to be acquitted for an act or behavior for which a black man would have been convicted.

This brings us to the conclusion of our review and analysis of the five models of the relationship between state and religion. As we have seen, the rise of religious radicalism, of which the murders of Lee Rigby in Great Britain and Theo van Gogh in the Netherlands are manifestations, is a serious matter.

Religiously motivated killings, such as, for instance, the murder of Jitzak Rabin, can also motivate us to think about what the most desirable relationship between state and religion is. The theory that advocates *separation* seems to emerge as the most suitable here. Political secularism or political agnosticism, supported by the idea of moral autonomy (or moral secularism), appears to be the best way to organize our religiously pluralist world. In this, the emphasis is on the word *our*. Separation of church and state has acquired new importance in our world, because it is a pluralist and multicultural world. In an agnostic or secular state, there is no room for special protection of religious convictions (blasphemy should therefore be removed from the penal code, as happened in the Netherlands) over other worldviews. Everyone has to be free to choose a religion, but also to change religions (so apostasy laws also have no place), and

154 See, for instance: Pojman, Louis, "In defense of the death penalty,", in: Hugh LaFolette, ed., *Ethics in Practice. An Anthology*, Blackwell, Malden and Oxford 2002 (1997), pp. 493–502; Haag, Ernest van den, "The death penalty once more," in: *U.C. Davis Law Review*, Vol. 18 (Summer 1985), pp. 957–972.

the public funding of certain religious positions over others —a form of discrimination with a long European history—ought to be ended.

In this chapter, we have discussed the situation in Saudi Arabia. Saudi Arabia is the most important theocracy of our time (together with Iran). It is important to understand this system, as well as the ideology that inspires its proponents.

A good understanding of theocracy is also important because many modern-day theoterrorists aspire to the ideal of a theocracy. They are inspired by the idea that the law must be mandated by God. Otherwise, the law is not valid to theocrats. And not just "not valid" but also something that serious believers ought to combat. It is their "religious duty" to do so

The fight against theoterrorism will probably not be successful if we do not take the principles that inspire it seriously. But it is not only important to know what drives the terrorists (the ideal of a theocracy), but also to know what needs to be defended: the ideal of democracy, or, more specifically, of the constitutional democratic state.

Chapter 4

The universality of values and principles

In 1999, a group of British Muslims, the Al-Muhajiroun (the Emigrants), pronounced a death sentence on the playwright Terrence McNally (*b*. 1938). McNally had written a play, *Corpus Christi*, [1] in which Jesus Christ was portrayed as a homosexual.[2] The leader of the Muslim group, Sheik Omar Bakri Muhammad (*b*. 1958), viewed McNally's play as blasphemous. According to the group the sheik claimed to represent, this was a problem, because they viewed Jesus as a messenger from God. The death sentence (*fatwa*)[3] meant that McNally would have to be detained and put on trial if he traveled to an Islamic country.

It had all started with a performance of the play in a theater in North London. Outside the theater, supporters of the Al-Muhajiroun handed out copies of the fatwa. Their leader, Sheik Bakri, in particular, made his views loudly heard.

Sheik Bakri is a Syrian cleric who has been living in England with his family, on welfare, since 1982. Bakri believes that what he is doing is what the Church of England should really be doing. The honor of Jesus Christ and the Virgin Mary are left undefended. The church is negligent in not taking action against McNally.

The sheik is not a fan of British society either. He would prefer to see the "black flag of Islam flying over Downing Street." He also believes British society to be corrupt: "Society here is full of corruption, rape, murder, the degradation of moral values, homosexuality, lesbians, and sex … People need

1 McNally, Terrence, *Corpus Christi,* Dramatists Play Service Inc., New York 1999.

2 "Fatwa on Terence McNally for his gay Jesus play," in: *Agence France-Presse,* October 29, 1999.

3 A fatwa is a religious judgment. It does not necessarily have anything to do with a death sentence. Since the fatwa Khomeini issued against Rushdie, which entailed a call to murder the author, the word *fatwa* has acquired a sinister meaning in the West. See on this: Winston, Brian, *The Rushdie Fatwa and After*, Palgrave, Macmillan, New York 2014; Al-Azm, Sadik J., "Is the "fatwa" a fatwa?," in: *Middle East Report*, July–August 1993, p. 27.

Islam." Bakri has no problem with violence in pursuit of this goal: "We believe in violence: we think it is healthy."[4]

This story about the fatwa on McNally matters, because it confronts us with a world that has become smaller. That which was once far away is now close by. And by *close by*, we do not just mean the appearance of direct practical problems, but also the moral considerations that come with them. Modern means of transport, the free movement of people, and other factors have contributed to a new reality in which bizarre folklore can sometimes come awfully close. The play *Corpus Christi* was written by an *American*. It was not performed in Yemen, Syria, Saudi Arabia, or any other country in the Islamic sphere of influence, but in England. The crime of blasphemy, which in Western history played a horrific part in (literally and figuratively) branding dissidents, heretics, atheists, and others who tried to extract themselves from orthodox faith,[5] seems to be back.[6] After all, what Sheik Bakri is in effect demanding is the application of Saudi or Yemeni blasphemy laws in *England*.

Cultural conflicts

For a proper understanding of the cultural conflict we are talking about, it may be useful to do a point-by-point comparison of Sheik Bakri's view and the British legal system. First of all, there is a difference with regard to the *perception of homosexuality*. Sheik Bakri apparently believes it to be an insult for someone to be portrayed as a homosexual, or to be accused of homosexuality. However, the British legal system does not consider homosexuality to be a problem.[7] As such, saying that someone "is gay" is not an insult but simply a claim about someone's sexual orientation.

4 More information about Sheik Omar Bakri and his ideas can be found on his own website: http://www.obm.clara.net/Pages/OBMHistory/biography.html

5 See on this the classic book by: Robertson, J.M., *A Short History of Freethought. Ancient and Modern*, Russell & Russell, New York 1957.

6 See: Heins, Majorie, *Sex, Sin, and Blasphemy: A Guide to America's Censorship Wars*, The New Press, New York 1993; Brent Plate, S., *Blasphemy: Art that Offends,* Black Dog Publishing, London 2006; Cabantous, Alain, *Blasphemy: Impious Speech in the West from the Seventeenth to the Nineteenth Century,* Columbia University Press, New York 2002; Cherry, Matt and Brown, Roy, *Speaking Freely about Religion: Religious Freedom, Defamation and Blasphemy,* International Humanist and Ethical Union Policy Paper, International Humanist and Ethical Union, London 2009.

7 At least, not since the 1960s. On September 4, 1957, the *Report on the Departmental Committee on Homosexual Offences and Prostitution* was published (also known as the "Wolfenden Report," named after the chairman of the committee, Lord Wolfenden). In those days, people could still be sent to prison for homosexual activities. See: *Wolfenden Report, Report on the Committee on Homosexual Offenses and Prostitution*, authorized American edition, introduction by Karl Menninger, Lancer Books, New York 1963. The Wolfenden Report advised no longer criminalizing homosexual activities between assenting adults. The report's recommendations also

According to the Dutch Constitution, discrimination on the basis of sexual orientation is prohibited. Article 1 of the Constitution reads: "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted." This does not list sexual orientation explicitly, but it is considered to be covered by the "any other grounds" upon which someone might be discriminated against (besides the explicitly mentioned grounds).

Secondly, there is a difference with regard to *blasphemy*. In the Netherlands, on January 23, 2014, the Criminal Code was changed, and the articles 147, 147a, and 429bis were repealed. These were the articles that contained the blasphemy offenses.[8] Since 2014, therefore, blasphemy is no longer officially illegal in the Netherlands. We were not the first to decriminalize it though. In England, blasphemy has not been illegal since 2008. Starting in the second half of the twentieth century, Western countries have seen a trend of abolishing blasphemy laws. But the reverse seems to be taking place in other parts of the world, where blasphemy is incurring stricter penalties. Sheik Bakri is a proponent of the latter trend.

A third point on which there is a cultural divide between the majority view in England and Sheik Bakri is the *death penalty*. At the European level, the death penalty has been abolished. A country cannot become a member of the European Union if it has the death penalty. But on this front, too, there are places in the world where things are very different. In some U.S. states, China, the Middle East, and in other parts of the world, the death penalty is still in force. To Sheik Bakri, this is no doubt a shining example for Britain (and Europe).

For Sheik Bakri, blasphemy is one of the most serious crimes a person can commit. That is why it justifies the death penalty. But the British legal system has decriminalized blasphemy, meaning it is no longer a punishable offense according to British criminal law[9]

formed the basis for a discussion between legal philosopher L.A. Hart (who defended it) and the judge Lord Devlin (who criticized the report's findings). See: Devlin, P., *The Enforcement of Morals,* Oxford University Press, Oxford and New York 1965 (first published as *Maccabaean Lecture in Jurisprudence, Proceedings of the British Academy,* 1959); Hart, H.L.A., *Law, Liberty and Morality,* Oxford University Press, Oxford New and York 1963.

8 It netted the Netherlands a favorable mention in *Freedom of Thought 2013. A Global Report on Discrimination against Humanists, Atheists and the Nonreligious,* International Humanist and Ethical Union, London 2013, p. 229, as "Free and equal." After all: "The constitution and other laws and policies protect freedom of thought, conscience and religion, as well as freedom of opinion and expression. These rights are generally respected in practice." There was one point of criticism though: "However, a parliamentary motion was approved in December 2013 that wants to examine an amendment to another statute, which would broaden prohibited speech to include 'serious insult to religion'."

9 For an overview of the history of blasphemy, see: Nash, David, *Blasphemy in the Christian World: A History,* Oxford University Press, Oxford 2010 (2007); Bradlaugh Bonner, Hypatia, *Penalties Upon Opinion: Some Records of the Laws of Heresy and Blasphemy,* Third Edition, revised and enlarged by F.W. Read, Watts &

A fourth difference between Sheik Bakri's views and the British legal system concerns *vigilantism*. Sheik Bakri calls for the playwright to be punished. In doing so, he is not only offering advice to the British government, but he is also speaking to (radical) believers who are supposed to carry out the death sentence. From the perspective of the British legal system, however, the sheik is not a competent judicial authority. And the people he is calling on to carry out the sentence are not competent judicial officers, authorized to execute a verdict. So not only does Sheik Bakri have a different view of homosexuality and blasphemy, but, in essence, he rejects the entire British legal system (as he clearly attests in his commentary). *Au fond*, he is doing the same thing as the Iranian religious and political leader Ayatollah Khomeini (1902–1989) did when, in 1998—so 10 years earlier—he issued a fatwa against British author Salman Rushdie and his translators and publishers: Rushdie had to be killed. This fate actually befell his Japanese translator, Hitoshi Igarashi (1947–1991), who was murdered on July 11, 1991. His Italian translator, Ettore Capriolo (1926–2013) survived an attack on July 3, 1991, as did Rushdie's Norwegian publisher, William Nygaard (*b*. 1941), who was wounded in an attack on October 11, 1993.[10]

This fourth point teaches us that the appeal to a higher law, a kind of divine law, does not always involve such innocent demands as Antigone's wish to bury her brother (see Chapter 1 of this book). It can also lead to the demand that heretics be punished and blasphemers be killed. The higher law is not always invoked for things that a modern-day majority would approve of. What to do, for instance, with Sheik Bakri's convictions?

Live and let live

A familiar attitude with regard to practices people do not agree with, or even those they would characterize as abhorrent, is that of the enlightened liberal: live and let live. People do not all have the same idea of the good life. We should leave people free to make their own choices in this. Who are *we* to judge others?

Those who do not believe that the liberal tradition is the best frame of reference here can also refer to the statements of religious leaders who have called for tolerance: "Let him who is without sin cast the first stone."[11]

At first glance, this does sound like wisdom. Have *we* always behaved so well, after all? In the 20th century, Western culture was responsible for mass murder on an unprecedented scale.[12] If one still wants to call it *the age of*

Co., London 1934; Levy, Leonard W., *Blasphemy: Verbal Offense Against the Sacred from Moses to Salman Rushdie*, The University of North Carolina Press, Chapel Hill and London 1993.

10 Winston, Brian, *The Rushdie Fatwa and After*, Palgrave, Macmillan, Basingstoke 2014, pp. 91, 77, 91, 129.

11 John, 8:7.

12 See: Glover, Jonathan, *Humanity. A Moral History of the Twentieth Century*, Jonathan Cape, London 1999.

civilization, this civilization has at least been besmirched by dark stains that no one can ignore (Hitler, Stalin).

On the other hand, one could say that, if anything, these declinations have taught Westerners what to avoid. The Universal Declaration of Human Rights (1948)[13] would never have been formulated had it not been for the horrors of the Nazi regime.[14] Is it therefore not also possible to say that Western culture in particular has developed a sensitivity to injustice that can be of value to other cultures? Does the example of Sheik Bakri not demonstrate that we cannot tolerate everything?

We will put off answering this question until after we have discussed the second story about cultural conflict we wish to introduce here. This is a story about the debate about female circumcision, or more accurately, the circumcision of young girls.

Female genital mutilation

On November 2, 1999, the Dutch social-liberal political party D66 called for an investigation into the scale of female circumcision in the Netherlands. Female circumcision (or female genital mutilation (FGM)) is a ritual that is performed in North African countries.[15] It is possible to distinguish a number of different types. In one of the most common forms, the clitoris and labia are cut off, after which the vagina is partially sewn shut.[16]

In 1999, the same year in which Sheik Bakri called for violence against American author McNally, there were reports of female circumcision taking

13 See on this: Robertson, Geoffrey, *Crimes Against Humanity: The Struggle for Global Justice,* Fourth Edition, Penguin Books, London 2012 (1999).

14 This is the paradox that was already identified in the Christian tradition: *O Felix culpa, quae talem ac tantum meruit habere Redemptorem*: "O happy fault that merited such and so great a Redeemer!" (from a homily by St. Augustine, partly in the Easter Proclamation *Exsultet, jam Angelica turba*). Fault, certainly, but still a happy fault, because without it there would be no redeemer. In that view, it makes sense to not be too hard on the transgressor for his faults.

15 Doesum, Yvonne van, "D66 eist harde aanpak besnijdenis meisjes," in: *Metro,* November 3, 1999.

16 See the discussion in: Tamir, Yael, "Hands off clitoridectomy', in: *Boston Review,* October/November 1996, with responses by: Martha Nussbaum, Jessica Neuwirth, and others. Especially interesting for its personal revelations, but also for its statistical material is: Kanko, Assita, *Parce que tu es une fille: histoire d'une vie excisée*, Renaissance du livre, Waterloo 2014. See also: Dirie, Waris, *Desert Flower: The Extraordinary Journey of a Desert Nomad*, eds. Waris Dirie and Cathleen Miller, Virago, New York 1998. See also the work of Waris Dirie: Dirie, Waris, *Desert Children*, with Corinna Milborn, translated by Sheelagh Alabaster, Virago, New York 2005; Dirie, Waris, *Desert Dawn*, with Jeanne d'haem, Virago, New York 2002. Dirie is a former model who has committed herself to the fight against FGM. Her life story was also made into a movie: https://www.youtube.com/watch?v=1RGfqToaVnQ

place in the Netherlands. Boris Dittrich MP said he was shocked by these reports. A radio broadcast by the Catholic Radio Broadcasting service (KRO) had revealed that the practice of female circumcision was being practiced not only in North Africa, but also in the Netherlands.

On the broadcast, a Somali woman, Naïma Abdi Dahir, says she knows a lot of stories of girls who have become victims of circumcision. The ritual is performed at home, on the kitchen table, without sedation, and under the supervision of four or five women.

A spokesperson for the Somali foundation Walaleeje, A. Mahamoud, confirms Naïma Dahir's story. "To prevent the circumcision from coming to light, the procedure is often done during the children's summer break."

Mahamoud believes that, in the Netherlands, a group of roughly 10,000 women is in danger of being circumcised. Girls of no more than eight years old are being mutilated on the order of their own families. To her mind, the reaction of the Dutch to this is too indulgent. Why? Dutch people are often hesitant to question practices from a different culture. "Out of respect," doctors and caregivers do not report it when they come across a victim of circumcision. This has to change, because if everyone allows these types of practices to continue out of "respect," nothing will ever change, according to Mahamoud.

So it seems that this is a job for politics. After all, there is no way that politicians can allow eight-year-old girls to continue to be mutilated for life, is there? Several cabinet ministers, such as those involved in public health, big city policy, and domestic affairs, promised to answer Parliament's questions about circumcision practices. But in the end, nothing really happened. In practice, the problem turned out to be difficult to tackle. How, after all, do you check if a girl has been circumcised? Making circumcision illegal is all well and good, but it does not make much of a difference if the police and Public Prosecution Service do not actively detect and prosecute cases.[17]

The conflict further defined

As in the case of the call to murder the American playwright McNally, the discussion about female circumcision is also the result of a cultural conflict. Here, too, it may be illuminating to give a point-by-point summary of the conflict.

17 During an interview, the feminist author Ciska Dresselhuys brought up female circumcision with the Christian-democratic (CDA) politician Maxime Verhagen. Verhagen believed female circumcision to be "a great evil." But he also said that he did not want checks. "But I would rather not see checks: that is too great a violation of bodily integrity." Verhagen supported the comments of his fellow party member Mirjam Sterk, who had said that she would find it "disgusting" to go through such a check. See: Dresselhuys, Ciska,"'Een minister met een hoofddoek. Prima!," interview with Maxime Verhagen, in: *Opzij*, May 1, 2004.

First, in Dutch politicians' rejection of female circumcision, a different idea of *female sexuality* seems to be operative than on the side of the parents who are inviting or personally executing such a procedure. In Dutch culture, sexual pleasure is considered a good thing. Female circumcision makes this sexual pleasure impossible, or at least much more difficult, and that is why it is reprehensible. But of course those who do not ascribe value to sexual pleasure, or to the sexual pleasure of women in particular, have a different view.

A second difference that emerges is a different appreciation of *bodily integrity*. Article 11 of the Dutch Constitution says that "everyone shall have the right to inviolability of his person, without prejudice to restrictions laid down by or pursuant to Act of Parliament." Mutilating the sexual organs of children could be viewed as one of the crassest manifestations of the violation of this value. Opponents of female circumcision point this out. They argue that children cannot be mutilated, not even by their parents.

Mutilation used to be a common feature of criminal justice. People were branded, body parts were amputated, eyes were gouged out; the body was damaged in all sorts of ways as "punishment." But that is viewed as reprehensible these days. In 316, Constantine decided that criminals' faces were no longer allowed to be branded.[18]

Especially since the publication of Beccaria's *Dei Delitte et della pene* (1764), the mutilation of the human body for punishment has been considered uncivilized. Executions in the form of beheadings, as they occur in Saudi Arabia in the course of regular criminal justice[19] and as they are applied by jihadists who publish their killings on the internet,[20] are generally rejected.

Furthermore (a third point), there are two different views of children and *children's rights* at play here. Of course parents of young children have to make all sorts of decisions in the child's interest. Parents send their kids to school (even if it is against the children's wishes at the time). Parents do not allow their kids to eat only ice cream and potato chips (although many young children would not object to this). So in that sense, you could say that parents decide for their children in all kinds of situations. But are they also allowed to induct a child into a certain religion or ideology by marking the child's body in such a way that it later becomes more difficult for the child to choose a different path? The general consensus seems to be that altering a child's body in irreversible

18 Siedentop, Larry, *Inventing the Individual: The Origins of Western Liberalism*, Penguin Books, London 2014, p. 117.

19 See on this: Murawiec, Laurent, *Princes of Darkness: The Saudi Assault on the West*, translated by George Holoch from the French, Rowman & Littlefield Publishers, Lanham 2005.

20 In 2004, Paul Marshall Johnson (1955–2004) was taken hostage by extremists in Saudi Arabia. His execution was videotaped. Other victims were Nick Berg, Eugene Armstrong, Daniel Pearl, and Kim Sun-il. Extremists use these kinds of videos for recruitment purposes. See on Perl: Lévy, Bernard-Henri, *Qui a tué Daniel Pearl?*, Grasset, Paris 2003.

ways should not be allowed. Incidentally, tolerance of male circumcision appears to be an exception to this rule.

Tolerance out of respect

Of course, the two examples given here (the call to murder a playwright and the mutilation of girls' genitals) are so obviously reprehensible that many people will think there are no problems here. But that would be too simple. The cultural conflict we are talking about is a pressing problem because there are different views on how to deal with it. Some people ask: "Should we not withhold judgment 'out of respect' for the culture of others?" It is *this attitude* in particular that contributes to the lack of decisive action on these matters. Some say: "These are not Dutch women being circumcised, but Somali women. And it is being done *by* Somali women. Who are we' to criticize 'their culture? (Also see Chapter 4 on this.) As the Belgian author David van Reybrouck (*b*. 1971) said: "Moreover, who are we to lecture others? Who are we to claim that we have all the answers? Who are we when it comes to democracy anymore? Who are we anymore?"[21] This has led many Dutch politicians who do not have a background of migration to feel unsure in tackling this problem. A leading role in this is often taken by political leaders who are not encumbered by these cultural sensitivities, like the social-democratic Member of Parliament Ahmed Marcouch (*b*. 1969), the present Major of Arnhem, or Major of Rotterdam Ahmed Aboutaleb (*b*. 1961). Other politicians often leave it at statements that they are "shocked" and lament that "something ought to be done about this." Afterwards though, the discussion often gets bogged down and focuses on the disadvantages of tackling the problem. For instance, if politicians wish to combat a heinous practice like female circumcision, there will have to be *checks*. And if you want to have girls checked (by the school nurse, for instance) to make sure they have not been circumcised, you will have to invade the children's privacy.

Before long, Dutch politics had identified a problem that was possibly worse than female circumcision: "We cannot very well start peeping between girls' legs, can we?" The genital mutilation of girls and women seems a much more difficult problem to solve than one would imagine.

In 2014, new figures from UNICEF sparked another discussion on this subject. The information showed that genital mutilation is not just prevalent in Africa, but also in Asia and the Middle East. According to the UNICEF statistics, there were at least 125 million circumcised women and girls living in the 29 countries where FGM was practiced.

21 Reybrouck, David van, *De democratie in ademnood: de gevaren van electoraal fundamentalisme,* Cleveringa-lezing 2011, Universiteit van Leiden, Leiden 2011, blz. 10.

Cultural relativism

Tolerating harmful practices out of respect for another culture is also called *cultural relativism*. The cultural relativist bases himself on cultural diversity. To him, this is not only a *fact*, but also a *norm*. So it is wrong to criticize "them" on the basis of "our" norms. The notion that there is a norm that surpasses culture, and by which we can judge other cultures (universal human rights, for instance), the cultural relativist thinks is an illusion.[22]

In this chapter, we want to examine the strength of the cultural relativist's case. It goes without saying that this matters. After all, if cultural relativism is correct, there is no basis for criticism of female circumcision. Or rather, we would have to judge the practice on the basis of the values and standards of the culture within which female circumcision occurs.

The German-Kurdish organization Wadi tries to collect data on FGM. According to the director of this organization, Thomas van der Osten-Sacken, it is very difficult to compile the data because governments do not cooperate. Especially in the Gulf region, there is very little willingness to address the problem.

Wadi published a report on Oman that shows that 80 out of 100 women a researcher talked to had been circumcised. However, this was not always the most severe form of circumcision.

In order to break the silence, Wadi is waging a campaign, together with the Dutch NGO Hivos. But it is hard to garner attention for the issue, Wadi's director explains: "It was never taken seriously. A black hole."[23]

For the purpose of the theme of this chapter (the universality of values and principles) it is important to make two observations.

1 Apparently, there exists a *wider variety* of values and standards than one would guess at first glance. Practices that are viewed as mutilation by some are seen as unproblematic, or even necessary, by others.
2 *Denouncing* practices that conflict with what some see as universal values and standards (such as the right to the inviolability of the body) is more difficult than one might imagine.

In this chapter, we will concentrate on the second phenomenon. How come, on the one hand, people do not believe it a good idea to murder an author for writing a "blasphemous" play about Jesus, but, on the other hand, it is extremely difficult to organize a protest against the call for his murder? Why is it that, despite official condemnation, a practice like female circumcision still manages to continue in a kind of underground fashion? Why is the persistence of bad cultural practices, as illustrated here, so *tenacious*?

22 See on this: Fourest, Caroline, *La dernière utopie: menaces sur l'universalisme,* Editions Grasset, Paris 2009.
23 Veeken, Rob, "Vrouwenbesnijdenis komt wereldwijd veel vaker voor", in: *De Volkskrant*, February 6, 2014.

The answer to that question is: cultural relativism. There exists a widely held belief that we identify here as *cultural relativism* that derails protest against cultural wrongdoing. After all, a cultural relativist is someone who denies the existence of universal values and standards, and who also considers it inappropriate to strive for them.[24]

Now let us have a closer look at the history and background of cultural relativism.

Six cultural relativists

A cultural relativist finds it difficult or inappropriate to denounce the practices of Al-Muhajiroun, with which we started this chapter. Apparently, Sheik Bakri has a different opinion on blasphemy than the view that has become dominant here in the West. In *his* culture, a play that depicts Jesus as a homosexual is blasphemous. And blasphemy should incur the death penalty. If the state is too decadent to impose it, the serious believer has to take action himself. Who are we to say that the sheik's view of blasphemy and homosexuality is worse than ours? Would such a pretention not be terribly arrogant? Would it not mean that we were assuming the superiority of our own view? And is that not always wrong?

Before evaluating cultural relativism, we need to be clear about what it represents. As a mindset, cultural relativism is widespread these days. Its cultural-historical roots lay deep in Western history. We will now try to reconstruct the cultural relativist mindset (or attitude) on the basis of a number of elements that great thinkers have put forth and that have become *gesunkenes Kulturgut*.

Cultural relativism poses a significant challenge for the idea of universal values and standards, and that is why we will take an extensive look at the history and theoretical justification of this viewpoint. Elements of cultural relativism can be found throughout European history. We will discuss six thinkers in particular: The Greek historian Herodotus, the philosopher Protagoras, the French Renaissance philosopher Montaigne, the sociologist William Graham Sumner, the cultural anthropologist Ruth Benedict, and the philosopher Edward Westermarck.

Let us begin with Herodotus.

Herodotus

A springboard for cultural relativism is to be found in the work of the first Greek historian: Herodotus (485–430 BCE).[25] And it is not surprising that we mostly

24 See on this: Gardner, Martin, "Beyond cultural relativism," in: Martin Gardner, *The Night is Large. Collected Essays 1938–1995*, Penguin Books, London 1996, pp. 149–161; Herskovits, Meville J., "Some further comments on cultural relativism," in: *American Anthropologist,* Vol. 60, No. 2 (April 1958), pp. 266–273.

25 See: Herodotus, *The Histories,* Penguin, Harmondsworth 1986 (1954), p. 220. Also included in: Pojman, Louis, ed., *Moral Philosophy: A Reader,* Second Edition, Hackett Publishing Company, Inc., Indianapolis and Cambridge 1998 (1993), p. 20.

encounter elements of cultural relativism in historians and cultural anthropologists. After all, they are the scientists who describe cultural diversity from the perspective of *time* (historians) and *place* (cultural anthropologists).

If people were given a choice between all the mores and customs that are practiced all over the world, nearly everyone would choose their own morals and customs, Herodotus says. That is how convinced people are that their own practices are superior to everyone else's, he continues. He offers a nice example by way of illustration.

The Persian King Darius the Great (king 522–485 BCE) once summoned Greeks and Callatians (an Indian tribe) to his court. He asked the *Greeks* (who always burned their dead): "What would it take for you to *eat* the dead bodies of your fathers?" The Greeks answered that nothing could get them to commit such a horrid act. Then Darius asked the Callatians (who always ate their dead): "What would it take for you to *burn* the bodies of your dead relatives?" The Callatians were equally shocked: they would never do such a thing! Herodotus concludes that this anecdote proves that the Greek poet Pindar (522–443 BCE) is right: "Custom is the king of all."

The relationship between custom and nature, between what is man-made ("custom," "culture") and what naturally exists ("nature" as opposed to "culture") has come to play a central role in Greek ethics. Herodotus offers an important connecting element for this. His assertion that custom is the father of us all could, incidentally, be called a "springboard for cultural relativism," or a "basis for cultural relativism," but not yet cultural relativism in the fullest sense of the term.

Those who say that custom *influences* morality or even *dominates* morality are voicing a psychological and sociological position. However, relativism, including cultural relativism, is an ethical position. As such, the factual observation of a plethora of cultures, mores, and customs, and their influence, will have to be supplemented by a moral "superstructure." What characterizes cultural relativism is that its supporters take the factual existence of diversity to mean that there are no universal norms. This conclusion (suggested by Herodotus) was explicitly drawn by the sophists.

The sophists

The sophists were travelling "wisdom teachers."[26] They taught rhetoric. Their views are discussed (and argued against) in the dialogues of Plato, who was highly critical of the sophists; since Plato, the word *sophist* has acquired a

26 "Halb Professor, halb Journalist," after the famous characterization of Gomperz. See: Gomperz, Theodor, *Griechische Denker. Eine Geschichte der Antiken Philosophie, I*, Veit & Comp. Leipzig 1896, p. 333, and Stace, W.T., *A Critical History of Greek Philosophy*, Macmillan & Co Ltd, London New York 1960 (1920), p. 109: "They were a professional class rather than a school, and as such they were scattered over Greece, and nourished among themselves the usual professional rivalries. They were professional teachers and educators."

negative connotation. But this may be unfair. Whatever the case, the sophists were occupied by the idea that laws and customs are important elements of human life. They contrasted the law (and convention) with nature.[27]

Socrates' ethics (and, consequently, Plato's) are saturated with the distinction between convention and nature. But Socrates' aim was to find *true virtue*, meaning the virtue that is "naturally" good for people. Not for any person in particular, but for all people. As such, Socrates was looking for universal values and standards. He represented the exact opposite of the sophists' position. Where the sophists believed that the pursuit of universality in moral matters was an illusion, Socrates argued in favor of this universality. He considered something to be "good" if it could be viewed as "naturally" good, as opposed to things that were "only" the result of human convention or agreement.

The difference of opinion between Plato and the sophists was considerable. Plato (following Socrates' example) believed in absolute and universal laws and values. The sophists "relativized" all of this. Although individual sophists had different views on the matter. Some among them emphasized the importance of convention; others stressed the significance of nature. Hippias,[28] for instance, was a proponent of the latter point of view.

Not much is known about Hippias of Elis (450–399 BCE), except that he is thought to have said that there are unwritten laws. These unwritten laws originate in the thinking of the *gods*, not in that of *people*. This was meant to explain that these laws are immutable and that their authority applied to everyone. As examples of these laws, he offered that all men are brothers, regardless of the state in which they live.

This is a revolutionary idea. It elevates citizenship above the limits of time and place. When we harm the interests of strangers, we also violate a *law*. This is not a conventional law, however; it is not a law based on human agreement or authority, but a law *of the gods*, or a *natural law* (which were the same thing, to Hippias's thinking).

Hippias's view illustrates the variety of opinion within the sophist movement. In effect, Hippias is a precursor of natural law thinking as we have described it in Chapter 1 of this book. The same certainly cannot be said of the other sophists.

27 On nature and convention in general, see: Welzel, Hans, *Naturrecht und materiale Gerechtigkeit,* Vandenhoeck & Ruprecht, Göttingen 1980 who applies the meaning of the distinction to natural law thinking. Also see on this: Bryce, James, "The law of nature," in: *Studies in History and Jurisprudence, Volume II*, reprint of the Oxford edition 1901, Scientia Verlag, Aalen 1980, pp. 112–171, and Hayek in Hayek, F.A., *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy*, complete edition in new one-volume paperback, Routledge & Kegan Paul, London, Melbourne and Henley 1982.

28 See: Guthrie, W.K.C., *The Sophists,* Cambridge University Press, Cambridge 1971, pp. 280–285.

Hippias is focused on the laws of nature, but Thrasymachus van Chalcedon (*ca.* 459–400 BCE) is preoccupied with the *conventional character* of law and morality.[29] He defends a conventional theory of justice and argues in favor of "might is right."[30] Justice, Thrasymachus says in Plato's *Republic*, is nothing more than the interests of the strongest. By "strongest," he means those in power. So it does not have to be a matter of physical strength. The aim of the law is simply to serve the interests of those who make the laws.

On this same subject, justice, another sophist, Callicles (*ca.* 484 BCE), defends a view that is diametrically opposed to that of Thrasymachus.[31] It is not clear if Callicles was an actual historical figure or if Plato invented him in his dialogues. Whatever the case may be, what matters is that he believes that people are *not* equal in a natural sense. People can be weaker or stronger, smarter or dumber, a leader or a follower—in other words, superior or inferior. Conventional morality was invented by the weak to protect themselves from the natural rule of the strong.

In his book *Good and Evil* (1984), the American philosopher Richard Taylor (1919–2003) paraphrases Callicles' position in the following words: "Conventional morality is invented by the multitude precisely to keep the strong from expressing their strength."[32]

It is not hard to see a predecessor to Karl Marx (1818–1883)[33] in Thrasymachus and a predecessor to Friedrich Nietzsche (1844–1900)[34] in Callicles. Hippias, Thrasymachus, and Callicles certainly demonstrate that the sophist movement contained a great diversity of views.

The philosopher A.N. Whitehead (1861–1947) was so impressed by the diversity of viewpoints contained in Plato's ideas that he said: "The safest characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato."[35] Of course this is a great compliment to Plato,

29 See: Wolf, Erik, *Griechisches Rechtsdenken, II, Rechtsphilosophie und Rechtsdichtung im Zeitalter der Sophistik*, Vittorio Klostermann, Frankfurt am Main 1952, pp. 103–119.

30 See: Plato, *Republiek, I*, p. 336b in: *Plato, Complete Works*, ed. John M. Cooper, Hackett Publishing Company, Indianapolis 1997.

31 See: Guthrie, *The Sophists,* pp. 101–107, and Gomperz, *Griechische Denker, I*, p. 326.

32 Taylor, Richard, *Good and Evil,* Prometheus Books, Buffalo, New York 1984, p. 33.

33 Of course, Marx was also a cultural relativist in the sense that he believed that the cultural superstructure of a society is determined by that society's economic structure. Marxism rejects autonomous ethics and philosophy.

34 See also: Rachels, James, "Nietzsche and the objectivity of morals," in: N. Scott Arnold, Theodore M. Benditt, and George Graham, eds., *Philosophy Then and Now,* Blackwell, Cambridge, Massachusetts, and Oxford 1998, pp. 385–414.

35 Whitehead, A.N., *Process and Reality: An Essay in Cosmology*, Corrected Edition, edited by David Ray Griffin and Donald W. Sherburne, The Free Press, New York, Collier Macmillan, London 1979, p. 39.

but it is also a compliment to Greek philosophy in general, including the sophists, because Plato mainly recorded the viewpoints that existed in his time.

Protagoras

But we have not yet introduced the most famous sophist: Protagoras. He is the one who gave the most radical interpretation of the conventional character of morality, as well as attaching normative consequences to it.

Like Callicles and Thrasymachus, Protagoras (490 BCE–420 BCE) also believed that morality was conventional in nature. As such, we cannot say that some elements of morality are "truer" than others. Man is the measure of all things: all moral distinctions are made by man,[36] making it impossible to speak of a *naturally* morally correct or incorrect act.[37]

However, the most remarkable thing about Protagoras's view is that he did not stop at the negative side of the belief that morality is conventional: he also thought that is how it *should be*. The criterion by which he made this judgment was that certain things, *assessed by their consequences*,[38] are better than other things. And these consequence are a social matter.

What, therefore, is a morally correct life? Protagoras says this is the life that is in accordance with the mores and customs of the society in which ones lives. "A genuine moral man, according to Protagoras, is simply a man who upholds and abides by the conventions of his culture, assuming that these conventions are well established and tested by time," Taylor writes, paraphrasing Protagoras's position.[39]

36 A reason why some speak of a *humanist* position. According to: Luce, J.V., *An Introduction to Greek Philosophy*, Thames & Hudson, London 1992, p. 81. However, sophism also constituted a "crisis in values," just as it was a crisis from a humanist perspective. See on this: Prior, William J., *Virtue and Knowledge. An Introduction to Ancient Greek Ethics*, Routledge, London and New York 1991, p. 38ff.

37 Plato, *Protagoras*, 320ff; Plato, *Theatetus*, 160c. See also: Zeller, Eduard, *Outlines of the History of Greek Philosophy*, Thirteenth Edition, revised by Wilhelm Nestle, translated by L.R. Palmer, Dover Publications, New York 1980 (1931, Duits 1883), p. 80, who points out that Herodotus is also thought to have consulted a lost work by Protagoras.

38 So, Protagoras was what we would nowadays call a *utilitarian* or a consequentialist. For a clear introduction to utilitarianism, see: Shaw, William H., *Contemporary Ethics. Taking Account of Utilitarianism*, Blackwell, Malden and Oxford 1999 and for its history: Quinton, Anthony, *Utilitarian Ethics*, Second Edition, Duckworth, London 1989 (1973). The relationship between consequentialism and utilitarianism is discussed by: Pettit, Philip, "Consequentialism," in: Peter Singer, ed., *A Companion to Ethics*, Blackwell, Oxford, and Cambridge, Massachusetts) 1993 (1991), pp. 230–241. For a discussion of the utilitarian character of Protagoras's ethics, see: Wolf, Erik, *Griechisches Rechtsdenken, II, Rechtsphilosophie und Rechtsdichtung im Zeitalter der Sophistik*, Vittorio Klostermann, Frankfurt am Main 1952, p. 50ff.

39 Taylor, *Good and Evil*, p. 40.

However, we do not find the clearest phrasing of this in the dialogue by Plato that is named after Protagoras, but in the *Theaetetus*. There, Plato has Protagoras say: "For whatever appears to a state to be just and fair, so long as it is regarded as such, is just and fair to it …"[40]

This attached normative consequences (or perceived normative consequences) to Herodotus's observation that custom rules us all. Protagoras qualifies morality as a function of time and place, as a product of culture. "Doing right" in Athens is not the same as "doing right" in Persia. The universality of values and standards is an illusion. This cultural relativism has also been anchored in folk wisdom: "to each his own," or "when in Rome, do as the Romans do."[41]

Now we have identified two important elements that will keep popping up as characteristic of the cultural relativist attitude or the cultural relativist mindset. First, cultural diversity is observed (Herodotus). Second, it is posited that a culture should really only be judged by that culture's own norms (Protagoras).

This concludes our overview of the relativist views of Ancient Greece. What it shows is that, as early as Ancient Greece, there were pleas both for the *universality* and for the *relativity* of values and principles. In the subsequent period, the era of Christian philosophy, relativism was less prevalent. Thomas Aquinas (1225–1274) and St. Augustine (354–430), the two most important philosophers of the Christian period, represented anti-relativist views. This was to be expected. They believed that they had found a universal basis for values and principles in the Gospel. It was not until the Renaissance that the relativism of the ancient Greeks was taken up again. This was done by Montaigne, among others.

Many of the Greek discussions about morality are dusted off by Michel de Montaigne (1533–1592) in his *Essais*. We will see, however, that later thinkers apply new shades of meaning to cultural relativism, and that, having begun as the critical attitude of an outsider, it slowly turns into a perspective that today is supported by many, and is even considered more or less self-evident in "enlightened circles." Montaigne provided cultural relativism with an air of tolerance.

Montaigne

Michel Eyquem de Montaigne (1533–1592) was a French nobleman with a skeptical–humanist bent. In that sense, his work is somewhat related to the sophists. When his father died, Montaigne retreated from public life at the age of 37, devoting his life to reading books from the library he had inherited from his friend Etienne de la Boétie. Montaigne was a Catholic, but he also had a keen eye for the intolerant peculiarities of his faith. For instance, he was shocked to hear of the St. Bartholomew's Day Massacre of 1572, in which

40 Plato, *Theatetus,* 167e.
41 Attributed to St. Ambrosius.

20.000 Huguenots (Protestants) were killed by his fellow Catholics. In religious matters, he preached tolerance (which was unusual during this particularly *intolerant* time).[42]

Montaigne thought that even a statement like "I know nothing" was too immodest. His motto was: "What do I know?" In his *Essais* (1580–1588), we find cultural relativist phrasings in several places. For instance in his discourse "Of cannibals."

He extensively reflects on the term *barbarian*. What do we mean when we call something *barbarian*? Is it not curious that everyone calls barbarian that which is not part of their own customs, Montaigne asks, almost literally identically to Herodotus?[43]

In Montaigne, though, we find a new element in European cultural history: *the wish to be modest*[44] and the conviction that cultural relativism ought to be classified as a quintessentially modest mindset (an ideal the sophists had no notion of yet, and which they did not celebrate as an ideal).[45] He fulminates against the habit of calling others "savages" and "barbarians" and denying them a good religion and proper system of government.

Let us be humble. That is not only called for when we compare the products of our own hand to those of others, but also when we compare the products of human ingenuity with nature's prowess. No matter what we try, Montaigne says, we cannot even hope to reproduce the nest of the smallest bird. In it, we find a structure, beauty, and practical utility that many products of human design lack. Plato is right when he distinguishes between the things that come from nature and the things that come from technology. The biggest and most beautiful are made by nature, the meanest by technology.[46] The savages great advantage is that they are closer to nature than we are.

42 See: Lacouture, Jean, *Album Montaigne*, iconographie choisie et commentée par Jean Lacouture, Gallimard, Paris 2007, p. 123: "On résumera l'affaire ainsi: Montaigne est prudent, s'agissant du roi; audacieux, s'agissant du pape."

43 Whom he also references. Montaigne also comments on the example of Darius and the burning or eating of bodies: "l'usage nous dérobe le vrais visage des choses," he says. See:

Montaigne, Michel de, *The Essays of Michel de Montaigne, Essais, I*, p. 23, translated and edited with an introduction and notes by M.A. Screech, Allen Lane, The Penguin Press, London 1991.

44 An admirer of Montaigne writes that it is hard not to view the life's work of a man as moderate as Montaigne living in an age of fanaticism and cruelty as a unique phenomenon. See: Snethlage, J.L., *Montaigne,* Kruseman, Den Haag 1963, p. 5.

45 On the revaluation of pride as a virtue (and the depreciation of modesty as an ideal), see: Taylor, Richard, *Restoring Pride. The Lost Virtue of Our Age*, Prometheus Books, Buffalo, New York 1996. The wish to be modest can also be viewed as a typically Christian virtue, and so Bréhier, Emile, "Le Pyrrohisme: Montaigne," in: *Histoire de la philosophie, Tome I/3*, Presses Universitaires de France, Paris 1967, pp. 677–681, p. 677, is correct in saying that Montaigne's skepticism is "nullement antichrétien."

46 Montaigne, *Essais, I*, 31.

Apparently, Montaigne sees "wild" as a good thing. "Wild" means *in harmony with nature*. He speaks of wild fruits and wild peoples with admiration.[47] Here, an early Rousseau (1712–1778) emerges.[48] The artificial, the hand-crafted, the cultivated—it is assessed unfavorably. Not the made, the cultural, but the not-made, the natural, is the norm. As such, the "wildness" of the wild peoples cannot be called "barbarian" in the deprecating sense of the word, Montaigne believes.

> These nations then seem to me to be so far barbarous, as having received but very little form and fashion from art and human invention, and consequently to be not much remote from their original simplicity. The laws of nature, however, govern them still, not as yet much vitiated with any mixture of ours: but 'tis in such purity, that I am sometimes troubled we were not sooner acquainted with these people, and that they were not discovered in those better times, when there were men much more able to judge of them than we are.

Montaigne does not yet use the term *noble savage*, but the *substance* of Rousseau's perspective is fully operative here. He also praises the wildlings' ethics. "All their ethics are comprised in these two articles: resolution in war and affection to their wives."[49] That notion, the idea that we have to live in harmony with the laws of nature and not according to laws we have devised ourselves, will undergo an important development in European cultural history.

In a passage that is strongly reminiscent of Hobbes' state of nature[50] (although Montaigne is much more positive about the natural condition), he says:

> This is a people, I would say to Plato, among whom there is no commerce at all, no knowledge of letters, no knowledge of numbers, nor any judges, or political superiority, no habit of service, riches, or poverty, no contracts,

47 Montaigne, *Essais, I*, 31.

48 The Rousseau of the first Discours. See: Rousseau, J.J., "Discours sur les sciences et les arts," 1750, in: Rousseau, *Oeuvres complètes, III*, Bibliothèque de la Pléiade, Gallimard, Paris 1964, pp. 1–57.

49 Montaigne, *Essais*, I, 31.

50 See: Hobbes, Thomas, *Leviathan*, edited by Richard Tuck, Cambridge University Press, Cambridge 1996 (1651), Ch. 13, p. 89: "In such a condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short." Hobbes also speaks of the Native Americans in the United States, but he calls them "savage people" who live in a "brutish manner." Ibid., p. 89.

> no inheritance, no divisions of property, no occupations but easy ones, no respect for any relationship except ordinary family ones, no clothes, no agriculture, no metal, no use of wine or wheat.[51]

He then continues: "The very words which mean *lie, treason, deception, greed, envy, slander* and *forgiveness* are unknown." In other words, life in this natural state is far from "solitary, poore, nasty, brutish, and short," as Hobbes portrays it.[52]

Here, cultural relativism becomes a critical reflection of Montaigne's own culture and morality. The "savage" is actually right, not us. "Ils ne sont pas en débat de la conquête de nouvelles terres," Montaigne writes: these savages are not conquering the world. It is a critique of the imperialism of his time. The savage has it all, and so he does not need to conquer, Montaigne says.[53]

We could call this a third element[54] of cultural relativism: the wish to be modest and to avoid asserting the superiority of one's own culture over that of others. To summarize:

1 Herodotus introduces the diversity that characterizes our cultural world. One population thinks this, the other that. Customs rules all.
2 We therefore cannot judge or criticize cultures from without. Every culture operates under its own logic (Protagoras).

Montaigne subscribes to the first two points, but he also adds a third:

3 Modesty.

This too is a feature we keep seeing in cultural relativists: not criticizing others is viewed as a sign of modesty, of a non-arrogant attitude. It is an element that, after Montaigne, keeps recurring in the European history of ideas, especially in modern times.

51 *Essays of Michel de Montaigne*, translated by Charles Cotton, edited by William Carew Hazlitt, Project Gutenberg, accessed April 29. 2018, https://www.gutenberg.org/files/3600/3600-h/3600-h.htm
52 Hobbes, *Leviathan*, p. 89.
53 The question Rousseau poses, namely: "le rétablissement des Sciences et des Arts a-t'il contribué à épurer ou à corrompre les moeurs?" Montaigne in effect answers in the quoted sentence. See: Rousseau, J.J., *Discours sur les sciences et les arts*, 1750, in: Rousseau, *Oeuvres complètes, III*, Bibliothèque de la Pléiade, Gallimard, Paris 1964, pp. 1–57, p. 5. See also: Ibid., p. 17: "L'Astronomie est née de la superstition; l'Eloquence, de l'ambition, de la haine, de la flatterie, du mensonge; la Géométrie, de l'avarice; la Physique, d'une vaine curiosité; toutes, et la Morale même, de l'orgueil humain. Les Sciences et les Arts doivent donc leur naissance à nos vices: nous serions moins en doute sur leurs avantages, s'ils la dévoient à nos vertus."
54 After having emphasized cultural diversity (Herodotus) as the first element and the prescription of a culture-dependent assessment criterion (Protagoras) as the second element of cultural relativism.

Sumner

This brings us to a fourth key witness of cultural relativism; along with Herodotus, Protagoras, and Montaigne, the American sociologist William Graham Sumner (1840–1910), professor at Yale, is a relevant figure here. He was strongly influenced by Darwinism, which was prevalent in his time and held that the social sciences ought to free themselves from moralistic superstition. There are no natural rights or natural values, Sumner believed. Well known is his application of Darwinism to the economy and the market. Millionaires, he posited, are as much a product of the struggle for existence (and natural selection of the fittest) as "strong" animal species in nature.[55]

Sumner also is important because he held the first professorship of sociology in the United States. He was a universal scholar who wrote books in the areas of history, political theory, sociology, and cultural anthropology. Today, he is best known as the theoretician who introduced the term *ethnocentrism*. *Ethnocentrism*, placing the focus on one's own population, is something that Sumner disapproved of. As such, he was a vehement critic of the imperialism that was dominant in his time.

To us, Sumner is most relevant for his views on the *formation and foundation of morality*. Central to this is his claim that moral standards are always cultural standards. As such, it is impossible to say that one moral code is superior to another. This has led us to the fourth dimension of cultural relativism: *the focus on the cultural as an all-encompassing phenomenon*.

Central to Sumner's argument is the notion of *folkways*.[56] According to Sumner, these are "always right":

> The folkways are the 'right' ways to satisfy all interests, because they are traditional, and exist in fact. They extend over the whole of life. There is a right way to catch game, to win a wife, to make one's self appear, to cure disease, to honor guests, to treat comrades or strangers, to behave when a child is born, on the warpath, in council, and so on in all cases which can arise.

So, just like Protagoras, he attaches normative consequences to his observation that custom rules us all.

55 See: Hofstadter, Richard, "William Graham Sumner: Social Darwinist," in: *Social Darwinism in American Thought 1860–1915,* University of Pennsylvania Press, Philadelphia 1945, pp. 37–52, and about Social Darwinism in general: Rachels, James, *Created from Animals. The Moral Implications of Darwinism*, Oxford University Press, Oxford 1991.

56 Sumner, William Graham, *Folkways,* Ginn and Company, New York 1907, passages from it under the title "Cultural Relativism" also in: James Rachels, ed., *The Right Thing to Do. Basic Readings in Moral Philo-sophy*, McGraw-Hill, Inc., New York and Toronto 1989, pp. 51–57.

Also, in Summers' opinion, rights can never be "natural," "God-given," or absolute. "The morality of a group at a time is the sum of the taboos and prescriptions in the folkways by which right conduct is defined." Sumner also phrases it like this: all philosophical, moral, legal, and political rules that a group upholds are reflections (and generalizations) of the experience of pleasure and pain in the struggle for existence.

This is a combination of ideas that we have also seen in Ancient Greece (especially in Protagoras) and in Montaigne. However, Sumner uses a particular term for the act of seeing the world through the lens of the morality of one's own group. He speaks of *ethnocentrism*, a word that Montaigne does not use, but that, *as a phenomenon*, the Renaissance philosopher also denounced. In Sumner's view, *ethnocentrism* "is the technical name for this view of things in which one's own group is the center of everything, and all others are scaled and rated with reference to it." Although this is a natural attitude in the sense that every group has a tendency to do it, he seems to disapprove of it. At least, the way in which he describes it suggests as much: "Each group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders." Every group believes that its own customs are the right ones, Sumner says, repeating Herodotus's position almost verbatim. People have nothing but contempt for the values of other groups. It is not even uncommon for people to regard the members of other groups as not even human. The Sami people call the members of their own group "humans" or "human beings." The Greenlandic Inuit thought that the Europeans had come to Greenland to adopt the Greenlanders' mores and customs. The greatest compliment one can pay a European, the Greenlander thinks, is to say that he or she will soon become a good Greenlander.

These may be "foreign cultures," Sumner says, but is the same thing not true of the large Western cultures? He believes so. The Jews saw themselves as the "chosen people." The Greeks and Romans thought other peoples were "barbarians." The Arabs considered themselves to be the noblest nation, and others to be more or less barbaric. The same is true of modern-day Britain, France, Germany, and Russia. "Each state now regards itself as the leader of civilization, the best, the freest, and the wisest, and all others as inferior." In other words: an emphasis on universal values and standards is nowhere to be seen. Every culture sees itself as the center of the world.

Folkways

Crucial to ethics is, of course, the way in which Sumner sees the relationship between the *folkways* and morality. He posits that when the elements truth and rightness are cultivated in beliefs about the wellbeing of people and society, the folkways are taken to another level. They then start to exert a constructive influence on people and society. At that point, they are called *mores*. So the mores are the folkways, "including the philosophical and ethical generalizations

as to societal welfare which are suggested by them, and inherent in them, as they grow."

The mores provide us with guidelines of what to do (or "of what ought to be"). "All notions of propriety, decency, chastity, politeness, order, duty, right, rights, discipline, respect, reverence, cooperation, and fellowship"—they all depend on the mores. The mores can make things right and good for one group and be totally wrong for another group.

In the 13th century, people had such strong negative feelings about heretics that the desire to eradicate them was just as self-evident to them as our wish to eradicate rattlesnakes is to us: "The world philosophy of the age is never anything but the reflection of the mental horizon, which is formed out of the mores, of the ruling ideas which are in the mores themselves."

What it all comes down to with Sumner is the following description of "immoral": "Immoral never means anything but contrary to the mores of the time and place."[57] There is no permanent or universal standard by which good and bad can be distinguished. Or, in his own words: "There is no permanent or universal standard by which right and truth in regard to these matters can be established and different folkways compared and criticized." "Immoral" is nothing more than acting in a way that conflicts with one's own group values.

So, in essence, Sumner does not add much to the cultural relativism of Protagoras and Montaigne. Why he nevertheless plays an important role in the history of cultural relativism is that, with Sumner, cultural relativism is more or less presented as the starting point for *scientific thinking* on morality, society, and the law.[58] Sumner also defended a position that, these days, is associated with the political right: Social Darwinism. That cultural relativism would also become *en vogue* in the circles of left-wing social thinkers can be largely credited to the popularity of the work of Ruth Benedict. Benedict is the fifth theoretician on whom we want to focus, in addition to Herodotus, Protagoras, Montaigne, and Sumner. Benedict may be the most famous cultural anthropologist to make cultural relativism the core of her philosophy.

Benedict

A fifth intellectual who was important to the development of cultural relativism was Ruth Benedict (1887–1947). Benedict was born in New York and initially studied English literature. After marrying the biochemist Stanley Benedict, she became interested in anthropology and ended up at Columbia University with

57 Sumner, William Graham, *Folkways*, Ginn and Company, New York 1907, p. 418.

58 Gensler, Harry J., "Cultural relativism," in: *Ethics*, Routledge, London and New York 1998, pp. 11–20, p. 17, reads: "The popular stereotype says that all social scientists are cultural relativists. This is a false stereotype." This may be true, but the stereotype did not come about for no reason. A social scientist who *does not think carefully* about the limitations of his social science approach is extremely vulnerable to the cultural relativist temptation.

Franz Boas (1858–1942), an authority who taught cultural relativism to an entire generation.[59] It was the heyday of Darwinism. Following in the footsteps of her mentor, Benedict would vehemently oppose this philosophy.

Benedict expected her cultural relativism to have beneficial results. If no culture was superior to any other, *imperialism* would also have to be rejected. This was a view she shared with Sumner. She also expected cultures to be tolerant of other mores and customs once the pretentions of a "superior" culture were disproved.[60]

She is most famous for her book *Patterns of Culture* (1935). However, a year before this was published, she had written an article in which she had shone a light on the terms *normal* and *abnormal* and in which she had taken a position that ethics handbooks were usually categorized as cultural relativism.[61]

What she calls *modern social anthropology* is important here. "Modern social anthropology has become more and more a study of the varieties and common elements of cultural environment and the consequences of these in human behavior."

Also characteristic is a second remark. She says: "For such a study of diverse social orders primitive peoples fortunately provide a laboratory not yet entirely vitiated by the spread of a standardized worldwide civilization."

This leaves nothing to be desired in terms of clarity. She assumes that primitive peoples are "fortunately" still living in a state in which they have not yet been "vitiated" by the global culture: an element we also see in Montaigne, when he writes in his essay on cannibals that wild peoples are only barbaric in the sense "that they have been little refashioned by the human mind and are still quite close to their original naiveté."[62] Benedict then points to the Dayak, the Hopi, the Fijians, and the Yakut as simpler peoples who have lived in sufficient isolation for the origins of local social habits to be studied. But why should this be done? What is the value of that knowledge? She expects such a study to produce material that can teach us to relativize Western mores, exactly as Montaigne did five centuries earlier.

59 On Boas, also see: Cook, John W., *Morality and Cultural Differences,* Oxford University Press, New York and Oxford 1999, pp. 51–116.

60 On Benedict, also see: Boss, Judith A., "Cultural relativism. Is morality dependent on culture?," in: Judith A. Boss, *Ethics for Life. An Interdisciplinary and Multicultural Introduction*, Mayfield Publishing Company, Mountain View, London, and Toronto 1998, pp. 104–146, p. 118.

61 Benedict, Ruth, "Anthropology and the abnormal," in: *The Journal of General Psychology,* Vol. 10 (1934), pp. 59–82, under the title "A defense of ethical relativism" also in: Pojman, Louis, ed., *Moral Philosophy: A Reader,* Second Edition, Hackett Publishing Company, Inc., Indianapolis and Cambridge 1998 (1993), pp. 33–37, and in: Gould, James A., ed., *Classic Philosophical Questions,* Seventh Edition, Macmillan Publishing Company, New York 1992, pp. 95–101.

62 *Essays of Michel de Montaigne*, translated by Charles Cotton, edited by William Carew Hazlitt, Project Gutenberg, accessed April 29, 2018, https://www.gutenberg.org/files/3600/3600-h/3600-h.htm

> In the higher cultures the standardization of custom and belief over a couple of continents has given a false sense of the inevitability of the particular forms that have gained currency, and we need to turn to a wider survey in order to check the conclusions we hastily base upon this near-universality of familiar customs.

It is clear that Benedict breaks with the modern belief in progress: once we have adopted the perspective she advises us to adopt, Benedict says we will cease to view modern civilization as a necessary peak of human ability, but as one of many possible civilizations.[63]

She then moves on to analyzing experiences and behavior that are seen as *abnormal* in some cultures and as *normal* in others. For instance, trance-like experiences and homosexuality might be considered normal in Western culture, but not in all the cultures she came into contact with as a cultural anthropologist. (As a side note: Benedict writes about Western attitudes with regard to homosexuality in the 1930s. Those attitudes were more akin to Sheik Bakri's views on the subject—see the beginning of this chapter—than to how Western culture perceives homosexuality today.)[64] This leads her to conclude "that normality is culturally defined." She also does not neglect to draw conclusions (or at least what she perceives to be such) from this observation. She says:

> An adult shaped to the drives and standards of either of these cultures [the primitive cultures], if he were transported into our civilization, would fall into our categories of abnormality. He would be faced with the psychic dilemmas of the socially unavailable. In his own culture, however, he is the pillar of society, the end result of socially inculcated mores, and the problem of personal instability in his case simply does not arise.[65]

Cultural relativism also enters into an alliance with the sociology of knowledge. "The very eyes with which we see the problem are conditioned by the long traditional habits of our own society." So, as humans, we are unable to escape this determinist effect of culture. Even *the way in which we perceive* is culturally determined.

Just like Sumner, Benedict also makes the leap from cultural anthropology to ethics. She even expects that she will not need to do as much missionary work among ethicists with her cultural relativism as among psychiatrists. "It is a point that has been made more often in relation to ethics than in relation to

63 Benedict, "Anthropology and the abnormal."

64 See on the history of thinking on homosexuality: Fone, Byrne, *Homophobia: A History,* Metropolitan Books, Henry Holt and Company, New York 2000; Rowse, A.L., *Homosexuals in History: A Study of Ambivalence in Society, Literature and the Arts,* Weidenfeld & Nicolson, London 1977.

65 Benedict, quoted in: Gould, James A., ed., *Classic Philosophical Questions*, Seventh Edition, Macmillan Publishing Company, New York 1992, pp. 95–101, p. 96.

psychiatry," she writes about highlighting how culturally dependent our judgments are. "We do not any longer make the mistake of deriving the morality of our locality and decade directly from the inevitable constitution of human nature," Benedict writes, as if she has hit upon some naturalistic fallacy in ethics.

Also note the blatant *new* belief in progress that lurks in these sentences: we used to make mistakes that now, in this enlightened age, we know how to avoid. It also shows that she believes that she not only has the best arguments, but also that these arguments have already won the day. After all: "We recognize that morality differs in every society, and is a convenient term for socially approved habits."

This last passage is an important one: morality is nothing more than "socially approved habits." The cultural anthropologist can help the ethicist to clarify the object of his study. We are used to saying: "It is morally right." But what we really should be saying is: "It is habit." The concept of "good" refers to the same thing as "that which society has approved."

So, she arrives at exactly the same place as Protagoras and Sumner, to whom immoral acts are acts "contrary to the mores of the time and place."

Nothing new under the sun then? Not entirely. Insofar as Benedict made cultural relativism fashionable for right-thinking progressive intellectuals.[66] Cultural relativism is not only the "scientific" position, as Sumner had already shown; it is also the preferred position, on sociopolitical grounds, for a critical intellectual elite at odds with its own culture and time. Relativism came to be a part of the counter culture.[67] This is where the idea originates, so dominant nowadays, that "everyone has their own truth."

Although there still is no trace of criticism of imperialism and the expansionist pursuits of Western culture in Sumner, this is at the heart of Benedict's writings. As such, it is difficult to overstate her role in the dissemination of the cultural relativist attitude.

In Benedict, however, cultural relativism is not yet a fully fleshed-out philosophical position, which justifies shining a light on a sixth and last key witness of cultural relativism. After all, at the beginning of the 20th century, a group of philosophers focused on the empirical character of morality, and *that* development would also turn out to be important for the origin story of modern-day cultural relativism. People sought the foundations of this in human emotions (emotivism).[68] Since these

66 On the popularity of relativism among students and intellectuals, also see: Bloom, Allan, *The Closing of the American Mind. How Higher Education has Failed Democracy and Impoverished the Soul of Today's Students*, Simon & Schuster, New York 1987.

67 See: Kristol, Irving, *Neoconservatism: The Autobiography of an Idea, Selected Essays 1949-1995*, The Free Press, New York 1995.

68 See on this: Rachels, James, "Subjectivism," in: Peter Singer, ed., *A Companion to Ethics,* Blackwell, Cambridge, Massachusetts and Oxford 1991, pp. 432–442, Rachels, James, "Introduction," in: James Rachels, ed., *Ethical Theory, Volume I: The Question of Objectivity*, Oxford University Press, Oxford 1998, pp. 1–19.

differ according to time and place, morality, they said, was also relative to time and place. Perhaps the most persuasive representative of this perspective is Edward Westermarck (1862–1939).

Westermarck

The Finnish scholar Edward Westermarck was a slightly older contemporary of Benedict's. He detested the German idealism that was popular in his time. He was drawn to the British empirical tradition of practicing philosophy (the work of Hume, among others), as well as the evolutionism of Darwin and Spencer. In particular, he did research on the historical development of marriage, as in *The History of Human Marriage* (1891),[69] in which he rejected the idea of primitive promiscuity. Often considered his most important work is *The Origin and Development of Moral Ideas* (1912–1917), in which Westermarck tried to study the notion of good and evil in various cultures, as well as its evolutionary development.[70] In *Ethical Relativity* (1932), he repeats the key points of his earlier work, answers critics (among whom was G.E. Moore), and explains the philosophical foundation of his thinking (relativism).[71]

With regard to the foundations of morality, Westermarck held to the emotivist claim that moral judgments are based on emotions. These moral emotions are distinguishable from others by the idea of retribution and impartiality. According to Westermarck, morality is a social and a relative thing.[72] There is no such thing as an objective moral judgment.

Perhaps Westermarck's greatest contribution to theory formation on ethics is that he described all the different attitudes with regard to manslaughter, blood vengeance, charity, slavery, love of truth, altruism, asceticism, and the afterlife. History does not show simple, linear progress. Many of the feelings and rules we associate with an enlightened mindset are sometimes also found in primitive

69 Westermarck, Edward, *The History of Human Marriage*, Macmillan, London 1891; Westermarck, Edward, *A Short History of Marriage*, Macmillan, London 1926.

70 Westermarck, Edward, *The Origin and Development of Moral Ideas*, Macmillan, London 1912–1917.

71 Westermarck, Edward, *Ethical Relativity,* Kegan Paul, Trench, Trubner & Co., London 1932.

72 Westermarck, Ibid., passim. Another well-known emotivist is Alfred Jules Ayer, whose *Language, Truth and Logic* appeared in 1936, four years after Westermarck's book. Ayer had a significant impact on the spread of emotivism in the Anglo-Saxon world. However, Westermarck is more important to us because of his cultural-anthropological approach to ethics. Moreover, although Ayer is an emotivist, he is not a cultural relativist. In the end, emotivism harks back to Hume, who phrased it like this: "When you pronounce any action or character to be vicious you mean nothing, but that from the constitution of your nature you have a feeling or sentiment of blame from the contemplation of it" (Hume, *Treatise, III*, i, 1). See also the commentary in: Rachels, James, "Introduction," in: James Rachels, ed., *Ethical Theory, Volume I: The Question of Objectivity*, Oxford University Press 1998, pp. 1–18.

peoples, just as barbarian beliefs and practices sometimes occur in highly civilized cultures.

Still, Westermarck is not a relativist in the sense that he wanted to avoid the more subjective tendencies inherent in the relativist approach to morality. The philosopher J.L. Mackie (1917–1981), himself the author of a relativist-flavored introduction to ethics,[73] characterizes it as follows:

> Nevertheless, Westermarck did indicate a few main trends which he expected to continue—the expectation of the altruistic sentiment, the increasing influence of moral judgments of reflection as opposed to sentimental likes and dislikes, and the restricting of religion to the function of supporting ordinary moral rules as opposed to special religious duties.[74]

Westermarck's own views are reflected in these words:

> Society is the school in which we learn to distinguish between right and wrong. The headmaster is Custom, and the lessons are the same for all the members of the community. The first moral judgments were pronounced by public opinion; public indignation and public approval are the prototypes of moral emotions.[75]

Society represents the birth hour of our moral awareness, Westermarck says. "Customs are not merely public habits—the habits of a certain circle of men, a racial or national community, a rank or class of society—but they are at the same time rules of conduct."[76] There is a reason we say "custom demands" or "custom commands."

He also quotes Montaigne (*Essais,* I, 22),[77] who says: "Les lois de la conscience, que nous disons naître de nature, naissent de la coutume; chacun ayant en vénération interne les opinions et mœurs approuvées …]" It is not for nothing that the word *moral* is etymologically linked to the term *mos*.[78]

73 Mackie, J.L., *Ethics. Inventing Right and Wrong*, Penguin Books, Harmondsworth 1977, p. 105 argues "that there are no objective values … and that no substantive moral conclusions or serious constraints on moral views can be derived from either the meanings of moral terms or the logic of moral discourse."

74 Mackie, J.L., "Edward Alexander Westermarck," in: Paul Edwards, ed., *The Encyclopedia of Philosophy, Volume 8*, The Free Press, Macmillan, New York and London 1967, pp. 284–286, p. 285. In 1939, the year of his death, Westermarck wrote *Christianity and Morals,* Kegan Paul, London 1939, in which he argued that Christianity had done more harm than good to morality. On Westermarck, see also: Cook, John W., *Morality and Cultural Differences,* Oxford University Press, New York and Oxford 1999, p. 106ff.

75 Westermarck, *Ethical Relativity,* p. 50.

76 Westermarck, Ibid.

77 Which should actually be: I, 23.

78 Westermarck, *Ethical Relativity*, p. 111.

Of course, we had already encountered this in Protagoras, Montaigne, and William Graham Sumner. Westermarck believes that the notion of the relativity of moral values will, in all likelihood, result in tolerance, a point that Montaigne had already made and that Ruth Benedict developed further, as we have seen. "Could it be brought home to people that there is no absolute standard in morality, they would perhaps be on the one hand more tolerant and on the other hand more critical in their judgments."[79]

It is the same line of reasoning that comes back over and over again in our key witnesses of cultural relativism. They consider morality to be "socially approved habits." They then conclude that these are variable and relative, and on the basis of this, they formulate the expectation that tolerance and respect among peoples will prevail once relativism is widely accepted.[80]

Stace, Bloom, and Bork

Cultural relativism slowly became a part of the array of views the progressive intellectual ought to subscribe to. To the great annoyance of conservative intellectuals like W.T. Stace (1886–1967),[81] Allan Bloom (1930–1992),[82] and Robert Bork[83] (1927–2012) the cultural elite of the Western world has been entirely convinced of the value and rightness of cultural relativism.

The American philosopher Louis Pojman (1935–2005) describes how popular relativism is among students. "The polls show a two-to-one ratio in favor of moral relativism over moral absolutism," he writes.[84] As such, the popularity of relativism in the current times is paralleled by the 1940s. Walter Terence Stace, an American philosopher who wrote an important critique of relativism called

79 Westermarck, Ibid., p. 59.

80 That expectation is also voiced by the great legal philosopher Hans Kelsen, whose views were discussed in Chapter 1 of this book. See: Kelsen, Hans, *Was ist Gerechtigkeit?,* Zweite Auflage, Franz Deuticke, Wien 1975, and Kelsen, Hans, "Absolutism and relativism in philosophy and politics," in: *American Political Science Review,* Vol. 42, No. 5 (1948), pp. 906–914.

81 In Stace, W.T., *The Concept of Morals,* Macmillan, London 1937, he presents a clear critique of relativism. In Stace, W.T., *The Destiny of Western Man,* Reynal & Hitchcock, New York 1942, he attached political relevance to an interpretation of the classical universalist tradition of Plato and Aristotle. See also: Herman, Arthur, *The Cave and the Light: Plato versus Aristotle and the Struggle for the Soul of the Western Civilization*, Random House, New York 2014 (2013).

82 In Bloom, Allan, *The Closing of the American Mind: How Higher Education has Failed Democracy and Impoverished the Soul of Today's Students,* Simon & Schuster, New York 1987, he presented a critique of the American universities, which he believed were permeated with relativist thinking.

83 In Bork, Robert H., *Slouching towards Gomorrah: Modern Liberalism and American Decline,* Harper Collins, New York 1996, he offered a critique of relativist trends in American thinking on constitutional law.

84 Pojman, Louis, ed., *Moral Philosophy: A Reader,* Second Edition, Hackett Publishing Company, Inc., Indianapolis and Cambridge 1998 (1993), p. 38.

The Concept of Morals (1937), talks of "the growing belief that the things which are most valuable to human beings—beauty, knowledge, and moral goodness—are *relative* to the circumstances, the time, and the place of their appearance, as well as to the natures of men."[85] Especially among intellectuals who like to be thought of as progressive, relativism is widely supported, he writes. "Those of the left wing are the ethical relativists. They are the revolutionaries, the clever young men, the up to date. Those of the right wing we may call the ethical absolutists. They are the conservatives and the old-fashioned."[86]

The question is how that tenacious persistence can be explained, when the arguments for relativism are far from irrefutable. Is personal worldview playing a role here? Pojman believes he has an explanation for this when he says that relativism is a kind of default position. People think they are committing to outdated convictions, such as a Platonic realm of forms, when they defend universal values.

This is no doubt a relevant factor. But relativism's greatest draw seems to be its perceived tolerance, modesty, and anti-imperialist attitude, in other words, the points Ruth Benedict tried to make. These days, those values are so self-evident (and rightly so) that a perspective that manages to claim a kinship with these ideas holds a strong position in the public debate. It is therefore possible to say that the work of the six great intellectuals and scientists (Herodotus, Protagoras, Montaigne, Sumner, Benedict, and Westermarck) has been of great import. There are certainly other thinkers we could have focused on in this context, but these six provide a fairly complete picture of relativist thinking.

It is clear that cultural relativist thinking strikes a chord with people, in current times especially. The reason for this may be that this time is also inhabited by fundamentalist philosophies that claim to have all the answers. The worldview of Sheik Bakri, with whom we started this chapter, illustrates this. How can anyone be so convinced of his own beliefs that he thinks it is justified to call for violence against a playwright? How can people be so sure of the arbitrary customs of their culture that they are willing to sexually mutilate their own daughters?[87] Because is that not what is happening in the case of the circumcision of girls? Would a healthy dose of doubt, a degree of relativization, not be very welcome here? Relativists do not wage imperialist wars, Montaigne and Benedict would tell us. So is a healthy dose of relativism not exactly what our time needs? Why meet Sheik Bakri's absolutism and universalism with *another* absolutism and universalism? Is that not sending precisely the wrong message? Let us try to convert the supporters of Sheik Bakri to a tolerant relativism.

85 Stace, W.T., *The Concept of Morals*, The Macmillan Company, New York 1962 (1937), p. vi.

86 Stace, Ibid., p. 1.

87 See on this: Kanko, Assita, *Parce que tu es une fille: histoire d'une vie excisée*, Renaissance du livre, Waterloo 2014.

Sounds good, right? Or not?

Perhaps not, because, on the other hand, relativists may not be imperialists themselves, but they also do not have many good arguments to dissuade others from it. Relativists are like pacifists: they do not wage wars themselves, but they also do not combat those who do. They lack ammunition with which to fight. In less martial language: they lack *arguments*.

In the rest of this chapter, let us attempt to further substantiate this critical stance with regard to cultural relativism. And let us begin with the reason why cultural relativism seems to be so popular these days, which is due to the undermining role it plays in formulating all sorts of pretentions of superiority.

Dickens and Kipling

Those who wish to understand cultural relativism's enormous popularity should really also look at what cultural relativism wanted to oppose: 19th century authors with overwrought ideas about the superiority of Western civilization. Infamous are the views of writers like Rudyard Kipling (1865–1936) who legitimized imperialistic politics.

> Take up the White Man's burden –
> Send forth the best ye breed –
> Go, bind your sons to exile
> To serve your captive's need;
> To wait, in heavy harness,
> On fluttered folk and wild –
> Your new-caught sullen peoples,
> Half devil and half child.[88]

This was 1899. Sumner was 59 years old at the time, Benedict 12, and Westermarck 37. Around the turn of the century, there were heated discussions all over the world about the merits of imperialism. The *San Francisco Call* wrote: "Rudyard Kipling has joined the ranks of those eminent British jingoes who are trying to induce the United States to help Great Britain in her imperial schemes by taking part in the Oriental imbroglio."[89] The criticism of the imperialist pursuits of the major powers was scathing. "There is something sickening in this 'imperial' talk of assuming and bearing burdens for the good of others," Alfred Webb wrote from Dublin. "Whenever empire (I speak of the United Kingdom) is extended, and the climate suits the white man, the aborigines are, for the benefit of the white man, cleared off or held in degradation for his benefit."[90] Others phrased it a bit more

88 Kipling, Rudyard, "The white man's burden," in: *McClure's Magazine,* Feb. 12, 1899.
89 *San Francisco Call,* Feb. 1899, Editorial.
90 Webb, Alfred, "Mr. Kipling's call to America," in: *The Nation,* Feb. 23, 1899.

carefully: "There is reason to doubt if the white man is entirely disinterested as a race in taking up the white man's burden."[91]

The idea that the savage was "half devil, half child," so a creature that needed to be educated and civilized, also has deep roots in European cultural history. Of course there were also critical attitudes with regard to Western culture, as voiced by Rousseau[92] and Montaigne (and going back further to the cynics, but also to the sophists),[93] but this was not the dominant view.[94] The dominant view was a self-confident attitude about the superiority of Western culture and the attendant way of thinking that Sumner analyzed so well. A good example of this can be found in an essay by Charles Dickens (1812–1870).

In 1853, Dickens published an essay that was highly critical of "the noble savage."[95] He was stimulated to do so by the performance of a group of Zulus who had been brought to England by a merchant from Natal: A.T. Caldecott. The group consisted of 11 men, a woman, and a child. They performed traditional dances and short plays at Hyde Park Corner.

Dickens, no conservative by any means, found the infatuation he saw around him with the "noble savage" to be revolting. He thought it diverted attention away from the wretched existence of England's "own" poor in the slums. His tone is unforgiving. "I have not the least belief in the Noble Savage," he writes.

91 "The white man's burden," in: *San Francisco Bulletin,* Feb. 7, 1899, Editorial.

92 Most radically in: Rousseau, J.J., "Discours sur les sciences et les arts," 1750, in: Rousseau, *Oeuvres complètes, III*, Bibliothèque de la Pléiade, Gallimard, Paris 1964, pp. 1–57, in which the problem is phrased like this: "Le rétablissement des Sciences et des Arts a-t'il contribué à épurer ou à corrompre les Moeurs?" (p. 5). Rousseau answers the question in the negative, appealing to Montaigne. "Je n'ose parler de ces Nations heureuses qui ne connoissent pas même de nom les vices que nous avons tant de peine à réprimer, de ces sauvages de l'Amérique dont Montagne ne balance point à préférer la simple et naturelle police, non-seulement aux Loix de Platon, mais même à tout ce que la Philosophie pourra jamais imaginer de plus parfait pour le gouvernement des Peuples" (p. 12).

93 For a convenient overview, see: Luck, Georg, *Die Weisheit der Hunde. Texte der antiken Kyniker*, Alfred Kröner Verlag, Stuttgart 1997.

94 Of course, the most famous critique of the glorification of the noble savage is Voltaire's. On August 30, 1755 he wrote to J.J. Rousseau: "On ne peut peindre avec des couleurs plus fortes les horreurs de la société humaine, dont notre ignorance et notre faiblesse se promettent tant de consolations. On n'a jamais employé tant d'esprit à vouloir nous rendre bêtes; il prend envie de marcher à quatre pattes, quant on lit votre ouvrage. Cependant, comme il y a plus de soixante ans que j'en ai perdu l'habitude, je sens malheureusement qu'il m'est impossible de la reprendre, et je laisse cette allure naturelle à ceux qui en sont plus dignes que vous et de moi." See: Voltaire, *Lettres,* présentées par Gérard Delaisement, Didier, Bruxelles, Paris, and Montréal 1968, p. 57.

95 Dickens, Charles, "The noble savage," in: *Household Words*, June 11, 1853. (*Household Words* was an English weekly magazine edited by Charles Dickens in the1850s. It took its name from the line in Shakespeare's *Henry V*: "Familiar in his mouth as household words.") Also in: John Carey, ed., *The Faber Book of Utopias,* Faber and Faber, London 1999, pp. 239–245.

> I consider him a prodigious nuisance, and an enormous superstition. His calling rum fire-water, and me a pale face, wholly fail to reconcile me to him. I don't care what he calls me. I call him a savage, and I call a savage a something highly desirable to be civilized off the face of the earth.[96]

The sympathetic attitude with regard to foreign cultures and the curiosity they represent, which we saw in Montaigne, is nowhere in evidence here. Western culture is superior, the other cultures inferior. Does this not look the perfect groundwork for the imperialism of the 1880s and 1890s, an attitude that was "eine englische Erfindung" (an English discovery)?[97] It is said of the savage that "he is a savage—cruel, false, thievish, murderous; addicted more or less to grease, entrails, and beastly customs; a wild animal with the questionable gift of boasting; a conceited, tiresome, bloodthirsty, monotonous humbug."[98]

How incredible, says Dickens, that the noble savage is so glorified! He is spoken of as if he is a part of the good old days. His disappearance from the world stage is lamented. But this is misguided. The savage's disappearance "is a blessed relief and an indispensable preparation for the sowing of the very first seeds of any influence that can exalt humanity."[99]

Little of what Dickens writes will be met with agreement these days. Slightly embarrassed, we read on. Once or twice, he says something that could be considered politically correct even in our day, such as when he criticizes the savage for his misogynistic views. (He agrees with Buffon, who had portrayed the noble savage in the only way that does justice to his status: "the sulky tyrant that he is to women.") But that is it. The rest of the time, his remarks sound extraordinarily cruel to modern ears, if not downright sinister.

One of the criticisms that Dickens levels against the savage is the dictatorial way in which he rules and is ruled:

> The noble savage sets a king to reign over him, to whom he submits his life and limbs without a murmur or question, and whose whole life is passed chin deep in a lake of blood; but who, after killing incessantly, is in his turn killed by his relations and friends, the moment a grey hair appears on his head. All the noble savage's wars with his fellow-savages (and he takes no pleasure in anything else) are wars of extermination—which is the best

96 Dickens, Charles, "The noble savage," in: *Household Words*, June 11, 1853, also in: John Carey, ed., *The Faber Book of Utopias*, Faber and Faber, London 1999, pp. 239–245.

97 Friedell, Egon, *Kulturgeschichte der Neuzeit, II*, Deutscher Taschenbuch Verlag, München 1976 (1927), p. 1369: "Der Imperialismus ist, wie alle grossen politischen Neuorientierungen, eine englische Erfindung. *'Empire and extension'* lautete die zauberkräftige Devise der achtziger und neunziger Jahre. Ihr Sänger war Rudyard Kipling."

98 Dickens, Charles, "The noble savage."

99 Dickens, Ibid.

> thing I know of him, and the most comfortable to my mind when I look at him. He has no moral feelings of any kind, sort, or description; and his "mission" may be summed up as simply diabolical.[100]

He ends his essay in an ominous fashion. "It is my opinion that if we retained in us anything of the noble savage, we could not get rid of it too soon."[101] Also:

> To conclude as I began. My position is, that if we have anything to learn from the Noble Savage, it is what to avoid. His virtues are a fable; his happiness is a delusion; his nobility, nonsense. We have no greater justification for being cruel to the miserable object, than for being cruel to William Shakespeare or an Isaac Newton; but he passes away before an immeasurably better and higher power than ever ran wild in any earthly woods, and the world will be all the better when his place knows him no more.[102]

Those last words are perhaps the most sinister: "when his place knows him no more." Western civilization was readying itself for an imperialist crusade across the entire world, so it seems.

At first glance then, cultural relativism, a position that does away with cultural superiority à la Dickens, seems to be a highly attractive point of view. It represents a sympathetic, open-minded, tolerant, politically correct mindset as an antidote to the arrogant Western pretention to be capable of and justified in ruling the world. It is in accordance with modern and enlightened insights from sociology, philosophy, and cultural anthropology, as the characterizations of Herodotus, Protagoras, Montaigne, Sumner, Westermarck, and Benedict have shown. It seems difficult to resist the temptation of the cultural relativist position. But is it really as strong as it seems?

Seven elements of cultural relativism

Let us try to examine the elements of cultural relativism more closely in order to judge whether this attractiveness survives critical analysis. When we summarize the central elements of cultural relativism, we arrive at seven elements.

First of all: *cultural diversity exists*. The starting point of cultural relativism, which is that cultural diversity exists, is, of course, undeniable. Herodotus observes the differences between Greeks and Callatians whereas Protagoras emphasizes cultural diversity. Montaigne points out the differences between his own culture and that of the savages. Sumner sees that folkways differ according to time and place. Benedict notes that homosexuality and other practices are

100 Dickens, Ibid.
101 Dickens, Ibid.
102 Dickens, Ibid.

regarded very differently in Western culture than in that of the Dayak, Hopi, and Yakut. Westermarck devoted his life to describing how much we and other peoples differ in our experience of blood vengeance, charity, slavery, love of truth, and asceticism.

The American philosopher Louis Pojman (1935–2005) points to Westermarck's *Origin and Development of Moral Ideals* (1906) as a "mine of examples of cultural diversity,"[103] but Montaigne's *Essais* (1580) do the same thing, really. His essay "De la coutume" is one long list of mores and customs that differ.[104] He thinks it is impossible to name a single belief, however bizarre, that cannot be found somewhere in the world. "I do believe, that no so absurd or ridiculous fancy can enter into human imagination, that does not meet with some example of public practice, and that, consequently, our reason does not ground and back up."[105] There are countries in which people turn their backs on others in greeting; there are countries in which people speak to their king only through an intermediary; there are countries in which virgins publicly display their genitals, while married women have to diligently cover them up; there are countries in which there are all-male brothels, and even marriages between men;[106] there are countries in which men and women are both circumcised and baptized; there are countries in which a soldier who manages to cut off seven heads in one or more fights and offers them to his king is elevated to the status of nobility; yes, there are even countries in which people subscribe to the rare and uncivilized belief that the soul is mortal.

Upon learning of this awesome variety, it is hard not to be impressed. And indeed, there is no denying cultural diversity.

Two uncomfortable examples of cultural diversity are the ones with which we started this chapter. First, there is the example of a sheik who wants to have a playwright killed over the contents of one of his plays. Second, there is the example of parents who have their children's genitals mutilated because they believe that their religion or culture requires it.[107]

No matter how you look at it: in emphasizing cultural diversity, cultural relativism cannot be argued with. In making this claim, then, the cultural relativists are correct.

103 Pojman, Louis P., "A defense of ethical objectivism,", in: Louis Pojman, , ed., *Moral Philosophy: A Reader,* Second Edition, Hackett Publishing Company, Inc., Indianapolis and Cambridge 1998 (1993), pp. 38–52, p. 51.

104 Montaigne, *Essais, I*, 23.

105 *Essays of Michel de Montaigne*, translated by Charles Cotton, edited by William Carew Hazlitt, Project Gutenberg, accessed April 29, 2018, https://www.gutenberg.org/files/3600/3600-h/3600-h.htm

106 In the Netherlands, marriage between partners of the same sex (*gay marriage* in the popular vernacular) has been possible since 2001.

107 See: Dirie, Waris and Miller, Cathleen, *Desert Flower: The Extraordinary Journey of a Desert Nomad*, Virago, New York 1998; Dirie, Waris, with d'haem, Jeanne, *Desert Dawn*, Virago, New York 2002; Dirie, Waris, with Milborn, Corinna, *Desert Children*, translated by Sheelagh Alabaster, Virago, New York 2005.

Secondly: *morality is a part of culture*. A second element that is featured in all cultural relativists is the claim that morality is also a part of culture. Or, morality is an element of culture. The word *culture* can be used in both a broad and a narrow sense here. In the broad sense, it refers to all characteristics of certain life forms. In the narrow sense, it refers to a system of values that is implicit to it.[108] In both cases, though, morality is included in it.

The notion that morality is a part of culture seems to be as impossible to argue against as the fact that cultural diversity exists. And that automatically leads us to the third claim, which is:

Thirdly: *morality is dependent on culture*. If the culture is different, the morality is different. We can conclude this from the examples of female circumcision and the declaration of a fatwa against the British author. People are part of a different culture, and that produces different moral convictions. Read Montaigne. Read Westermarck. "There is nothing, in my opinion, that [custom] does not, or may not do; and therefore, with very good reason it is that Pindar calls her the ruler of the world," Montaigne writes.[109] Pascal (1623–1662) phrased it well when he wrote: "Three degrees of latitude reverse all jurisprudence; a meridian decides the truth. Fundamental laws change after a few years of possession."[110]

What we see here in Pascal is a point that will be made over and over again. It is a comparison between morality and law. That this association is made is understandable. Morality and law are comparable in many ways. Both involve normative rules. A characteristic of law is that its validity differs according to national jurisdiction. It is lawful to drive on the left side of the road *in Britain*. It is lawful to drive on the right side of the road *in the United States*. And of course no one will claim that although people in Britain drive on the left side of the road, driving on the right side is really the right thing to do. As such, *when it comes to the law*, we are all cultural relativists. So why should we not be with regard to morality?[111]

108 "Culture," in: *The Oxford Companion to Philosophy,* Oxford University Press, Oxford and New York 1995, p. 172.

109 *Essays of Michel de Montaigne*, translated by Charles Cotton, edited by William Carew Hazlitt, Project Gutenberg, accessed April 29, 2018, https://www.gutenberg.org/files/3600/3600-h/3600-h.htm

110 *Pascal's Penseés*, with an introduction by T.S. Eliot, Project Gutenberg, accessed April 29, 2018, https://www.gutenberg.org/files/18269/18269-h/18269-h.htm "Trois degrés d'élévation du pôle renversent toute la jurisprudence, un méridien décide de la vérité; en peu d'années de possession, les lois fondamentales changent." See: Pascal, *Pensées,* Fragment 294 (Edition Brunschvicg).

111 Morton, Adam, "Rationalism versus relativism in morals," in: *Philosophy in Practice,* Blackwell, Cambridge, Massachusetts and Oxford 1996, pp. 91–122, p. 107, phrases it like this: "What places are to table manners, and points of view are to right and left, societies might be to morality. Moral beliefs are not simply true or false but only relative to society."

This cultural relativist claim is partly correct, partly incorrect. Things like driving on the left side or the right side of the road are morally arbitrary. It would be strange to morally disapprove of the British habit of driving on the left side of the road. But what about other parts of the legal system? What about the legal rule that grants women only 50 percent of an inheritance while men can claim the full 100? Or what about a cultural custom that allows torture in order to obtain a confession? Or a legal system that criminalizes apostasy?[112]

Fourth: *people cannot free themselves from their culture*. Cultural influences cannot be shaken, the cultural relativist teaches. And isn't that true? Cliteur and Ellian are looking at the world through the lens of 21st century Europeans or Dutch people. If they had been born in Somalia, they would have had a different view of female circumcision, right?

Montaigne describes the power of cultural determinism as follows:

> The principal effect of the power of custom is to seize and ensnare us in such a way that it is hardly within our power to get ourselves back out of its grip and return into ourselves to reflect and reason about its ordinances.[113]

We take in custom with our mother's milk, so Montaigne believes. And precisely because it is so familiar to us in its genesis, it seems we are born to follow that pattern. "Whence it comes to pass that what is off the hinges of custom people believe to be off the hinges of reason: God knows how unreasonably, most of the time."[114] So, culture decides our moral opinions in the sense that we cannot break free from it. We do not have "pristine eyes," Benedict says. The folkways, Sumner says, "extend over the whole of life." The mores decide all notions of neatness, chastity, politeness, duty, justice, respect, and so forth. Here too, it is Montaigne who best gives voice to the cultural relativist position: "We are Christians by the same title that we are Perigordians or Germans."[115] We receive our religion "by our own hands." "[W]e are happened in the country where it is in practice … Another religion, other witnesses, the like promises and threats, might, by the same way, imprint a quite contrary belief."[116]

112 See the country overview in: *Freedom of Thought 2013. A Global Report on Discrimination against Humanists, Atheists and the Nonreligious,* International Humanist and Ethical Union, London 2013, and also the reflections in: Grim, Brian J., and Finke, Roger, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century,* Cambridge University Press, Cambridge 2011.

113 *Essays of Michel de Montaigne*, translated by Charles Cotton, edited by William Carew Hazlitt, Project Gutenberg, accessed April 29, 2018, https://www.gutenberg.org/files/3600/3600-h/3600-h.htm

114 Montaigne, Ibid.

115 Ibid.

116 Ibid.

This is where cultural relativism starts to become less convincing, as the example of Ellian and Cliteur demonstrates. Ellian was born in Teheran, Cliteur in Amsterdam. Yet they still hold like views on female circumcision. How can this be?

The proponent of natural law (see Chapter 1) would point to the universality of human nature. As we will see later, the universality of human nature is also important as a basis for universal human rights.

Fifth: *There is no such thing as absolute values and truths*. And does it not follow from this that the existence of absolute and universal values ought to be rejected as a fantasy? "Superstition," Sumner calls it, and he also thinks he can explain where it comes from. The same can be found in Herodotus, Protagoras, Benedict, and Westermarck.

In some of the key features listed here, cultural relativism seemed to be simply a descriptive view that has very little to do with ethics or any other normative science. But anyone who is reading between the lines—and one does not have to look *that* hard see it—will conclude that the cultural relativist also frequently makes normative pronouncements. That is also why cultural relativism is discussed in ethics handbooks. If it were only an opinion on cultural diversity, as an object of reflection it would never leave the circle of cultural anthropologists. If it were just a theory of influences on human behavior, only sociologists and psychologists would be talking about it. But cultural relativism is also a theory about what people *ought to* do. The cultural relativist urges us to be modest, as Montaigne and Benedict do. He provides criteria by which we can distinguish morally wrong from morally right, as Protagoras and Sumner do. The normative claims of the cultural relativist can be summarized in two points, namely:

Sixth: *It is wrong to judge a foreign culture by our own standards*. This is the first clear normative claim the cultural relativist makes. Here, the cultural relativists plainly take the role of the moralist. This point is most prominently found in Montaigne, but it is also already present in Protagoras. And Ruth Benedict is also enamored of this idea. Moreover, Benedict expected her cultural relativism to have beneficial consequences. If no culture is superior to any other, imperialism also has to be rejected. Cultures therefore become tolerant of one another.[117] Westermarck, too, believes that the idea of the relativity of moral values would, in all likelihood, result in tolerance. "Could it be brought home to people that there is no absolute standard in morality, they would perhaps be on the one hand more tolerant and on the other hand more critical in their judgments."[118]

Seventh: *A culture can only be judged by criteria derived from that same culture*. A second claim made by cultural relativism is the mirror image of the first.

117 See: Boss, Judith A., "Cultural relativism. is morality dependent on culture?," p. 118.
118 Westermarck, *Ethical Relativity*, p. 59.

From the first, one could conclude that cultures should not be judged at all, but that is a form of moral nihilism the cultural relativist will avoid. He does believe that a culture can be judged; he just thinks that the criteria we use to do so have to be criteria produced *by this same culture*. This perspective already existed in Protagoras.

Criticism of cultural relativism

Now that we have identified the characteristics of cultural relativism, we can evaluate them. Of course there is always the question: *how many* and *which* elements does a person have to believe to be rightfully called a real *cultural relativist*? We will limit ourselves to the suggestion that, at minimum, the notion of the cultural determination of morality occupies a central place. The foundation of cultural relativism, the existence of cultural diversity, is also important, of course, but it is such a universally accepted observation that it would render us all cultural relativists if it were considered the essence of the philosophy. What matters is what the cultural relativist does with the fact of cultural diversity.[119] So what does he do? He draws a far-reaching conclusion from that cultural diversity: relativism. But *that* conclusion might not be correct.

We think that, indeed, it is not. The weakness of cultural relativism lies in an overestimation of the cultural dimension of morality. Cultural relativists are *au fond* cultural determinists: they see morality as entirely beholden to culture. But that does not do justice to the nature of morality. We will illustrate this here by taking a closer look at the elements we have previously introduced as the "cultural relativist temptation." After all, if we can disprove the cultural determinism of cultural relativists, it might open up the path that cultural relativists regarded as closed off: the establishment of universal values and standards (the central ambition of natural law thinking, as we have seen in Chapter 1).

Dworkin on "critical morality"

The first question we have to ask is not if moral values are influenced by culture (a claim that anyone will accept), but *if it is completely impossible for morality to free itself from cultural determination*.

At that point, we have to contend with the ambivalence of the word *morality*. The American legal philosopher Ronald Dworkin (1931–2013) points out that terms like *a moral position* and *a moral conviction* function as terms of

119 In this sense also: Gensler, Harry J., "Cultural relativism," in: *Ethics*, Routledge, London and New York 1998, pp. 11–20; and also: Pojman, Louis P., 'Ethical relativism: who's to judge what's right and wrong?', in: Louis P. Pojman, *Ethics. Discovering Right and Wrong*, Second Edition, Wadsworth, Belmont 1995, pp. 24–40.

justification and criticism, but also as merely descriptive terms.[120] We can speak of *morality, moral convictions, moral positions* and so forth "in what might be called an anthropological sense, meaning to refer to whatever attitudes the group displays about the propriety of human conduct, qualities or goals."[121] In a sense, we could say, for instance, that the morality of Nazi Germany was based on prejudices, or that it was irrational.

However, we can also use *moral position* and *moral conviction* in a more critical sense, and that is to distinguish morality from rationalizations, prejudices, and matters of personal aversion and taste. Dworkin tries to pinpoint what is meant by this "critical morality" and what characteristics it has. The result of his analysis is the following: "characteristic of critical morality is that reasons have to be given for a moral position and that this position has to be consistent."[122]

What does this mean?

It means people cannot merely express *feelings* ("homosexuals make me sick"). Dworkin says: "We distinguish moral positions from emotional reactions, not because moral positions are supposed to be unemotional or dispassionate—quite the reverse is true—but because the moral position is supposed to justify the emotional reaction, not vice versa."[123]

The person who can do no more than parrot what others have taught him in this area has not based his judgment on a moral conviction.

What Dworkin gives voice to here is a well-known critique of emotivism that is broadly accepted among ethicists nowadays.[124] Emotivists assume that moral judgments are expressions of our emotions. Westermarck, for instance, is a proponent of emotivism, and his (cultural) relativist approach to morality is

120 Dworkin, Ronald, "Lord Devlin and the enforcement of morals," in: *The Yale Law Journal,* Vol. 75, No. 5 (April 1966), pp. 986–1005, partly in: N. Schott Arnold, Theodore M. Benditt, and George Graham, eds., *Philosophy. Then and Now*, Blackwell, Malden, Massachusetts and Oxford 1998, pp. 438–442. Here Dworkin takes a position against Patrick Devlin, who, in his book *The Enforcement of Morals,* had argued in favor of enforcing the morality of the common citizen ("the man in the Clapham Omnibus") by means of the law. See: Devlin, P., *The Enforcement of Morals,* Oxford University Press, Oxford and New York 1965 (first published as Maccabaean Lecture in Jurisprudence, *Proceedings of the British Academy,* 1959). Devlin also had a famous discussion on this point with H.L.A. Hart, *Law, Liberty and Morality,* Oxford University Press, Oxford and New York 1963.

121 Dworkin, Ibid.

122 Dworkin, Ibid.

123 Dworkin, Ibid.

124 See: Rachels, James, 'Subjectivism', in: Peter Singer, ed., *A Companion to Ethics,* Blackwell, Cambridge, Massachusetts and Oxford 1991, pp. 432–442; Rachels, James, 'Nietzsche and the objectivity of morals', in: N. Scott Arnold, Theodore M. Benditt, and George Graham, eds., *Philosophy Then and Now,* Blackwell, Cambridge, Massachusetts and Oxford 1998, pp. 385–414; Stace, W.T., *The Concept of Morals,* Macmillan, London 1937, pp. 1–69.

closely related to his emotivism. These days, though, emotivism is viewed with much more skepticism than 50 years ago, during its "glory days," so to speak.

Bernard Williams (1929–2003), a British philosopher, criticizes emotivism with the observation that if two people presented two different moral viewpoints, the emotivist would say that there *is no difference of opinion*, because they are really like two people in a boat, where one says "I feel sick" and the other "I feel fit as a fiddle."[125] In other words, the emotivist really cannot explain *differences of opinion* in moral matters.

To get back to the point, it is also important that Dworkin's (and Williams's) criticism also impacts the view that regards morality as nothing more than consensus about folkways: mores, existing practices, and so forth. This may be the understanding of morality we see in anthropologists, Dworkin says, but it does not fully capture the meaning of the word *morality*, including in its everyday use. Someone who merely adopts folkways is not taking a "moral stance," at least not in the sense of critical morality.

It goes without saying that this nullifies the definitions of morality subscribed to by Benedict, Sumner, Protagoras, and other cultural relativists. Morality *in the sense of critical morality* is not following folkways but forming one's own critical opinion with regard to them.

That morality is a part of culture and that culture *influences* morality is, of course, true. It could even be called a truism. So in that sense, Benedict is right in saying that it will not be hard to convince ethicists of the influence of culture on morality. The ethicist Judith Boss (*b*. 1942) writes:

> Very few ethicists believe that morality is completely autonomous—that is, independent of its particular context. As moral decision-makers, we live in a world of particulars. Social settings, individual circumstances, cultural values, environmental conditions, and religious beliefs vary tremendously from culture to culture.[126]

And who could deny that values and standards are influenced by culture? So, in order to defend a more unconventional claim, one would have to take it further. One would have to defend, for instance, that this influence is much greater than most people think, or that people cannot extract themselves from this cultural influence. And that is, indeed, what the cultural relativist does. Benedict says that we can never see the world with "pristine eyes." Just as Kant says that we cannot perceive without time and space, so cultural relativists believe that we cannot free ourselves from the "cultural time and space." Just as the psychological egoist believes that the individual person cannot extricate himself from his own selfish

125 Williams, Bernard, *Morality,* Cambridge University Press, Cambridge 1993 (1972), p. 16.

126 Boss. "Cultural relativism. is morality dependent on culture?," p. 111.

urges,[127] so the cultural determinist thinks that people cannot free themselves from the culture of their group.[128] In other words, the cultural relativist teaches a kind of cultural determinism.

The question is whether this position is defensible.

"Critical morality" and cultural anthropology

We have already expressed our agreement with Dworkin, who lays out his position with regard to the concept of morality. But we could also pose the question with regard to an analysis of the *view of mankind* that the cultural relativists (usually educated in cultural anthropology) subscribe to. What is the *philosophical* anthropology of the cultural anthropologist?

The cultural relativist does not merely posit that *what the group considers right* is, in fact, right. In addition, cultural relativism also represents the belief that an individual can never extract himself from the group.[129] Implicit in Sumner's *Folkways* is a confrontation with writings like *On Liberty* (1859) by John Stuart Mill (1806–1873)[130] or "Aforismen zur Lebensweisheit" (1851) by Arthur Schopenhauer (1788–1860),[131] which—despite all the differences between them—all contain a common belief that the individual is free to escape the pressure of the group.

In Sumner's view, such a thing must be impossible. What Schopenhauer calls "Selbstdenken"[132] can be nothing more than an illusion to Sumner. To him, a history of freethought, of people freeing themselves from their group's mores, is actually impossible; after all, the individual is completely at the mercy of the

127 So, *psychological egoism* should be clearly distinguished from *moral egoism*. Psychological egoism is defended, among others, by Thomas Hobbes in *Leviathan*, and criticized by: Butler, Joseph, *Fifteen Sermons Preached at Rolls Chapel*, Oxford 1726, partly also in: D.D. Raphael, *British Moralists, 1650–1800, Volume I*, Hobbes-Gay, Hackett, Indianapolis and Cambridge 1991, pp. 325–377. For a clear analysis, see: Broad, C.D., *Five Types of Ethical Theory*, Routledge & Kegan Paul, London 1930 and Rachels, "Man is not always selfish," in: James A. Gould, ed., *Classic Philosophical Questions*, Macmillan and Maxwell, New York and Toronto 1992, pp. 121–132.

128 Also a reason why psychological egoism, cultural relativism, and subjectivism are characterized as challenges to morality. See, for instance: Ellin, Joseph, *Morality and the Meaning of Life*, Harcourt College Publishers, Forth Worth 1995, p. 18ff, and Bond, E.J., *Ethics and Human Well-Being*, Blackwell, Oxford and Cambridge, Massachusetts 1996, pp. 7–20.

129 It makes a significant difference whether people see human beings as "Schöpfer der Kultur" or as "Geschöpf der Kultur." On the different views, see: Landmann, Michael, *Philosophische Anthropologie*. Menschliche Selbstdeutung in der Geschichte und Gegenwart, Walter de Gruyter, Berlin and New York 1976, p. 176.

130 Mill, J.S., *On Liberty*, Penguin Books, Harmondsworth 1977 (1859).

131 Included in: Schopenhauer, Arthur, "Parerga und paralipomena," *Sämtliche Werke, V*, Cotta-Verlag/Insel-Verlag, Frankfurt am Main 1965 (1851).

132 See: Schopenhauer, Ibid., pp. 577–588.

culture in which he lives, from head to toe, down to the last hair on his head.[133] Any attempt to rise above our culture, any pretention that we have actually managed such a thing, Sumner can only dismiss as a delusion. "Every attempt to win an outside standpoint from which to reduce the whole to an absolute philosophy of truth and right, based on an unalterable principle, is a delusion," he writes.[134] And yet the question remains: How is change even possible in that case? Sumner will have to provide an answer here. He does not explicitly address this problem, but implicitly he does formulate an answer, however unsatisfying. He apparently realizes that every culture sees the introduction of new elements every once in a while. He explains this as follows: "New elements are brought in only by new conquests of nature through science and art." This could be true. Leaving "art" out, it could be a Marxist idea. But positing that the engine of history consists of the development of science is not the same thing as *explaining how that is possible on the basis of the premises that Sumner has posited as inviolable*. After all, how can he explain something like that happening in the first place? Science is a human enterprise. And if people, entirely ensnared by the constraints of folkways and mores, were not able to extract themselves from the force of reigning paradigms, how could scientific change have taken place? How did Galileo (1564–1642) free himself from the mores of his time? And how did Newton (1642–1727) pull it off? How was Darwin (1809–1882) able to resist the folkways and mores of the Christian science of his day?[135]

Sumner would probably quote John Donne (1572–1631): "No man is an island." Great scientists did not operate within a vacuum. When Darwin presented evolution, "it was already in the air." But that does not really explain it, because it begs the question how those *precursors* to Darwin could have extracted themselves from their culture.

Ruth Benedict seems a bit more careful on this point. She says: "The *vast majority* of individuals in any group are shaped to the fashion of that culture." She goes on to say: "In other words, *most individuals* are plastic to the moulding force of the society into which they are born" (emphasis added).[136] And indeed: that is true of the vast majority of people. John Stuart Mill would agree. So would Schopenhauer. In fact, Schopenhauer speaks, not too

133 A majestic defense of the freedom to criticize is also: Clifford, W.K., "The ethics of belief," 1877, in: W.K. Clifford, *The Ethics of Belief and Other Essays*, introduction by Timothy J. Madigan, Prometheus Books, Amherst, New York 1999, pp. 70–96.

134 Sumner, *Folkways*, p. 55.

135 From which, incidentally, he did not derive much pleasure. Darwin was no free-thinker who liked to do battle with the prevailing orthodoxy, unlike his enthusiastic apostle T.H. Huxley, who wanted to live longer in order to see the "foot of Science on the necks of her enemies." See: White, Michael, and Gribbin, John, *Darwin. A Life in Science*, Simon & Schuster, London 1995, p. 187.

136 Benedict, Ruth, "Anthropology and the abnormal", in: *The Journal of General Psychology*, Vol. 10 (1934), pp. 59–82.

flatteringly, of the "manufactured goods of nature."[137] He is describing the people who follow the traditional, predictable path, who select the standard options. The great majority of people are conformists (even scientists who like to support prevailing paradigms and give voice to the ideas of their time).[138] But of course what matters is that this is not true of *everyone*. Benedict seems to realize this too; it is no accident that she speaks of "the vast majority" and not about "everyone." There have always been people who were able to extract themselves from the cultural matrix. And perhaps the unusual thing about morality in its critical form is that it adopts "a view from nowhere,"[139] or that of the "impartial spectator,"[140] or uses the "pristine eyes" Benedict does not believe exist.

The correctness of the Kantian approach in ethics is that a categorical imperative must always be *universalizable*. [141] However, this does not mean that people cannot conform to the local folklore in fairly inconsequential matters. But when it comes to female circumcision, a ritual beheading, or other fundamental issues, people *can* and *should* adopt a universal human perspective. Not *one's own values and standards*, but the values and standards that should apply to all right-thinking human beings decide the matter.[142]

Consistency

If this point is correct, it means that, in the end, no one can live as a cultural relativist. At least not consistently. Cultural relativism is a contemplative position. It is the position of the outsider. It is the position of someone who makes observations, of someone who describes how people act, not how they should act. But if Herodotus, Protagoras, Montaigne, Sumner, Benedict, and Westermarck were to be confronted with a great injustice, none of them would adopt a passive posture and say: "That's just how things are; there is nothing to be

137 Schopenhauer, Arthur, *Die Welt als Wille und Vorstellung, I*, Cotta-Verlag and Insel-Verlag, Stuttgart and Frankfurt am Main 1976 (1818), p. 268: "Der gewöhnliche Mensch, diese Fabriksware der Natur …]

138 How often do we read in a "scientific" discourse that this or that position used to prevail, but that we know better "now"? We also saw this in Benedict.

139 Nagel, Thomas, *The View from Nowhere,* Oxford University Press, New York and Oxford 1986.

140 Smith, Adam, *The Theory of Moral Sentiments, III*, iii, p. 4.

141 Championed these days by Hare. See: Hare, R.M., *Sorting out Ethics,* Clarendon Press, Oxford 1997, and more briefly: Hare, R.M., 'Universal prescriptivism', in: Peter Singer, ed., *A Companion to Ethics,* Blackwell, Oxford and Cambridge, Massachusetts 1993 (1991), pp. 451–464.

142 Rachels rightly writes: "Torture and slavery could still be wrong, independent of cultural standards, even if those other types of behavior are not. It is a mistake to think that because some standards are relative to culture, all must be." See: Rachels, James, *Can Ethics Provide Answers? And Other Essays in Moral Philosophy*, Rowman & Littlefield Publishers, Inc. Lanham, Boulder, New York and London 1997, p. 23.

done about it." No human being can live with the claim that the Holocaust just happened to be a product of the Nazi's mores. Any reasonable and right-thinking person will reject that idea and try to offer valid reasons for that rejection. And although we may *observe* that female circumcision is a part of Somali culture, it does not make it right.

Although we *understand* that Sheik Bakri's convictions are tied to his religious worldview, it *does not make it OK* to kill playwrights. Why? Because McNally can appeal to his universal and inalienable right to have his own opinions about Jesus. Even about Jesus? Yes, even about Jesus, or Buddha, or Mohammed. And because girls in Somalia have an inalienable right to their own bodily integrity, the female circumcision is as bad in Mogadishu as it is in Amsterdam.

The saying, quoted by Herodotus and Montaigne, that there is nothing that custom does not or may not do appears, on closer inspection, to be less convincing than it seemed. Even Montaigne seems to realize this, as a reading between the lines demonstrates. He says: "The principal effect of the power of custom is to seize and ensnare us in such a way that it is *hardly* within our power to get ourselves back out of its grip and *return into ourselves* to *reflect and reason* about its ordinances" (emphasis added).[143]

The words in italics here are significant. Despite his repeated assurance that the power of custom is great, he does acknowledge certain criteria by which we could and should judge customs.

That is hard, certainly. We are barely capable of it. But it is, apparently, necessary in order to "return into ourselves." That statement presents a "self" that is not culturally determined. This "self" then has to turn to reason, not to custom. A bit further on, Montaigne also says that it *seems* (so not *is*) as if we are inclined to do what we were born to do.

Even immediately after Montaigne has told the story about Darius, he makes a few remarks that really undermine the gist of his claim that culture rules all. As we have seen before, Darius asked for what price the Greeks would be willing to adopt the custom of the Indians and eat their deceased fathers, to which they replied that they would never do such a thing. Montaigne comments on this by saying: "Everyone does the same, for use veils from us the true aspect of things."[144] This reveals that Montaigne is not a consistent relativist in the sense that he still envisions a "true aspect of things" ("le vrai visage des choses"), apart from what culture proscribes. In a radical—or as we call it these days: *postmodern*—relativism, there can be no such thing as a "true aspect of things." Over and over again, Montaigne reformulates his central thesis about the cultural dependency of all our convictions, but just as often, he also

143 *Essays of Michel de Montaigne*, translated by Charles Cotton, edited by William Carew Hazlitt, Project Gutenberg, accessed April 29, 2018, https://www.gutenberg.org/files/3600/3600-h/3600-h.htm

144 *Ibid*.

relativizes that thesis with comments in which he contrasts the "truth" and "reason" with that which is shaped by culture.

One more example of something Montaigne says that is illustrative in this sense:

> Whoever would disengage himself from this violent prejudice of custom, would find several things received with absolute and undoubting opinion, that have no other support than the hoary head and rivelled face of ancient usage. But the mask taken off, and things being referred to the decision of truth and reason, he will find his judgment as it were altogether overthrown, and yet restored to a much more sure estate.[145]

So, again we see an appeal to "truth," to "reason," and to the possibility of escape from the "prejudice of custom."

That ends our discussion of Montaigne. In conclusion, we want to point out that it is not only characteristic of the moral position that people can free themselves from culture, but that this is exactly what the cultural relativists *themselves* have done. So the paradox is that, in a moral sense, *the cultural relativists acted in conflict with what was possible according to their own theories*. After all, the majority of people in the cultures in which Benedict and the other cultural anthropologists lived believed Western culture to be superior to that of the "savage." The views of Spencer and Dickens were more popular at the end of the 19th century than those of the cultural relativists (just as in modern times, the beliefs of the cultural relativists prevail and those of Dickens and Spencer have become less common). So in essence, the cultural relativists were behaving in an *immoral* fashion according to the theory of morality that cultural relativism itself proscribes (the theory that people not only follow customs but that they ought to do so). After all, immoral behavior conflicts with the prevailing mores, with the folkways—which Sumner believes are "always right"—the values of the culture that Protagoras believes ought to be a guideline for behavior.

But from the fact that Benedict, for instance, succeeded in turning away from the dominant Darwinism of her time, one can also conclude that the cultural relativists were not only behaving immorally, but also that they were disproving their own theories about cultural determinism. From the fact that Sumner was able to free himself from the imperialism that was dominant in his time, it is clear that a person, Sumner himself in this case, can escape the cultural forces that surround him.

As such, the cultural relativist gets caught in the famous paradox of the skeptic who is certain of the impossibility of certainty.

145 Ibid.

Practical objections

So it seems that cultural relativism is preached but not practiced by its proponents. With their own actions and moral exhortations, cultural relativists put the lie to the relativism they champion. And it is no surprise that the cultural relativists do not practice cultural relativism themselves. It would lead to remarkable consequences if we were to listen to Protagoras and only judge a group by its own values. A result of cultural relativism would be that the moral reformers would always be wrong. Abraham Lincoln (1809–1865) and the French and British writers who opposed slavery would have been in the wrong in that case.[146] And the British would have been wrong when they rejected widow burning. Jesus would have been wrong when he rejected certain Jewish rites and customs.[147] And why should the adulterous wife not be stoned to death (John 8)? Was that not the custom of that culture at that time?

Cultural relativism also conflicts with what is called *American values*. If cultural relativism were correct, not only would the Universal Declaration of Human Rights be a Western conceit, but so would the American values of "life, liberty and the pursuit of happiness." The Declaration of Independence of 1776, in which the Americans broke free from the British homeland because George III violated certain "inalienable rights" would—again, if cultural relativism is correct—be nothing more than rhetorical nonsense: "non-sense upon stilts," as Bentham said (on different grounds than cultural relativism, however).[148]

But Abraham Lincoln and the Northerners would also have been wrong when they sought to "teach the Southerners a moral lesson" with regard to slavery. Where did they get the right to criticize Southern folkways? How is it possible to speak of the "monstrous injustice of slavery"[149] if morality is nothing more than "socially approved habits"?

Universality is indispensable

It seems that the idea of universal values, so values that are not dependent on the mores of a particular group, needs to be upheld. Only when this is the case can we denounce glaring instances of moral failure, such as those that took place during the rule of the Third Reich. The horrors of the Holocaust made it hard to continue to view morality as a matter of feelings.

146 See the commentaries on slavery by Lecky, Martineau, Dickens, and others in: Haight, Gordon S., ed., *The Portable Victorian Reader,* Penguin Books, Harmondsworth 1976, pp. 271–296.

147 See: Boss, "Cultural relativism. is morality dependent on culture?," p. 43.

148 Bentham, J., "Anarchical fallacies," in: *The Works of Jeremy Bentham,* Bowring Edition, William Tait, Edinburgh 1843, also in: Waldron, Jeremy, ed., *Nonsense upon Stilts. Bentham, Burke and Marx on the Rights of Man*, Methuen, London and New York 1987, pp. 46–69.

149 See Lincoln's speech on October 16, 1854 in: *Historic Speeches,* ed. Brian MacArthur, Penguin Books, Harmondsworth 1996, p. 344.

Even before the Second World War, H.G. Wells (1866–1946), among others, wanted to formulate values with which the Western world could fight Nazism.[150] Nazism and antisemitism did, after all, contain folkways or mores that were difficult to respect as expressions of culture. In other words: "to each his own" seemed difficult to maintain with regard to the excesses of the Third Reich. Judith Boss rightly says: "The United Nations chose to reject cultural relativism. In 1945, the tribunal at the United Nations Nuremberg Trials put forth a list of universal standards of justice that established parameters on the norms of civilized behavior."[151]

Had cultural relativism been applied to the moral reprehensibility of the Nazi regime, it would have remarkable results. If Adolf Eichmann (1906–1962) and other war criminals had been exceptions to the rule, their behavior could have been denounced. But if they were representatives of mores and folkways that were broadly accepted in the culture of the German Third Reich, they really could not be accused of any kind of "immoral" behavior.

Hannah Arendt (1906–1975)[152] and Harry Mulisch (1927–2010)[153] made a study of Eichmann's character. Eichmann was responsible for the transport of Jews to the concentration camps. They believed that he was not a fanatic, motivated by some grand idea, but an ordinary man, a conformist who did what the people around him expected of him and what his superiors demanded.[154] Boss says: "Nazi Adolf Eichmann represented the quintessential cultural relativist. He was, in terms of his moral reasoning, 'everyman'."[155]

But the Nuremberg Tribunal apparently took the universalist stance. It assumed that "crimes against humanity" is a universalist notion, binding for all peoples at all times. The scholar of international law Rosalyn Higgins (*b*. 1937)

150 See on this: Burgers, J.H., "The road to San Francisco: the revival of the human rights idea in the twentieth century," in: *Human Rights Quarterly*, Vol. 14 (1992), pp. 447–477.

151 Boss, "Cultural relativism. is morality dependent on culture?," p. 135.

152 Arendt, Hannah, *Eichmann in Jerusalem. A Report on the Banality of Evil*, Revised and Enlarged Edition, Penguin Books, Harmondsworth 1992 (1963), and Bergen, Bernard J., *The Banality of Evil. Hannah Arendt and the 'The Final Solution,'* Rowman & Littlefield, Lanham 1998.

153 Mulisch, Harry, *De zaak 40/61. Een reportage*, Uitgeverij De Bezige Bij, Amsterdam 1979, translated as: Mulisch, Harry, *Criminal Case 40/61: The Trial of Adolf Eichmann*, translated by Robert Naborn, foreword by Debórah Dwork, University of Pennsylvania Press, Philadelphia 2005. See also: Lang, Jochen von, ed., *Eichmann Interrogated. Transcripts from the Archives of the Israeli Police*, Da Capo Press, New York 1999.

154 A type of person that the psychologist Milgram demonstrated is extremely common. For a short description of his experiments, see: Milgram, Stanley, "The perils of obedience," in: *Harper's Magazine*, 1974, under the title "An experiment in autonomy," also in: Louis P. Pojman, ed., *The Moral Life. An Introductory Reader in Ethics and Literature*, Oxford University Press, New York and Oxford 2000, pp. 625–640.

155 Boss, "Cultural relativism. is morality dependent on culture?," p. 136.

phrases the idea of universality in her book *Problems & Process: International Law and How We Use It* (1994) as follows. She asks: why do we have obligations to other people in the first place? She answers, as we have also seen in Chapter 3 of this book: "The answer can only be because they have rights, human rights."[156]

But what do we mean by *human rights*? For instance, what distinguishes the right of an individual to have a contract honored from that individual's right not to be tortured? Both are legal rights. Still, there is a difference, Higgins says. She describes that difference in the following way:

> Human rights are rights held simply by virtue of being a human person. They are part and parcel of the integrity and dignity of the human being. They are thus rights that cannot be given or withdrawn at will by any domestic legal system.[157]

Higgins also addresses the criticism that is leveled against this claim of universality. It is sometimes said that there is no "fully universal concept of human rights." We should take the range of cultures and political systems into consideration. But Higgins rejects this position.

> In my view this is a point advanced mostly by states, and by liberal scholars anxious not to impose the Western view of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards. The non-universal, relativist view of human rights is in fact a very state-centred view and loses sight of the fact that human rights are *human* rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned. I believe, profoundly, in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development. They are keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment.[158]

156 Higgins, Rosalyn, *Problems & Process: International Law and How We Use It*, Clarendon Press, Oxford 1994, p. 96.
157 Higgins, Ibid., p. 96.
158 Higgins, Ibid., p. 97.

This is very different from what we hear from Ruth Benedict.

Higgins believes that the claim to universality of fundamental values and principles, as it exists in the tradition of human rights, is essential in order to fight injustice in our world. Denying the claim to universality ("deconstructing" it, as postmodern thinkers call it) is not in the interest of the weak and oppressed. They are served by it being upheld.

Now let us apply this to the case with which we started this chapter. Calling for the murder of a playwright does not conflict with contingent sensitivities of Western culture, but it does conflict with a *fundamental right*. It is a human right to hold views about Jesus Christ that differ from what the church holds up as the one true belief. However, it is also the right *of the church* and of any religious organization or individual to proclaim *heterosexuality* as the norm, as it is the right of gay people or groups that represent them to pay no attention to this and point out that many of the great names from the arts, culture, and politics were homosexuals. That is the essence of A.L. Rowse's book *Homosexuals in History: A Study of Ambivalence in Society, Literature and the Arts* (1977).[159]

In *A New Introduction to Jurisprudence*, the position of religious icons like Jesus, Mohammed, Buddha, Moses, or any other religious or spiritual leader commands particular attention. Even those who believe that a fatwa on McNally is inappropriate sometimes remark that it is "needlessly provocative" to speculate about the sexual orientation of spiritual leaders that have "special significance" to a large part of the world's population.[160] It would show "respect," they say, to "accept people for who they are."

Although the attitude that comes through in these seemingly innocent words sounds unobjectionable ("respect," "mensen in hun waarde laten": what could be wrong with that?), it is still unfair. We will try to explain why.

Let us begin with a factual observation that in itself will not be controversial. Many people orient their lives around great religious leaders (Jesus, Mohammed, Buddha, etc.). As such, how we think about these leaders is of great importance for our "public morality." By way of illustration, here is an example: a religious believer who has a marked aversion to homosexuality will generally disapprove of Jesus being portrayed as a homosexual, as McNally does in his play. He sees this as "provocative." Now, that may be true, and it may even have been intended that way. But that does not mean that it is not also entirely legitimate for a writer to intend and create such a provocation. After all, someone who wishes to change the taboo on homosexuality has a *legitimate interest* in the possibility that, if historical research showed that Jesus Christ

159 Rowse, A.L., *Homosexuals in History: A Study of Ambivalence in Society, Literature and the Arts,* Weidenfeld & Nicolson, London 1977.

160 Herrenberg, Tom, "Denouncing divinity: blasphemy, human rights, and the struggle of political leaders to defend freedom of speech in the case of *Innocence of Muslims*," in: *Ancilla Iuris, 1,* 2015, pp. 1–19.

was a homosexual, this could also be freely made known. Put a different way: homosexuals who want to fight discrimination against their sexual orientation have a certain interest in a "gay Jesus." And heterosexuals who want to continue a taboo against homosexuality have an interest in a "straight Jesus."

What characterizes a free society is that we can debate these things. *Academic freedom* should mean that historians can freely investigate the historical Jesus. In addition, the *artistic freedom* of writers (including playwrights) should mean that they are free to depict religious icons in whatever way they see fit.

So does this mean you should also be allowed to create "stereotypical," "discriminatory," "offensive" art, "caricaturer Dieu"?[161] The answer is: absolutely.

We would do well to remember that much of the art in museums today, works that are viewed as monuments of civilization, was once "offensive." This is also true of the work of Rembrandt, Caravaggio, and Michelangelo.

This seems to indicate that even when historical research produces no answers, it is still the right of writers and artists to speculate about holy figures in any way they like. As such, Jesus, Buddha, or Mohammed should not be granted a special exemption that, for instance, Napoleon, the pope, or Darwin do not enjoy.

Finally, a remark about the second case with which we started this chapter. According to the universalist perspective Higgins describes in the quotation above, rejecting clitoridectonomy (female circumcision) is not just countering other people's folkways with our own folkways: it should be regarded as a violation of women's dignity, no matter where it takes place (independent of culture or religion). The genitals of an eight-year-old girl should be sacred and inviolable: for the tribe elder, for her parents, but also for the state in which she lives. From the perspective Higgins subscribes to, it does not matter whether the girl and her parents are in Somalia or in Amsterdam.

Hamed Abdel-Samad

The Egyptian-German writer Hamed Abdel-Samad (*b.* 1972) came to Germany in 1995, when he was 23 years old. He went to college there, and in books like *Mein Abschied vom Himmel: Aus dem Leben eines Muslims in Deutschland*

161 Brent Plate, S., *Blasphemy: Art that Offends,* Black Dog Publishing, London 2006; Boespflug, François, *Caricaturer Dieu? Pouvoirs et dangers de l'image,* Bayard, Paris 2006. See also: Boespflug, François, *Dieu et ses images: une histoire d'Éternel dans l'art,* Bayard, Montrouge cedex 2011; Boespflug, François, *Le Dieu des peintres et des sculpteurs: l'Invisible incarné,* Musée du Louvre Editions, Hazan, Paris 2010; Boespflug, François, *Le Prophète de l'Islam en image: un sujet tabou?,* Bayard, Paris 2013.

(2009),[162] *Der Untergang der islamischen Welt: Eine Prognose* (2010),[163] and *Krieg oder Frieden: Die Arabische Revolution und die Zukunft des Westens* (2011)[164] he comments on the differences between German culture and that of his country of birth, Egypt. In *Mein Abschied,* he describes how, after having lived in Germany for a time, he returns to his family's village in Egypt. His mother asks him about his life in Germany and about his German wife. His sister also joins in the conversation, and, in passing, she says: "Hamed, next week, we are going to have our daughter Rabab circumcised. We have been waiting for you."[165]

Hamed is dumbfounded by the ease with which the subject is breached, as a just a matter of course. He is shocked and asks his sister not to have the girl mutilated ("Ich bat sie, das arme Mädchen nicht verstümmeln zu lassen").[166] But his sister will hear none of it: "It will calm her down." Hamed does not give up: "Stop this nonsense." But his sister says: "Everyone here does it. She is *my* daughter." Mother comes to her daughter's defense: "It is our tradition." Still, Hamed does not give in: "If everyone were to run around naked, should we do it too?" But his mother asks Hamed to behave himself. His sister feels challenged and starts to offer reasons for the circumcision: "I don't want her to run around chasing boys when she is older and bring shame on our family." Hamed reminds his sister of how painful the ritual was in her own case. Does she want to put her own daughter through that? Now his sister tries a different tack: "Does someone who has lived in Germany for a couple of years suddenly want to come and tell us how we should live here?"

Damit war die Diskussion beendet, Hamed writes.[167]

This discussion is a good illustration of the controversy we have been talking about. Hamed takes the universalist position: girls, everywhere in the world, should not be circumcised. If they are, the girl is "mutilated" ("verstümmelt"). This should not happen, and it does not matter whether this is happening in his Egyptian village or in Germany.

His sister first tries a pragmatic argument: it will calm the girl down. This point is not elucidated further in the discussion, but it is easy to see how the conversation might have gone if it had been. Indeed, people who experience no sexual desire (or severely diminished sexual desire) become "calmer." But is this kind of "calm" preferable to the "unrest" caused by burgeoning sexual feelings?

162 Abdel-Samad, Hamed, *Mein Abschied vom Himmel: Aus dem Leben eines Muslims in Deutschland,* Knaur Taschenbuch Verlag, München 2009.
163 Abdel-Samad, Hamed, *Der Untergang der islamischen Welt: Eine Prognose,* Droemer Verlag, München 2010.
164 Abdel-Samad, Hamed, *Krieg oder Frieden: die Arabische Revolution und die Zukunft des Westens,* Droemer Verlag, München 2011.
165 Abdel-Samad, *Mein Abschied,* p. 62.
166 Abdel-Samad, Ibid., p. 62.
167 Abdel-Samad, Ibid., p. 62.

As said, they do not continue this particular line of reasoning, because the conversation quickly moves to the sister's cultural relativist argument that all parents in Egypt have their daughters circumcised. So why not her?

From Protagoras's point of view, Hamed's sister is right. As such, Protagoras advised: follow the customs of the community. In a more descriptive way, Sumner said the same thing. That just happens to be what morality *is*: the mores follow the folkways. But from Dworkin's perspective, this is the wrong way to look at morality. At least, "critical morality" is not sufficiently taken into consideration. If anything, "morality" is also critically examining customs, just as Hamed is doing here. Hamed questions the consistency of his mother and sister's convictions: they would not walk around naked if everyone else did, would they? The cultural relativist element narrowly applies to the question if Hamed, who has become European, can criticize Egyptian culture with values that are alien to it. The cultural relativist's answer is "no."

The conflict between universalism and cultural relativism permeates many modern-day discussions about morality. Those who adopt the universalist perspective will also say that it is a mistake to believe that every expression of culture is just as good as any other expression of culture, just because they are cultural expressions (in a sense making culture sacrosanct and above all criticism). Dworkin's critical morality means that we can criticize every moral conviction. Not only *can* we do this, but we *have to* do it.

Chapter 5

The classical foundations of modern law

In the first four chapters of this book, we addressed a number of important philosophies having to do with legality and legitimacy.

In the first chapter, we saw that legality and legitimacy are important concepts for any legal order. The need for *legality* is emphasized by legal positivism. The need for *legitimacy* by natural law thinking.

In Chapter 2, we discussed the state model that, in many parts of the world, is (rightly) viewed as a *legitimate* state: constitutional democracy. A constitutional democracy is a combination of two ideals: (1) constitutionalism and (2) democracy. *Constitutionalism* represents the limitation of government power by the law. *Democracy* means that the people have sway over the government's decisions.

In the third chapter, we focused on one element of a legitimate state that is much debated nowadays: the separation of church and state, or, in other words, the ideal of secularism. *Secularism* is the resolve to separate church and state. We call a state that has largely succeeded in this a *secular state*, a *religiously neutral state*, or an *agnostic state*.

Chapter 4 revolved around the question of whether we can hold up the principles of a constitutional democracy as *universal*. That is to say: Are these values and standards that should apply to all people? Or are the cultural relativists right in saying that there are no such things as universal values and standards and everything is locally and historically determined?

In Chapter 5 of *A New Introduction to Jurisprudence*, we will ground the previous chapters in the history of political thought. We will try to show that the values of constitutional democracy have to be understood as quintessentially *modern* values. The model of constitutional democracy came about in confrontation with older, often religion-based ways of thinking, such as "the divine right" to rule.

During the transition from the Middle Ages to the modern era, legal scholars and philosophers created new foundations for the law. In the Middle Ages, law and society were underpinned by Christian theology. However, modernity brought an end to the heavenly foundations of worldly legal and political systems. Not God, but the people were seen as the basis for the sovereign power of

a specific legal system. The will of the people began to shape the legal order, and so a scaffolding on which to build this new foundation was needed. Since the birth of Western civilization, an important part of interpersonal contact and actions between people has been regulated by the idea of a contract.

The *contract* is as old as civilization itself. That is why the concept of the contract was put forward as the foundation of the new legal order, within which the will of the people could and can be implemented. Thinkers who came up with the social contract as the basis of the legal order are also known as *contract thinkers*; some prominent names include Spinoza, Hobbes, Locke, Rousseau, and Beccaria. But before discussing some contract thinkers, we have to answer the question of which factors led to the transition from the Middle Ages to modernity. And what do we mean by "modernity"? In addition, a question with regard to the meaning of the term *politics* in the Middle Ages also arises here. Without understanding these subjects and terms, it is impossible to understand contractual architecture as an indispensable foundation of modern law.

The Dutch historian Johan Huizinga (1872–1945) elegantly describes the contrast between the Middle Ages and modernity:

> To the world when it was half a thousand years younger, the outlines of all things seemed more clearly marked than to us. The contrast between suffering and joy, between adversity and happiness, appeared more striking. All experience had not yet to the minds of men the directness and absoluteness of the pleasure and pain of child-life. Every event, every action, was still embodied in expressive and solemn forms, which raised them to the dignity of a ritual. For it was not merely the great facts of birth, marriage and death which, by the sacredness of the sacrament, were raised to the rank of mysteries …[1]

According to Huizinga, the premodern man lived in the full contrast of life. Everything was clearly shaped. The political-legal shapes, in which power and the law structured themselves and society, are important for understanding modernity and the modern man. The questions are: How should we view the transition from the Middle Ages to modernity and what indelible influence did this transition have on the conditions that enabled the modern forms of law and politics? In order to answer this question, we will first examine the political-theological structures that ruled the Middle Ages, after which we will explain how the transition to modernity could have happened. Finally, we will show what an important role the philosophy of René Descartes and the legal reform movement play in this. We cannot understand modern democracy without some

1 Huizinga, Johan. *The Waning of the Middle Ages; A Study of the Forms of Life, Thought, and Art in France and the Netherlands in the XIVth and XVth Centuries*. London: Edward Arnold, 1963, p. 1.

historical awareness of two crucial events: the Reformation and the Enlightenment. These subjects will, of course, feature only minimally. In this way, we aspire to paint a picture, however limited, of the transition to modernity and the legal changes that came with it that led to contract thinking.

The modern worldview

Modernity, as opposed to premodernity, is often confused with the technological and scientific developments that make life so much easier nowadays. It is tempting to regard the fruits of these times as the hallmarks of modernity. Consequently, there are people who measure a country's level of modernity by the presence of the internet, airplanes, or missiles. In that sense, an African country that uses modern means of communication is a part of modernity. These types of examples do not reflect what modernity is; at best, they can be regarded as fruits of it. So, a catalog of the modern products or inventions should not be equated with the concept of modernity. For instance, a country can have a wide network of asphalted roads, but that does not mean that it upholds the legal and political culture of modernity. Such a country can, despite its modern technology, be living under premodern constructs. We must remember that the Western notion of time is very different from that of other cultures. Sudden shifts in time and forms of temporal discontinuity are characteristic of the European continent as the heart of Western civilization.

That is why, from the perspective of philosophy, we distinguish three eras:

1 Ancient philosophy, from between roughly 600 BCE to 600 CE
2 Medieval philosophy, from between roughly 800 to 1450
3 Modern philosophy, from roughly 1500 to the present.

It is, of course, incorrect to believe that philosophies from these different eras can be viewed as islands, wholly separate from one another. We live in modern times, but we are still talking about the words of Plato and Aristotle from ancient philosophy. Of great importance to us here are the political-legal changes that lead to the modern era. Legal philosophy (as well as political philosophy) played an important part in these changes. A structural analysis of the transition from the Middle Ages and the Ancien Régime to modern times is crucial to understanding modernity.

The political architecture of the Middle Ages[2] is closely connected to Christendom,[3] in which the category of the clergy had become customary since Emperor

2 See: Ullmann, W., *A History of Political Thought: The Middle Ages*, Penguin, Harmondsworth 1965; Ulmann, W., *The Church and Law in the Earlier Middle Ages. Selected Essays*, Variorum Reprints, London 1975; Burns, J.H., ed., *The Cambridge History of Medieval Political Thought c. 350–c. 1450*, Cambridge University Press, Cambridge 1988; Flasch, Kurt, *Einführung in die Philosophie des Mittelalters,* Wissenschaftliche Buchengesellschaft, Darmstadt 1987.

3 See: Clarke, C.P.S., *Short History of the Christian Church from the Earliest Times to the Present Day*, Longmans (Green & Co.), London 1929; Bethune-Baker, J.F.,

Constantine the Great[4] (323–337). The rehabilitation and recognition of Christianity at the *Edict of Milan*, [5] a so-called *edict of toleration*, by the Roman emperors Constantine (the West) and Licinius (the East) spelled the end of the bloody persecution and oppression of Christians and the beginning of an influential political-theological process.[6] Although Christianity was not named the official state religion until Emperor Theodosius did so in 391, Emperor Constantine introduced a new principle: the separation of spiritual and worldly power, which had been wholly unknown to pre-Christian Rome and Greece.[7] The new category, the clergy, historian Edward Gibbon (1737–1794) believes can be divided into seven subcategories: "(I) Popular election (II) Ordination of the clergy (III) Property (IV) Civil jurisdiction (V) Spiritual censures (VI) Exercise of public oratory (VII) Privilege of legislative assemblies."[8] This shows the systematic and organized manner in which Christianity operated from its earliest beginnings. In the end, all of this resulted in a sizeable legal jurisdiction: the canon law that was in turn set down in the *Corpus Iuris Canonici*, a collection of ecclesiastical laws.[9] That is how European civilization acquired three inextricable foundations: (1) *Roman* law and political thought, (2) *Greek* philosophy, and (3) the *Judeo-Christian* faith. This combination brought forth two different philosophical eras: (1) patristics[10] until 800 and (2) scholasticism[11] from 800 until 1500.

An Introduction to the Early History of Christian Doctrine to the Time of the Council of Chalcedon, Methuen, London 1903.

4 See: Burckhardt, Jacob, *The Age of Constantine the Great*, Doubleday, New York 1949 (1852).

5 According to historian Edward Gibbon, the emperors had two important reasons for adopting this universal tolerance, namely the humane intention to pursue peace and happiness for their people and the "pious hope that, by such a conduct, they [would] appease and propitiate the Deity, whose seat is in heaven." Gibbon, Edward, *The History of the Decline and Fall of the Roman Empire, Volume 2,* Baudry's European Library, 1840, p. 306.

6 With the exception of the brief battle Emperor Julian, the Apostate, (361–363) waged against Christianity. See on this: Vidal, Gore, *Julian: A Novel*, Vintage Books, New York 1992 (1962).

7 Gibbon, Edward, *The Decline and Fall of the Roman Empire*, Dent, London 1961, p. 323.

8 Gibbon, Edward, *The Decline and Fall of the Roman Empire,* Chapter 20, Christian Classics Ethereal Library, accessed May 13, 2018: https://www.ccel.org/g/gibbon/decline/volume1/chap20.htm

9 See: Kunkel, Wolgang, *Römische Rechtsgeschichte: eine Einfüührung*, Bööhlau, Köln-Wien 1972; Robinson, Olivia F., *The Sources of Roman Law: Problems and Methods for Ancient Historians*, Routledge, London 1997; Johnston, David, *Roman Law in Context*, Cambridge University Press, Cambridge 1999.

10 This refers to church fathers like St. Augustine. In the beginning, they primarily sought to reconcile the polytheist Greek culture and the Christian belief in monotheism.

11 After the so-called *dark times* (the centuries between 400 and 800), the rule of Charlemagne brought some unity to Europe. From the fertile soil of this "Carolingian Renaissance," a legal and philosophical season of growth emerged. The medieval philosophical period that is referred to as *scholastics* produced some great names, such as Anselm of Canterbury, Abelard, and Thomas Aquinas.

The novel by Umberto Eco (1932–2016), *The Name of the Rose* (1980)[12] is a rich illustration of the philosophical and political debates in scholastic times.

Political power and its legitimization during the Middle Ages were based on highly complicated political-theological doctrines. For instance, Charles the Great defended the Christian virtues in his own name, with an emphasis on his religious role: "King, by the grace of God." According to the philosopher and historian Dirk Noordman, this reflects the basic principle of medieval political theology:

> The essence of this concept [King, by the grace of God] was that the close ties that had existed between the sovereign and the people until the 7th century began to loosen, because the people were no longer the party that transferred power to the king and that could therefore also depose him by legal means. The people were simply in the king's custody.[13]

The power was not, or at least not primarily, in the hands of the people, nor was it legitimized by reference to the people. After the break-up of the Carolingian Empire, more decentralized and competing institutions and individuals stepped onto the stage: the age-old rivalry between popes and kings also resurfaced.[14] According to Claude Lefort (1924–2010), in the Middle Ages and the Ancien Régime, power was a theological-political whole that reflected societal unity in the image of bodily unity. This unity presented itself in the body of the sovereign. This belief had its roots in Christian theology: *corpus mysticum*, the mystical body, of which the church and the Christian community were a part. This mystical depiction of power, which was the ultimate basis for the legal order, would change radically in modern times.

From the Middle Ages to the modern era

Under the influence of the Renaissance, scholastic philosophy and medieval Christianity were subjected to a philosophical climate and a desire for change. As early as Roger Bacon (1210–1292), a trend towards empirical research began that was essential for the eventual development of the natural sciences. The

12 Eco, Umberto, *The Name of the Rose*, Harvest, New York and London 1980.

13 Noordman, Dirk, *Economie en filosofie in de Vroege Middeleeuwen 750–1250*, Verloren, Hilversum 1996, p. 42.

14 Noordman rightly writes: "As such, the political situation in Christian Europe after the break-up of the Carolingian Empire over two centuries can be described as the shared rule of a number of monarchs (among whom, the emperor) and many bishops (among whom, the pope). In this landscape, the monarchs often convene the bishops' synods, but the bishops, in turn, involve themselves greatly in political and economic affairs. In the meantime, the knights are trying to find their own way in the maze of feudal and ecclesiastical rights and duties. … In the period 1050–1200, in the West, an ecclesiastical hierarchy gradually develops, with Rome at its head." Noordman, Ibid., p. 45.

Renaissance, which sparked an unequivocal interest in antiquity and in humanism, played a significant part in the developments that were still to take place in the area of religion. The Renaissance and the Reformation are often mentioned in a single breath by many historians. There is no good definition of the Renaissance; historians try to delineate this development, which was also influenced by Islamic civilization, by referencing a spiritual rebirth of Europe:

> The Renaissance, therefore, cannot be easily defined. … The essence of the Renaissance lay not in any sudden rediscovery of classical civilization but rather in the use which was made of classical models to test the authority underlying conventional taste and wisdom. It is incomprehensible without reference to the depths of disrepute into which the medieval Church, the previous fount of all authority, had fallen. In this the Renaissance was part and parcel of the same movement which resulted in religious reforms. … The prime quality of the Renaissance has been defined as 'independence of mind'.[15]

Independence of mind is a good characterization of what the Renaissance has brought forth. Of course, Erasmus of Rotterdam is a famous example that needs no explanation. And Martin Luther (1483–1546) is the church reformer whose theological and political activities brought an end to the Catholic Church's religious monopoly in Western Europe. More critical readings of the Bible and general division within the faith opened the gates to the modern era.

In addition, the inventions and discoveries of the time undoubtedly also provided a strong impulse for the transformation process that had already begun. These were inventions like the compass, gunpowder, and the printing press. The medieval astronomic worldview was literally turned on its head: in the Middle Ages, people believed that the Earth was the immovable center of the universe and that everything revolved around it (geocentrism). But that belief slowly began to be questioned. Nicolaus Copernicus (1473–1543) devised the so-called *Copernican* (heliocentric) model, and he demonstrated, among other things, that the Earth rotates around its axis. Copernicus is the founder of modern astronomy. *De Revolutionibus orbium coelestium* (*On the revolutions of the heavenly spheres*) was later placed on the *Index librorum prohibitorum*. [16] The Index contained a list of books the Catholic Church had banned. The natural scientists and ecclesiastical authorities clashed frequently in the final days of the Middle Ages. Galileo Galilei (1564–1642) was successfully prosecuted by the Inquisition for his scientific discoveries.[17] Another

15 Norman Davies, *Europe: A History*, Pimlico, London 1977, p. 471.

16 See on this the still unsurpassed: White, A.D., *A History of the Warfare of Science with Theology in Christendom*, two volumes, Dover Publications, New York 1960 (1896) and for a brief overview: Russell, Bertrand, *Religion and Science*, Oxford University Press, London, New York, and Toronto 1935.

17 For a recent study that is still ongoing on the conflict between Galileo and the church, see: Shea, William R. and Artigas, Mariano, *Galileo in Rome. The Rise and Fall of a Troublesome Genius*, Oxford University Press, Oxford 2003.

scholar, Giordano Bruno (1548–1600), was less fortunate. On February 17, 1600, he was burned at the stake in Rome for his claim that the universe is infinite.[18] Newton, Kepler, and many other natural scientists, using instruments and a new application of mathematics, brought about a scientific revolution that would change the world utterly. This brief summary is intended merely to refresh our memories and enable us to mark the political and legal meaning of the modern era. Various legal, economic, social, scientific, and religious factors contributed to the transition from the Middle Ages to the modern era. With it, the law and the notion of power changed. But what implications did the advent of the modern era have for philosophy, and so also for legal philosophy? For this, we need to turn to Descartes.

Descartes

In a philosophical sense, the modern era begins with René Descartes (1596–1650). He is, as the German philosopher Schopenhauer said, "the father of modern philosophy."[19] Descartes is also the father of modern rationalism. In the Middle Ages, the architecture of reality was never radically questioned. The objectivity of the world was safeguarded by the assumption of the existence of one almighty God. Not man with his human needs, but the divine order was the center of reality. On the basis of this, a complex, political-theological worldview was constructed that shaped and fed the structures of power and law. In medieval legal thought, the subjectivity of the human person was never given prominence. In his *Meditationes de prima philosophia* (in short: meditations) Descartes posits that, once in our lives, we have to free ourselves from all our existing opinions, and we have to make a new beginning from first principles. This is what we have to do if we want to build something permanent and definite in the sciences.[20] Descartes opposes scholastics: he wants to start all over again.

To do this, he has to prove that almost everything is untrue. He will reject everything he has even the slightest reason to doubt. After all, the senses often deceive us. He asks himself: "How could it be denied that these hands or this whole body are mine?"[21] Say, Descartes posits, that we are dreaming right now,

18 Which caused British social reformer Charles Bradlaugh to remark that mankind had much to gain from a rejection of "Christian Theory" both in the field of geology and astronomy. For a justification of this, including examples, see: Bradlaugh, Charles, "Humanity's gain from unbelief," 1889, in: *North American Review*, Vol. 148, No. 3 (March 1889), pp. 294–306.

19 Schopenhauer, Arthur, "Die Welt als Wille und Vorstellung," *II*, in: *Sämtliche Werke, Band I*, Cotta-Verlag/Insel-Verlag, Stuttgart and Frankfurt am Main 1976 (1818), p. 13.

20 Descartes, René, "Meditation on first philosophy," in: *Descartes, Key Philosophical Writings*, Wordsworth Classics, London 1977.

21 Descartes, René, John Cottingham, and Bernard Williams. *Meditations on First Philosophy: With Selections from the Objections and Replies*, Cambridge University Press, Cambridge and New York 2017, p. 25.

and that all the particulars around us are not real. Why would it not be the case that we are also imagining our heads, hands, the coatrack, the door? Of course we are not aware that we are dreaming. Only algebra and geometry are beyond doubt. We are certain that one plus one equals two. All other certainties, including existence itself, are yet to be proven. Error, distrust, and fantasy have to be separated from truths and certainties. Descartes was looking for an Archimedean point, an immovable point that could underpin *being*.

Cartesian doubt is extraordinarily radical:

> I will suppose then, that everything I see is spurious. I will believe that my memory tells me lies, and that none of the things that it reports ever happened. I have no senses. Body, shape, extension, movement and place are chimeras. So what remains true? Perhaps just the one fact that nothing is certain.[22]

Descartes is not an atheist. In the same work, he presents an ontological argument for God's existence. In this Cartesian thought construct, everything can deceive him, including his senses. Finally, he comes to the conclusion that the statement *I think, therefore I am* (*cogito, ergo sum*) must be true. Indeed, one thing is certain: a subject (an I) is asking the questions. But Descartes wonders: so even if I must exist, I still do not know who I am, really. According to the philosopher Bernard Delfgaauw (1912–1993) it comes down to this:

> The emphasis on the *cogito* leads to the following identification: cogito – anima – homo. This means: I discover myself in thinking (*cogitare*); this thinking is my soul (*anima*); I am certain of my soul because of thought; I am not certain of my body: as such, man is primarily his soul.[23]

So, the modern era revolves around the *I* (subject) and *thinking* (cogitare). Descartes eliminates doubts by thinking:

> Thinking? At last I have discovered it—thought; this alone is inseparable from me. I am, I exist—that is certain. But for how long? For as long as I am thinking. For it could be that were I totally to cease from thinking, I should totally cease to exist. At present I am not admitting anything except what is necessarily true. I am, then, in the strict sense only a thing that thinks; that is, I am a mind, or intelligence, or intellect, or reason—words whose meaning I have been ignorant of until now. But for all that I am a

22 Descartes, René, *Meditations on First Philosophy, Second Meditation*, translated by John Cottingham, Genius, accessed May 13, 2018: https://genius.com/Rene-descartes-second-meditation-annotated

23 Bernard Delfgaauw, *Filosofie van de vervreemding. Als vervreemding van de filosofie*, Kok Agora, Kampen 1987, p. 53.

> thing which is real and which truly exists. But what kind of a thing? As I have just said—a thinking thing. … I know that I exist; the question is, what is this "I" that I know? … But what then am I? A thing that thinks. What is that? A thing that doubts, understands, affirms, denies, is willing, is unwilling, and also imagines and has sensory perceptions.[24]

In Delfgaauw's view, Descartes acknowledges the certainty of consciousness, but only this certainty and no other.[25] The "I" is not dependent on any material thing. Descartes also adds that this "I," which makes me what I am (meaning the soul), can be entirely separated from the body, and it is even easier to know than the body. Even without the body, the soul can still be whole.[26] This way of thinking was utterly foreign to medieval man. Here begins a new world in which (despite the remnants of scholastics) objectivity, the existence of an outer world, and even individual existence is questioned. With Cartesian philosophy, thinking in terms of a subject (the "I"), subjectivism is also introduced. At the same time, thinking (cogitare) is encouraged to investigate absolutely everything. The result is that, from this point forward, reason (the rational mind) becomes the agency that will provide certainty, no longer the truth as revealed by God (remember the quotation by Schopenhauer: Descartes urged people to use their own heads instead of the Bible or Aristotle).[27] Uncertainty is the baseline mood of the modern era that we will also find in political and legal structures. Because no one can doubt their doubt, certainty arises. Criticizing Descartes means criticizing modernity. Can we escape the modern era? One thing is clear: Descartes' approach is the philosophical-intellectual beginning of modernity. But where and how did politics and law begin in the modern era?

Criminal law and modernity

The Renaissance; the Reformation, with all its political and military consequences; and the unending process of urbanization have each made a considerable contribution to the crisis of legitimacy of the ruling authorities. Before dealing with the nature of that crisis of legitimacy, we will demonstrate by means of criminal law how this crisis took shape in the area of the law.

The old Germanic "criminal code," which had almost no public law aspects and was based on peace, reconciliation, and compensation (a sum, *fredus* or *fredum,* that was paid to the aggrieved tribe), was overshadowed in the 13th century by a new penal concept: inquisitorial revolution. This was an ambiguous revolution: on the one hand, it came about under the influence of the

24 Descartes, *Meditations on First Philosophy, Second Meditation.*
25 Delfgaauw, Ibid., p. 55.
26 Descartes, René, *Over de Methode*, Boom, Amsterdam 1987, p. 70.
27 Aristotle was a great authority to scholastic philosophers, so great that an appeal to a text by Aristotle had nearly as much weight as an appeal to Holy Scripture.

Renaissance for the harmonization and rationalization of criminal proceedings, and, on the other, it had a Roman-Catholic character that turned out to be aimed at persecuting dissenters and producing a new form of irrationality. The accusatory character of Germanic criminal law was imbedded in the concept of the passive role of the judge, which forced the parties to gather their own evidence and battle it out themselves: through trial by ordeal, such as ordeal by water or ordeal by fire. The origin of the inquisitorial process lies in Italy and was spread through canon law. During the reign of Pope Innocent III (1196–1216), the *inquisito* was introduced to the ecclesiastical criminal process. The procedure *per inquisitionem* was meant to make the furtherance of the church's "divine" interests easier. Initially, the church sought only to, on the basis of *ratione personae* (by reason of his person), have its own clergy brought under the jurisdiction of the church. It did this because, following the example of St. Augustine, the church sought to strictly separate worldly and spiritual governments. This change is highly significant, because it played an extraordinarily important role in modernity's formation of public law. Those who wish to understand the development of criminal law in its current form must first decipher the secret of this transition. Various factors contributed to it. This is a brief summary of the most important factors:

- Centralization: this trend is mostly stimulated by the church, which, on the one hand, sought to further the process of evangelization and, on the other, aimed to preserve the faith of recently converted peoples.
- Economy: the rise of the cities, for instance in northern Italy, the birthplace of the Inquisition, played a part in prosecuting crimes *ex officio*. It is not surprising, also, that one of the first public law offenses was, among others, counterfeiting money.
- Combating Germanic forms of irrationality.
- Certainty: the citizenry longs for certainty, especially in connection with the rise of the cities. The growth and complexity of society made the private detection and apprehension of perpetrators particularly difficult.
- Rules of evidence: the irrational elements involved in the adversarial legal system rendered trust in the correct outcome of divine ordeals almost impossible.
- Uniformity: this need arose partly due to the process of centralization. Uniformity in criminal proceedings would, on the one hand, increase legal certainty and, on the other, enhance safety due to uniform prosecution.
- Roman and canon law. The introduction of Roman law not only influenced private law, but also criminal law, for instance through the concept of legal entity, centralist trends, and codification thinking.

In effect, the rise of the inquisitorial procedure was a kind of secularization compared to the adversarial procedure. Formalist rules of evidence and the divine ordeals were replaced by more "rational" rules of evidence that are

geared towards the material truth. Certainty with regard to what really happened, this comes to take center stage. And what really happened could only be discerned after the suspect had confessed. The suspect's confession was considered the "Queen of evidence" (*regina probationum*). Torture was the means by which to tempt this queen and lure her into the labyrinth of medieval criminal law, upon which the death sentence could be carried out. This bloody process would be ended by the Batavian Republic centuries later.

Deterrence, retribution, inequity, and cruelty were the most notable characteristics of punishment during the period under discussion. On the one hand, the changes led to centralization and (formalistic and procedural) rationalization, and on the other, they brought about hitherto unheard of forms of cruelty, secrets trials, and inequity. Finally, the ongoing irrationality was visible particularly in torture and in the rules of evidence. The dynamics of a contradictory process of rationality and irrationality (in the time of the Reformation) and Cartesian "doubt" caused the legitimacy of criminal law to teeter. This theological legitimation, which we have already discussed, had to be continually validated by an appeal to the divine. The state's monopoly on the use of force that is expressed through criminal law is an essential characteristic of the political. And as soon as criminal law, for whatever reason, can no longer be legitimized, the regime's days are numbered. That is when renewal starts.

From the 16th century onwards, the first serious attempts to create a codified body of criminal and procedural law began to emerge. Rightly, it is pointed out that codification is more than the writing down of the law; codification also always means a change of the law.

> After all, in recording current law, in order to organize it, all of it has to be thought through. This leads to that which is superfluous being scrapped, that which is missing being supplemented, that which is unclear being clarified, and that which conflicts being harmonized.[28]

The most famous codification results of this period are: the Constitutio Criminalis Carolina of 1532, the Ordonnance Royale of Villers-Cotterêts of 1539, the Marian Statutes of 1554/1555, and the *Criminal Ordinances* of 1570. The legislator had, on the one hand, to meet the needs of the emergent national states (and nations) and, on the other, to safeguard legal entity and legal certainty. In addition, it must also be noted that "in the emergent national states, the political rulers have stronger ties to criminal law than to private law."[29]

With the *Criminal Ordinances*, the legislator intended not only to organize criminal law, but also to establish a limitation: article 42 demonstrates this. The article is about the abolition of the (torture) rack in criminal cases.

28 Vrugt M., van de, *Aengaende Criminele Saken. Drie hoofdstukken uit de geschiedenis van het strafrecht*, Kluwer, Deventer 1982, pp. 12–13.

29 Ibid., pp. 12–13.

Nevertheless, we can conclude that these codifications turned out to have been unable to effectively tackle the problems of the time, such as legal certainty and the as yet to be applied limitations on the usual cruelties.[30] The pursuit of codification and renewal was therefore not yet finished.

The criminal law debates on tyranny, arbitrariness, and cruelty should not be viewed separately from the general cultural developments that characterized a particular period in history, one we call the *Enlightenment*. The Enlightenment is a cultural era (more or less coinciding with the 18th century)[31] in the history of Europe that would not have been possible without Descartes' philosophy.[32] Here, we can ask the question: What will mankind's subject of study be? The answer: man.

It was also about a *Kulturkampf* between the traditional theology about God and man and the more mechanical, physics-driven, and especially skeptical approach to the universe and the nature of man. The critical gathering and organization of knowledge (*encyclopédie*) led to what Paul Hazard called "the crisis of the European mind."[33] One of the Enlightenment thinkers was the French philosopher and man of letters Voltaire (1694–1778). In response to an earthquake in Lisbon (November 1, 1755) that lasted for 10 minutes and destroyed the entire city, Voltaire wrote a philosophical-literary story entitled

30 Even the *Criminal Ordinances* were suspended at the Pacification of Ghent in 1576.

31 Although some also distinguish an early enlightenment. The classic work on the Enlightenment is: Hazard, Paul, *The European Mind 1680–1715*, translated by J. Lewis May, Penguin University Books, Harmondsworth 1973 (Fr. 1935). The 18th century Enlightenment is examined by the same author in: Hazard, Paul, *European Thought in the Eighteenth Century. From Montesquieu to Lessing*, translated by J. Lewis May, Peter Smith, Gloucester, Massachusetts 1973 (Fr. 1946). Also much read is: Gay, Peter, *The Enlightenment: The Rise of Modern Paganism*, W.W. Norton & Company, New York and London 1966 and more recently: Israel, Jonathan I., *Radical Enlightenment. Philosophy and the Making of Modernity 1650–1750*, Oxford University Press, Oxford and New York 2001. A connection between the 18th century Enlightenment and previous eras, such as classical antiquity, are discussed by: Luce, J.V., *An Introduction to Greek Philosophy*, Thames and Hudson, London 1992, p. 79. See also: Windelband, W., *History of Ancient Philosophy*, translated by Herbert Nernest Cushman, Dover Publications, New York 1956 (Ger. 1900), p. 111 which speaks of an enlightenment in antiquity, and Wundt, Wilhelm, *Ethik. Eine Untersuchung der Tatsachen und Gesetze des sittlichen Lebens,* Drei Bände, Zweiter Band, Fifth Edition, Verlag von Ferdinand Enke, Stuttgart 1923–1924 (1866), p. 16, which describes Greece at the time of Socrates as a "Zeitalter der Aufklärung." In *A History of the Freedom of Thought*, Thornton Butterworth, London 1932 (1913), p. 26, J.B. Bury describes the fifth century BCE as "the age of Illumination."

32 "A Spanish professor of medicine claimed, in 1716, that Descartes' philosophy had thrown all Europe into the greatest intellectual and spiritual perplexity seen for centuries." Jonathan. I. Israel, *Radical Enlightenment. Philosophy and Making of Modernity 1650–1750*, Oxford University Press, Oxford and New York 2001, pp. 3 and 23–34.

33 See on this the work so named, which originally appeared in French.

Candide, ou l'optimisme (1759). In it, he criticizes the concept of theodicy that relates to the justification of divine providence.[34] Voltaire has issues with this line of thinking: "that everything cannot be other than it is, because since everything was created for a particular purpose, everything must also necessarily have been created for the best purpose." What "best purpose" did the Lisbon earthquake serve? Why is God unable to eradicate evil? Human suffering cannot be reconciled with divine omnipotence.[35] That is why Voltaire wrote that forbidden suffering is even more unbearable than visible misery. He is highly critical of Christianity and Islam, but also Judaism. He points his critical arrows at Jesuits and other representatives of Christianity in South Africa:

> Everywhere the weak execrate the powerful, before whom they cringe; and the powerful beat them like sheep whose wool and flesh they sell. A million regimented assassins, from one extremity of Europe to the other, get their bread by disciplined depredation and murder, for want of more honest employment.[36]

The Enlightenment is characterized by "systems theory." A few typical features of the period are: reorientations of physics, the formulation of hypotheses, critical examination of existing knowledge, the widespread distribution of mathematics in the natural sciences, the new legal philosophical approach to the law, and a political order in which people, not God, are central. New philosophical frameworks gradually emerged in three areas of science: (1) Natural science; (2) Law and politics; and (3) Religion and history. Reason replaced the age-old understanding of God. This shift influenced political and legal thought.

This transition from the Middle Ages to the modern period is the essence of modernity, without which the internal change within the domain of law and politics cannot be understood. The Enlightenment thinkers from Britain, who are also called the *empiricists*, contributed greatly to the list above by pointing out the importance of empiricism, experience, and sensory perception, and by their critique of speculative metaphysics. John Locke (1632–1704) and David Hume (1711–1776)[37] are the major

34 Famously analyzed in: Leibniz, Gottfried Wilhelm, *Versuche in der Theodicée über die Güte Gottes, die Freiheit des Menschen und den Ursprung des Übels*, Übersetzt und mit Anmerkungen versehen von Arthur Buchenau (Philosophische Werke in vier Bänden, ed. Cassirer), Felix Meiner Verlag, Hamburg 1996 (Fr. 1710).

35 This remains a problem for every form of theism (Judaism, Christianity, and Islam). See on this: Morton, Adam, *On Evil*, Routledge, New York and London 2004, and Neiman, Susan, *Evil in Modern Thought: An Alternative History of Philosophy*, Princeton University Press, Princeton and Oxford 2004 (2002).

36 Voltaire, *Candide: or, The Optimist,* New York Public Library website, accessed May 13, 2018: http://candide.nypl.org/text/chapter-20

37 Locke, John, *An Essay Concerning Human Understanding*, collated and annotated with prolegomena, biographical, critical, and historical by Alexander Campbell Fraser, in two volumes, Dover Publications, New York 1959 (1690).; David Hume, *A Treatise of Human Nature*, Penguin Books, London 2003 (1740).

representatives of the philosophical criticism of rationalism. The previously mentioned transition also influenced morality: people began to answer ethical questions by using reason. The Encyclopedist movement in France did not merely critically gather knowledge; it also emphasized the importance of (good) child rearing, and with it of good education. The word *encyclopédie* is made up of two Greek words: *enkyklios* (in a circle) and *paideia* (learning). Here, the first seeds of a modern approach to child rearing emerge. Through child rearing, the Enlightenment thinkers wanted to gradually defeat unscientific irrationality and establish a new form of shared ethics based on reason.[38] The economic changes, the rise of capitalism,[39] and the philosophical approach to this,[40] will not be discussed here. Capitalism is the economic mold of the modern age. But, before we get into the classical foundations of modern law, we have to finish this point-by-point approach to the Enlightenment by considering Immanuel Kant's (1724–1804) contribution to the Enlightenment.

Enlightenment

The classic answer to the question "What is enlightenment?" was formulated by Immanuel Kant in his essay of the same name.[41] Kant's essay, which first appeared in 1784, is more relevant than ever. These days, it is often referenced in discussions about Islam. Can Islam be reconciled with modern thinking? Has Islam gone through an enlightenment?

We should not confuse enlightenment[42] with a religion or ideology. At its heart, the Enlightenment is nothing more than a period in European cultural history. But it is also a mindset, a critical attitude with regard to all manner of inherited traditions and customs: often traditions that are legitimized by religions and ideologies. Kant defines this mindset as follows:

> Enlightenment is man's emergence from his self-imposed immaturity. Immaturity is the inability to use one's understanding without guidance from another. This immaturity is self-imposed when its cause lies not in lack of understanding, but in lack of resolve and courage to use it without

38 A good example of this is also J.J. Rousseau's book on child rearing. See: Rousseau, J.J., *Émile, ou de l'education*, Gallimard, Paris 1966 (1762).

39 In "Die protestantische Ethik und der Geist des Kapitalismus," (1920, in: Max Weber, *Gesammelte Aufsätze zur Religionssoziologie, I*, Mohr Siebeck, J.C.B. Mohr (Paul Siebeck), Tübingen 1988, pp. 17–206) Max Weber convincingly analyzed the significant role that the puritanical form of Protestantism played in the emergence of capitalism. According to this religio-sociological study, the Reformation fostered capitalism.

40 See: Smith, Adam, *Wealth of Nations*, Oxford University Press, Oxford 1993 (1776).

41 Kant, Immanuel, "Beantwortung der Frage: was ist Aufklärung?," in: *Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Pädagogik, 1*, Hrsg. W. Weischedel, Suhrkamp, Frankfurt am Main 1981 (1784), pp. 53–61.

42 See: Cassirer, Ernst, *Die Philosophie der Aufklärung*, Felix Meiner Verlag, Hamburg 1998.

> guidance from another. *Sapere Aude*! [dare to know] "Have courage to use your own understanding!"—that is the motto of enlightenment. Laziness and cowardice are the reasons why so great a proportion of men, long after nature has released them from alien guidance (naturaliter maiorennes), nonetheless gladly remain in lifelong immaturity, and why it is so easy for others to establish themselves as their guardians. It is so easy to be immature.[43]

The Enlightenment claims to promote individual use of reason. This is how man ought to free himself from his immaturity. In this way, "maturity" becomes a political category that, as opposed to the political theology of the Middle Ages, asks, no *requires* people to use their reason, to be mature, without fear of persecution, hell and damnation, God or devil. In essence, tradition and authority are traded in for human reason. Independent thought becomes a moral duty: individual responsibility is suddenly irreplaceable. Kant realizes that this is not an easy thing: "Thus, it is difficult for any individual man to work himself out of the immaturity that has all but become his nature."[44] Can a revolution put an end to this immaturity? Kant answers this in the negative, because although a revolution might remove an individual despot, it can never establish a particular way of thinking. That is why, according to Kant, the population can only achieve enlightenment slowly. Enlightenment is a personal mindset, after all. What does this enlightenment require? Does it lead to disobedience and anarchy? Kant believes that enlightenment requires nothing more than freedom. What freedom? The most harmless form of freedom: "the freedom to use reason *publicly* in all matters."[45] Where the call from all sides had always been "do not reason," Kant asks people to reason but also to obey:

> 'Do not argue!' The officer says, 'Do not argue, drill!' The tax man says, 'Do not argue, pay!' The pastor says, 'Do not argue, believe!' (Only one ruler in the World says, 'Argue as much as you want and about what you want, but obey!').[46]

Kant is not talking about the private use of reason, but about its public use. So it is not about the freedom of an individual mind, because only public, communal freedom leads to a common form of reason and *sensus communis*. The presence of others beyond the "I" in the public space and their opinions about an event make it possible for objectivity to be conferred on the world. Not thinking itself, but the active presence of *people* in the communal space provides

43 Kant, Immanuel, *What is Enlightenment?* Uppsala University website, accessed May 13, 2018: http://www2.idehist.uu.se/distans/ilmh/Ren/idehist-enlighten-kant02.htm
44 Kant, Ibid.
45 Kant, Ibid. (emphasis added).
46 Kant, Ibid.

us with the foundation of objectivity with regard to our existence: insofar as others exist who witnessed the same event, I know that I am not dreaming. The Enlightenment takes this a step further, Kant says. This "moving forward" is the original destination of man. And whoever wants to prevent this—the human nature of moving forward in peace—by force, is committing a crime against human nature, Kant believes. Clerics have to allow citizens the freedom to use their reason publicly. That is also why governments have to treat men, "who are now more than machines, in accord with their dignity."[47] Against the backdrop of these cultural, political, and intellectual changes, people tried to formulate a new ultimate foundation for the law and the social system.

Contract thinkers

In the previous sections, we have tried to formulate an answer to the question of what we mean by "modernity." In this section, we want to concern ourselves with the legal-theoretical foundations of modern law and politics. What makes modern law "modern"? And what about modern politics? For this, we will mostly discuss the rightwing-anthropological side of the work of two modern-day thinkers: Hobbes and Rousseau. Both are known as *contract thinkers*. This means that they wanted to answer the question of what, in the end, human society (our living together) is based on. They also asked the question: Why does the state have authority over us (or: Should it have this authority)? In answering these questions, the contract thinkers point to the concept of the social contract.

Of course, we do not mean to provide a detailed analysis of the contract thinkers' philosophical convictions. Nevertheless, we hope to shine a light on the basic structures that underpin the development of modern law (and politics). The democratic revolution can be viewed as the moment at which modernity was "implemented" legally as well as politically. The people take the place of God, and all power is returned by the people to the people.

Nation-building was accompanied by many violent conflicts and ruminations on how a nation state ought to be designed. There are a number of thinkers who worked on the following question: How should a society that is no longer formed by the grace of God be shaped? The contract thinkers were the philosophers who wanted to base social unity on the social contract. Because we cannot examine all these thinkers here, we will only (but not exhaustively) discuss the primary ideas of Hobbes and Rousseau.

47 Kant, Ibid.

Hobbes

Thomas Hobbes (1588–1679) is an influential philosopher who inspires many modern-day thinkers.[48] For instance, Robert Kagan (*b*. 1958) examined the divide between America and Europe by means of a thesis to which Hobbes' thinking is central. Kagan believes that Europe is moving beyond power and moving into a self-contained world of laws and rules, transnational deliberation, and international cooperation. According to Kagan, this places Europe on a path to a post-historic paradise of peace and relative prosperity and the realization of Immanuel Kant's (1724–1804) "perpetual peace." America is different. It is still stuck in the swamp of historical reality, because Americans have to exercise their power in an anarchist, Hobbesian world, where international rules and laws are unreliable.[49] The question now is: What were Hobbes' views?

Hobbes' legal philosophy was shaped in the context of the English civil war between Parliament and the king, in which Oliver Cromwell (1599–1658) played an important part. Cromwell became the leader of the resistance against the king. Later, he himself became the ruler of England (1649–1658). Under his rule, the trial of Charles I took place, which ended in his conviction: on January 30, 1649, the king was beheaded.

In his book *Leviathan* (1651), Hobbes describes how a legal system should be devised. His very definition of the word *reason* shows his strictly secular way of thinking. Reason should be viewed as nothing more than "reckoning," so adding and subtracting. As such, reason is a general term marking and denoting our thoughts.[50]

As discussed, characteristic of Hobbes is his secular approach. In his work, we already see the Holy Scriptures being discounted as a source of knowledge. The world has to be given over to philosophy and the other sciences; the Holy Scriptures cannot help us in this. *Leviathan* is a Biblical word. It is the name of a monster from the Book of Job in which man wrestles with himself and with the Supreme Being.

Who or what is the Leviathan? The answer is:

> Who can open the doors of his face? His teeth *are* terrible round about. *His* scales *are his* pride, shut up together *as with* a close seal. One is so near to another, that no air can come between them. … Out of his mouth go

48 Among others Gray, John, *Heresies. Against Progress and Other Illusions*, Granta Books, London 2004, who believes that we can learn from Hobbes that providing safety is the most important task for the government, surpassing all other government functions.

49 See: Kagan, Robert, *Of Paradise and Power: America and Europe in the New World Order*, Vintage Books, Random House, New York 2004 (2003).

50 Hobbes, Thomas, *Leviathan*, Cambridge University Press, Cambridge 2000 (1651), pp. 31–32.

> burning lamps, *and* sparks of fire leap out. Out of his nostrils goeth smoke, as *out* of a seething pot or caldron. His breath kindleth coals, and a flame goeth out of his mouth. … He esteemeth iron as straw, *and* brass as rotten wood. … He maketh a path to shine after him; *one* would think the deep *to be* hoary. Upon earth there is not his like, who is made without fear. He beholdeth all high *things*: he *is* a king over all the children of pride.[51]

The concept of power is given special meaning in Hobbes: the power of a person consists of the means he has at his disposal at a particular moment with which he can acquire a good in the future. Power can be original or instrumental. The greatest human power is that which is comprised of the power of as many people as possible.[52] As such, power is a real phenomenon with observable empirical characteristics. The concept of power is separated from the ethical domain here. Power is the ability to compromise. Moreover, power is neutralized and brought into the sphere of private law. Hobbes applies the same empirical approach to the shaping of his view of mankind. The sciences of law and politics are unthinkable without an anthropological basis. They need a view of mankind as a starting point.

Hobbes' anthropological analysis is about the natural state of man:

> Nature hath made men so equall, in the faculties of body, and mind, as that though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he.[53]

It follows from the fact that we have equal opportunities, according to Hobbes, that we have equal hope of achieving our goals. That equality produces mutual distrust; it makes one person want to be a step ahead of another. The result is that two people become each other's enemies if they both desire the same thing that they cannot both enjoy at the same time. The most important causes of discord are: competition, distrust, and pride. These can lead to conflicts. From all of this, Hobbes concludes that when people do not live under a common

51 The Leviathan is referred to in other places in the Old Testament as well. In the King James version: Job 41:1: "Canst thou draw out leviathan with an hook? Or his tongue with a cord *which* thou lettest down?" Psalms 104:26: "There go the ships: *there is* that leviathan, *whom* thou hast made to play therein." Isaiah 27:1: "In that day the LORD with his sore and great and strong sword shall punish leviathan the piercing serpent, even leviathan that crooked serpent; and he shall slay the dragon that *is* in the sea."

52 Hobbes, *Leviathan*, p. 62.

53 Hobbes, Ibid., pp. 86–87.

power that commands respect from all, they will be in a constant state of war of all against all. In Hobbes' view, war does not just consist of battles, but is primarily the willingness to take up arms. After all, the essence of war is *ability*, the *possibility* of using force of arms in a conflict. Because man naturally has the *will* to wage war, he will end up in a state of war whenever a common authority is lacking.

So what is the natural state of man? War. And the constant fear and threat of violent death: "And the life of man, solitary, poore, nasty, brutish, and short."[54] Hobbes believes that this war of all against all also means that nothing can be unjust because the concepts of good and evil, justice and injustice do not apply here, because justice and injustice are not properties of the mind or the body.

Again, we see theological concepts perish. *Homo homini lupus*: to man, man is a wolf. To Hobbes, natural law, or *ius naturale*, implies the freedom that everyone has to exercise their power for his own self-preservation, or not. In this view, power is used to guarantee self-preservation. Hobbes calls the absence of outward limitations *freedom*. The *lex naturalis* (natural law), on the other hand, is a prescription or a general rule that does not appear in and of itself. Thus, a natural law prescription is brought to light by reason. We should not mix up the terms *right (ius)* and *law (lex)*; "Right, consisteth in liberty to do, or to forbeare; Whereas Law, determineth [determine], and bindeth [bind] to one of them: so that Law, and the Right, differ as much, as Obligation, and Liberty, which in one and the same matter are inconsistent."[55] So, the law is an obligation and right is a freedom. According to Hobbes' anthropological principle, in a state of nature, man is engaged in a war of all against all, because there, everyone has a right to everything, even the body of another. And as long as this state of nature of all against all exists, Hobbes believes that man is in permanent danger. There, lives are at stake. In the Hobbesian view, people have to pursue peace, but if peace is not to be had, all means and advantages of war can be sought out and used. Peace is one of the fundamental laws. It is a law (*lex*), while war aligns with natural law (as a right: *ius*), because all people are allowed to defend themselves with any and all means at their disposal.

From the law "the pursuit of peace," a second fundamental law follows:

> That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.[56]

54 Hobbes, Ibid., p. 89.
55 Hobbes, Ibid., p. 91.
56 Hobbes, Ibid., p. 92.

This is where the Hobbesian social agreement or contract emerges: people relinquish their freedom in exchange for collective safety, if and insofar as it is also done by others. Not all power and freedom is given away, only that which is necessary for the achievement of peace and safety. This agreement creates a common power that is meant to safeguard freedom and safety. A claim like "I donate," or "I give," if applied to the future, is called a *promise*, according to Hobbes. The essence of citizenship is promise, which, of course, is always focused on the future. The legal order is comprised of the citizens who have acknowledged one another's citizenship by promising to respect each other's freedom and safety and to not use violence. However, as soon as it turns out that the common power is not able to use its monopoly on the use of force effectively, for the protection of individuals or groups of people, the common power meets its end. At that point, the civic promises lose their legal and political meaning: the civil war and anarchy have already begun. The monster, Leviathan, is this common power, or in other words, the state that is tasked with keeping humanity away from the abyss. After all, the Leviathan is king of all the sons of pride. At the same time, Leviathan—being a product of people—is just as brittle and fleeting as the community that formed him. The Leviathan is not eternal, because he can disappear, after which the war of all against all begins.

Rousseau

Not all contract thinkers were as pessimistic about man and his natural state. Jean Jacques Rousseau (1712–1778) is a classical contract thinker with an optimistic (and some critics say, naïve) view of mankind. That is why *Du Contrat social* (1762) begins with an optimistic anthropological statement:

> Man is born free; and everywhere he is in chains. One thinks himself the master of others, and still remains a greater slave than they. How did this change come about? I do not know. What can make it legitimate?[57]

This view of mankind also clarifies Rousseau's questions and points of focus. He polemicizes with Hobbes in other texts as well, such as in *Discours sur l'origine et les fondements de l'inégalité parmi les hommes*. In it, Rousseau writes:

> Hobbes contends that man is naturally intrepid, and is intent only upon attacking and fighting. Another illustrious philosopher holds the opposite, and Cumberland and Puffendorf also affirm that nothing is more timid and

57 Rousseau, J.J., *The Social Contract & Discourses*, Project Gutenberg, accessed May 13, 2018: http://www.gutenberg.org/files/46333/46333-h/46333-h.htm

> fearful than man in the state of nature; that he is always in a tremble, and ready to fly at the least noise or the slightest movement.[58]

Why? Because everything in nature operates in a uniform manner. Man will certainly be startled by new phenomena, but man surpasses animals in skill, and so he will learn not to fear them. What event caused this "noble" savage to change? The answer to this establishes the first foundations of Marxism:

> The first man who, having enclosed a piece of ground, bethought himself of saying *This is mine*, and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars and murders, from how many horrors and misfortunes might not any one have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows, "Beware of listening to this impostor; you are undone if you once forget that the fruits of the earth, belong to us all, and the earth itself to nobody."[59]

The emergence and development of the notion of property rights initiated a process that cannot be stopped. Indeed, we never see this kind of romanticism in Hobbes.

Power is not legitimate in and of itself, and man is only obliged to obey legitimate power. Moreover, no man has natural authority over any other man without mutual consent. Freedom is the *conditio sine qua non* of being human: "To renounce one's liberty is to renounce one's quality as a man, the rights of humanity, and even his duties."[60] Contrary to Hobbes, Rousseau believes that people are not naturally each other's enemies, because it is the relations between material things, not between people, that lead to war. And that only happens in a civil society that upholds property rights. Private wars do not exist

> as a state of war cannot arise from simple personal relationships, but only from relationships involving property, a private war or a war of man against man cannot exist, either in the state of nature, where there is no definite property, or in the social state, where everything is under the authority of laws.[61]

Technically, war takes place between states, but as soon as he uses the word *war* in a non-legal-formalist sense, Rousseau's claim can only be based on his romantic view of mankind, because this Rousseauist theory about war is

58 Rousseau, Ibid.
59 Rousseau, Ibid.
60 Rousseau, J.J., *On the Social Contract or Principles of Political Right*, translated by Ian Johnston, johnstoniatexts, accessed May 13, 2018: http://johnstoniatexts.x10host.com/rousseau/socialcontracthtm.htm
61 Rousseau, Ibid.

unthinkable without a number of presuppositions about the natural state of man. These presuppositions are that (1) savage man has to be *portrayed* as an angel, and (2) the state of nature has to be *assumed* to be a balanced, romantic condition.

Rousseau is also concerned with man's self-preservation. That is why he is looking for a kind of society that, with all its collective strength, defends and protects the person and goods of everyone who takes part in it. Here, we also see the watchwords of contract philosophy: *self-preservation, safety*, and *freedom*. Rousseau says that because all people give themselves over to each other, no one is really giving himself to anyone. The definition of the social contract is this: "Each one of us puts his person and all his power in common under the supreme direction of the general will, and as a body we receive each member as an indivisible part of the whole."[62] In Hobbes, no one gives up any more power than is strictly necessary, and it happens on the condition that the common power is able to defend everyone.[63] That is why Hobbes regards the common power as an empirical fact, one that might be weak or perish. Rousseau sees the common power as normative, a closed system without the real-life limitations and historical events that can influence it in a changing reality. Everyone must always obey this common (Rousseauist) power. Rousseau does believe, however, that the transition from the state of nature to the civil condition has changed man. After all, in his behavior, man has replaced instinct with justice.

The general will, the "*volonté générale*," exists as long as there are different people who together consider themselves a single body with a single will. What does this Will relate to? It relates to the common survival and the general wellbeing.[64] The general will could be impaired by private interests ("les intérêts particuliers"). Does the term *general will* imply an unchangeable "will"? Is it not rather the private interests of the "petites sociétés" that can, in the long run, grow out of and outgrow the general will, and so also the common interest? Is democracy not a kind of society in which citizens are duty-bound to keep peacefully reformulating the common interest again and again? Of course, we should not confuse the notion of *general wellbeing* with the *common interest*, because general wellbeing is not an interest but the ultimate goal (*telos*) of a society. Moreover, the content of the common interest changes, and so is temporary in nature.

62 Rousseau, Ibid.

63 It need not be argued that, under the current circumstances of the fight against terrorism, this point has acquired new relevance. A state that is unable to adequately protect its citizens from theoterrorists fails dreadfully, from Hobbes' perspective. See on this: Cliteur, Paul, *Theoterrorism v. Freedom of Speech*, Amsterdam University Press, Amsterdam 2019.

64 Rousseau, *On the Social Contract or Principles of Political Right* . Rousseau's original words are: "Tant que plusieurs hommes réunis se considèrent comme un seul corps, ils n'ont qu'une seule volonté, qui se rapporte à la commune conservation, et au bien-être général."

Rousseau formulates his concern over the rise of "les intérêts particuliers" as follows: "S'ensuit-il de-là que la volonté générale soit anéantie ou corrompue?" The answer is no, because the general will is always solid, unchangeable, and pure. The private will is subordinated to the general will, which will then overshadow all other expressions of will. Subsequently, Rousseau believes that "Each man, in detaching his interest from the common interest, sees well enough that he cannot completely separate from it …"[65] The "volonté générale" can never be extinguished in a person. Here, the political takes on a religious interpretation: the fire of all that is good is never extinguished in the heart of man. So, man is good by nature. Rousseau's decidedly secularized political philosophy has a strongly religious connotation, paradoxically. And this is precisely the basic character of all totalitarian ideologies of modern times, which all sought to construct a general, inextinguishable, unchangeable will for mankind, if not by direct appeal to Rousseau, then at least following in his footsteps. But what is this general will, really?

> In *Volksvertegenwoordiging. Rousseau's maatschappelijk verdrag in de spiegel van de rechtsstaat*, B. van Roermund describes the theological meaning of the concept of "general will." This term was thought to have originated in the 17th century in a theological discussion between Jansenists and Jesuits. According to Van Roermund, this theological discussion built upon a debate about Paul's claim that God "will have all men to be saved."[66] So this is about the problem of theodicy. Van Roermund says that we recognize a secularized, political version of the problem of theodicy in Rousseau's book. The classical theological aspect of this is:
>
> on the one hand, how evil and injustice can exist in the world if God is good and just, and on the other, how it is possible that God wishes all men to be saved when he damns some for all eternity. (Beforehand), He [God] wants all men to be saved in general because he is good, but (afterwards) he apparently does not want all men to be saved because men are free to sin and some do.[67]

The general will acquires totalitarian tendencies because all those who refuse to obey the general will shall be forced to obey it by the entire body. The general will does not negotiate, debate, or reason. The general will forces.

In a secularized political ideology, the divine has to be replaced by human freedom and the satanic principle by the organized society, that is, the state. Despite all the substantive differences between them, the contract thinkers did not *grosso modo* seek to abolish the state; they wanted to do away with

65 Rousseau, Ibid.
66 1 Timothy 2:3–4.
67 Roermund, Bert van, Volksvertegenwoordiging. Rousseau's "Maatschappelijk verdrag" in de spiegel van de rechtsstaat, Damon, Leende 2000, p. 130.

arbitrariness and despotism in order to be able to use the state to safeguard the greatest possible freedom and safety. In a totalitarian society, "the state" becomes the enemy of the people, and it needs to be abolished as quickly as possible and replaced with a constitutional democracy. After all, a totalitarian state represents a political order that functions on the basis of gross human rights violations. Rousseau's religious romanticism was based on anthropological romanticism: "Man is born free, and everywhere he is in chains." As a consequence, civil society and especially property rights are viewed as the source of inequality and its resulting criminality. Karl Marx built upon this religious-anthropological romanticism. He sought not only to abolish the state but civil society in its entirety in order to make individuals happy in a property-free society. This is precisely the problem of the modern era: political theology without God versus the political.

In Rousseau's *The Social Contract*, people do not give over a part of their power, but all of their power to the common power, because, as we have quoted before, Rousseau wrote that all of us put all our power under the supreme direction of the general will. The totality that the general will presupposes is not just a theological fight. Rather, it announces the rise of the total society, which naturally, like every other totality, is underpinned (religiously), with or without an appeal to God. That is why Rousseau draws two important conclusions with regard to the general will: (1) the general will is by no means the will of all, since the will of all, meaning the sum of all individual wills, only seeks to further private interests; and (2) the wrongdoers who tarnish the right of the social contract are the traitors, and because they have violated the laws, they are enemies of the state. To these enemies (the public enemies), the law of war applies. Society is allowed to declare its "criminal members" enemies. The Dutch philosopher Hans Achterhuis (*b.* 1942) is right in pointing out the effect of Rousseau's theories on recent history, from Robespierre to Stalin. And because Rousseau is concerned with the true freedom and happiness of people, his political construct, Achterhuis believes, is not only more tempting, but also much more dangerous and murderous in the end than Hobbes'.[68]

This concludes our description of the context that enabled modernity to begin. We have seen how political and cultural changes influenced the law and politics. As a consequence, there was also a drastic change in the way people thought about the foundations of the legal order. In the end, this process of change resulted in what we now view as the classical foundations of modern law. In examining this material, we have limited ourselves to two legal philosophers, which we have discussed very briefly by way of example. We will now give a summary of the most important characteristics of the foundations of a modern legal order:

68 Babitt, Irving, *Rousseau & Romanticism*, new introduction by Claes G. Ryn, Transaction Publishers, New Brunswick and London 1991 (1919).

- The change from God to people as the ultimate foundation and delineation of the legal order. *Popular sovereignty* becomes the powerbase of the political order. This should not be confused with atheism; it is about the secularization of power. In this new view, the people are the foundation of power. As soon as the people *are* no longer the basis of power, or they can no longer be *claimed* to be, the legal order loses its legitimacy in the application of its monopoly on the use of force. This is the start of an insurmountable crisis of legitimacy that will lead to a political transition.
- The change from Holy Scripture to Reason. Knowledge about the world and the law is no longer the exclusive property of theological and religious declarations and methods of interpretation. A form of "knowledge pluralism" emerges. The law can no longer justify itself merely by appealing to Holy Scripture. This also secularized the legitimizing foundations of the law and politics.
- The change from *imago Dei* to the anthropological indeterminism of man. The view of mankind that underpins the legal order is also secularized. Different, sometimes contradictory explanations of the anthropological origin of mankind exist: man as an angelic animal, man as a dangerous wolf, man as an economic being, or man as a rational being. The law envisions man as a subject (*subjectum*): the carrier of rights and duties and the subject of the law. This pluralism of perspectives on mankind puts an end to the previous clarity about man and his destiny. No one knows where man is heading.
- The contract as the foundation of society. This spurs a demythologizing development that tries to ground a society's founding act not in a myth, but in reason (the social contract as the foundation for society). This even secularizes the symbolic moment of founding. In contrast to Antiquity and the Middle Ages, this renders the survival of a society and its attendant legal order not necessarily self-evident. The result is that there is an ongoing debate about the existence and survival of the political order and its form. After all, there is no god or other myth that safeguards and legitimizes it.
- The change in the meaning of history. In the modern era, history is a big question mark. The point of living together and the direction society should take have never been as problematic as in the modern era. The inner conflict of modern man tears up the legal order from time to time: the longing for meaning in combination with the apparent meaninglessness of the outside world is intrinsic to the subjectivism of modernity, in which even the objectivity of the external world is questioned.
- The change from cohesion between law and society to individual self-preservation. According to Hannah Arendt (1906–1975), what makes society so hard to bear is not, or at least not primarily, that there are so many people, but the fact that the world (of law and politics) is not able to simultaneously separate and connect these people. Here, Arendt touched

upon one of the biggest problems of modern law. In order to clarify the abstract aspects of this, she uses a table as a metaphor. A table—at which two people sit opposite one another—divides and separates the people present. If that table between them were to suddenly disappear, as if by magic, leaving the two people no longer separated from each other, but also no longer connected by anything concrete, with time, they would no longer be able to bear one another's presence.[69]

- The codification and rationalization of the law. This process had already begun before the modern era, but in the modern era it was viewed as a fundamental anchor point, which was further expanded and radicalized with the French Revolution and Napoleonic law. R. Foqué and A.C. 't Hart rightly posit that the Napoleonic codification is viewed as the crowning achievement of the fight for a democratic legal order and a society of free people. According to Foqué and 't Hart, the codification was an attempt to chart and consolidate the new society, for which the reform philosophy of Beccaria was indispensable.
- The expansion of the sciences and the importance of the formation of public opinion. With the modern era, the battle for public opinion begins. Facts and analyses are meant to convince the people, or at least a large portion of them, of a certain proposition. The conflict between lies and obvious untruths stimulates new techniques for the expression and verification of opinions. Popular sovereignty, the way in which it can wield its power, is closely related to the opinions of the people.

Human rights

The secularization of power, knowledge, and the law literally brought forth the new world. The old world died slowly and far from quietly. The age of the *homo hierarchicus*, which had played an organizing role in politics and the legal system, also perished. The modern era is characterized by the emergence of *homo equalis*. [70] This is not about equality before the law, because the Greeks knew that as well. The ancient societies were based on rank, and this is done away with by the coming of *homo equalis*. According to historian Johan Huizinga, rank meant "state," "*estat*," or "*ordo*." It contains the notion of a God-given reality. In his masterpiece *The Autumn of the Middle Ages*, Huizinga also opines that, in the popular understanding of the state and society, all the ranks had a role to play. The role was not assigned according to the principle of utility, but on the basis of the divinity

69 Arendt, *The Human Condition*, The University of Chicago Press, Chicago and London 1958, pp. 52–53.

70 See: Dumont, Louis, Homo hierarchicus: Essai sur le système des castes, Gallimard, Paris 1979.

or the of someone's position in society.[71] Huizinga gives a beautiful description of a society that is structured by rank:

> God created the people to labor, to till the soil, to make a sustainable living through trade; the clergy for the works of the faith; but the nobility to enhance virtue and uphold justice, to be a mirror for others by the acts and mores of their fair persons. The highest task in the state, the protection of the Church, the propagation of the faith, the protection of the people from oppression, the preservation of the common welfare, the fight against violence and tyranny, the consolidation of the peace: Chastellain assigns them all to the nobility. Truth, bravery, goodness, and mildness are its character traits.[72]

This view of society was to be violently destroyed by modernity. The disappearance of the aristocracy,[73] as the binding agent of premodern times does not free the *homo equalis* of the modern era from social disparity. How could this political-legal earthquake have happened? By revolution.

The American Revolution was the first and last revolution that has nothing in common with the later European and non-European revolutions. It was about the independence of a nation that was yet to be formed, and it was achieved with relatively little use of force. The Founding Fathers of the United States sought to realize the *Constitutio Libertatis*. [74] Rousseau's views had made their mark on the French Revolution, whereas the American Revolution was mostly influenced by the ideas of Montesquieu (1689–1755). According to Arendt, this was because America's founders sought to construct the political sphere in such a way that power and freedom could be combined.[75] The true revolution, to which all modern political categories of revolution can be traced back, happened in France in 1789. That revolution tore down the old and built up the new. The ambiguity of the French Revolution, according to Foqué and 't Hart, is the cause of the ambivalent attitude that most political scientists have towards the revolution. After all, the French had ended the Ancien Régime, and in so doing they brought the founding of the liberal constitutional democracies closer. On the other hand, they created a political category that is intrinsically tied to violence, as well as to the idea that social outcomes can be created. The

71 Huizinga, Johan, *Herfsttij der Middeleeuwen*, Leiden University Press, Leiden 2018 (1919), p. 80;
Huizinga, Johan, *The Waning of the Middle Ages*, Dover Publications, New York 2007.

72 Huizinga, Ibid., p. 81.

73 Kinneging, A.M. Andreas, *Aristocracy, Antiquity and History. Classicism in Political Thought*, Transaction Publishers, New Brunswick and London 1997.

74 Vgl. Hamilton Alexander, Ray John, and Madison James, *The Federalist. A Commentary on the Constitution of the United State*, Modern Library, New York 2000.

75 Arendt, *On Revolution*, Penguin Books, Harmondsworth 1973 (1963). p. 150.

significance of the French Revolution is described by Alexis de Tocqueville in *The Old Regime and the French Revolution*. The corruption, the inequality, the despotism, and all the other failings of the Ancien Régime were, Tocqueville believes, the causes of the revolution. The revolution was unavoidable.

Tocqueville writes about the historical value of the revolution:

> No great historical event is better calculated than the French Revolution to teach political writers and statesmen to be cautious in their speculations; for never was any such event, stemming from factors so far back in the past, so inevitable yet so completely unforeseen.[76]

Alexis de Tocqueville knew as early as 1856 that the French Revolution aspired to have a worldwide effect[77] and that it created a missionary atmosphere.[78] In answer to the question of what the true intention of the revolution was, he writes: "to change the whole nature of our traditional civilization, to arrest its progress, or even to make any vital change in the principles basic to the structure of society in the Western World."[79]

The French Revolution also sought to create a new, universal world (namely, the Western world) that would be based on the principles of the liberal constitutional state. The establishment of modern democracy implied the end of the feudal system and the mystical connection "politics" had to God. At the same time, Tocqueville describes how the French Revolution turned into an orgy of violence, and that is why he rightly believes that there was a satanic element to the revolution. He hopes, therefore, that in the darkness of the future, an aristocracy will arise that can channel these unknown forces and their destructive urges.

Besides constitutionalism, the revolution also produced the idea that social change can be created by force, for which history was viewed as the best preparation for a yet to be formed man and society. The revolution sought to return to a period of authenticity in the distant past, a paradisiacal beginning in which everyone was happy. Because this return could not be captured in the real world, the revolution had to be based on a philosophical discourse about this reality. This reality was the moment to which mankind sought to return. The revolution could not be devised by the workers; it was formulated by the philosophers. That is why a revolution, no matter where, always requires its own particular philosophers. Because real history is yet to begin, the revolution sees itself as the midwife of this history that is yet to be born. And because the ideological content of the revolution is not fixed, a conflict arises among the

76 Tocqueville, Alexis de, *The Old Regime and the French Revolution*, Anchor Books, New York 1983 (1856), p. 1.
77 Tocqueville, Ibid., p. 10.
78 Tocqueville, Ibid., p. 12.
79 Tocqueville, Ibid., p. 19.

revolutionaries about what the course of history should be. From a revolutionary perspective, the violence does not have to be justified. After all, everything is in the service of a great contemplative discourse about humanity and its history. The violence becomes abstract, which justifies the violence on the basis of its concordance with the ideology. Neither the courts, nor the parliaments, and certainly not the fellow citizens decide the grounds for and the proportionality of the violence. Therein lies the cause of the disproportionate use of revolutionary violence, in which arbitrariness becomes the measure of all things. Because there is competition with regard to deciding the ideology and the course of history, the revolutionary eats his own children. An appeal to the ideology of the revolution is sufficient to justify violence against friends.

The revolutionary thinks and acts instrumentally; after all, everything is in the service of the ideology, and the revolution itself is the instrument for bringing about an earthly paradise. So, the revolution serves a different purpose. In essence, the violence is also instrumental, because the violence is meant to achieve a pre-set goal. The revolution and violence are products of similar patterns of thought and action: the absolute instrumentality that is "creating" sameness.[80] Saint-Just's wording is revealing of the intensity of the revolutionary use of force:

> Between the people and its enemies, there is nothing in common but the sword; steel must control those who cannot be ruled "by justice"; the monarchical and the neutral majority must be "kept down". So there can be no clemency; revolutionary justice represents "strictness" (Saint-Just, 26 February, 1794). The sword of justice should fall quickly everywhere. … the instrument of the people's government during the revolution is both virtue and terror … Terror is nothing more than swift, harsh, and unforgiving justice; so she is a product of virtue.[81]

The guillotine is indeed the machine and the divine symbol of the revolution.

The revolution that proclaimed the rights of man ended in massive human rights violations.[82] It happened because the liberal truth of the revolution, which opposed the Ancien Régime, was devoured by the ideological religiosity of that same revolution. The philosophy of the revolution developed into an unheard of intellectual activity by Marx, Engels, and Lenin, all of whom passionately opposed human rights and the liberal constitutional state. Lenin said that the revolution pulled history forward like a locomotive. Lenin, the founder

80 See: Arendt, Hannah, "On violence," in: *Crises of the Republic*, Harcourt Brace, London 1972 (1969), pp. 105–198.

81 Arasse, Daniel, *De machine van de revolutie. Een geschiedenis van de guillotine*, SUN, Nijmegen 1989, p. 114.

82 Even a superficial reading of the writings of the revolutionary Saint-Just (1767–1794) will make anyone denounce state terror. See: Saint-Just, *Saint-Just. Oeuvres complètes*, Gallimard, Paris 2004.

of the Soviet Union, believed, like Marx, that revolutions would one day bring an end to the state (its liberal incarnation), which would also put an end to parliamentarianism. Democracy is considered to be small-minded.[83]

The realization of *the* ideology is inevitably accompanied by violence, excessive violence. This excessive violence can hardly serve as a foundation for the rebuilding of the public space. From the perspective of the revolutionaries, the state is an instrument for realizing the ideals of the revolution. The lack of constitutionalism in the revolutionaries inevitably leads to tyranny. Because of the revolution, the modern era was legally and politically established once and for all. The reception of modernity was complete. Between Hobbes' dangerous savage and Rousseau's romantic savage, there is a space in which the philosophy of mankind of the Enlightenment and human rights resides.

Rousseau and Hobbes again

Again, we have to address the difference between Rousseau's view of mankind and that of Hobbes. It lies in the area of anthropology; after all, they have conflicting views of mankind that underpin the social contract. One may have different political-anthropological motives for entering into a social contract. In the second part of *Discourse on Inequality*, Rousseau describes his vision:

> But above all things let us beware concluding with Hobbes, that man, as having no idea of goodness, must be naturally bad; that he is vicious because he does not know what virtue is; that he always refuses to do any service to those of his own species, because he believes that none is due to them; that, in virtue of that right which he justly claims to everything he wants, he foolishly looks upon himself as proprietor of the whole universe. Hobbes very plainly saw the flaws in all the modern definitions of natural right: but the consequences, which he draws from his own definition, show that it is, in the sense he understands it, equally exceptionable.[84]

Savage man in his natural state is not as bad as Hobbes imagines.[85] This shows how important a view of mankind is to a political-legal idea that is meant to constitute the basis of society. The question now is: What view of mankind underpins human rights? The crucial moments in the history of human rights: the proclamation of the British *Bill of Rights* (1689), the *Declaration of*

83 Marx, Karl, "'Der Achtzehnte Brumaire des Louis Bonaparte," in: *Karl Marx Politische Schriften, Erster Band*, Wissenschaftliche Buchgesellschaft, Darmstadt 1978 (1852).

84 Rousseau, J.J. *A Discourse upon the Origin and the Foundation of the Inequality among Mankind*, Project Gutenberg, accessed May 13, 2018, http://www.gutenberg.org/cache/epub/11136/pg11136-images.html

85 Rousseau says: "So that we may say that savages are not bad, precisely because they don't know what it is to be good." See: Rousseau, Ibid.

Independence (1776), and the *Déclaration des droits de l'homme et du citoyen* (1789). What is the significance of the establishment of human rights in the modern era? What political-philosophical or political-historical changes embody human rights? The fundamental change in attitude, caused by the developments described, is depicted in an extraordinarily fascinating way in 1896 by the legal scholar A. de Graaf in his dissertation *Een beschouwing over de geschiedenis van het straffen (*a reflection on the history of punishment):

> The time of which I am about to speak is an age of great legal uncertainty … The entire period is one of protest, protest against the old, protest against what is coming. People can feel the Revolution deteriorating, but this is not the case; when a Revolution breaks out, deterioration has already taken place … *"human rights"*. The tool with which people abstract, *i.e.* classify, *i.e.* organize is reason. Reason brings equality, makes one see the equal, the unusual belonging to a single species, including humans, and so *man*: the goddess of reason therefore honors Revolution. In no people is reason so developed as in the French, and nothing is so developed in the French as reason. So this is it: *the type man has been discovered*. [86]

De Graaf not only explains how important the French Revolution was, but he especially emphasizes how, as a consequence of this, and in the wake of human rights, "man" as an abstract category has been discovered. According to De Graaf, this type of man should be considered a "person," i.e. someone with dignity. . There are three important elements to the change brought about by the Revolution:

1 The existing political-legal reality was broken down by the Revolution; the end of the Ancien Régime
2 Human rights became the legal form that constitutes the secularization of power[87]
3 A *type* of man emerged based on the principle of personality.

We will translate these three elements into more accessible terminologies:

1 the establishment of democracy and the end to societies based on mysticism
2 the place of power is declared empty
3 human rights as the foundation of a baseless society.

86 De Graaf, A., *Een beschouwing over de geschiedenis van het straffen*, J. Clausen, Amsterdam 1896, pp. 105, 113, 117.

87 "All the characteristics or rights that man is said to possess have to indicate what constitutes personality. The personality that was curtailed by Israel, denied by the Romans, silenced by the church, has been freed …. Until now, it was the state that proscribed the laws; now, it is personality that devises them." See: Ibid., pp. 117–118.

The codification movement institutionalized these elements. In their study *Instrumentaliteit en Rechtsbescherming* (instrumentality and legal protection),[88] Foqué and 't Hart name the French jurist Portalis (1746–1807) as the codifier of the post-revolutionary period. The Council of State for Napoleon (Portalis), with the Constitution of 1791 and the Code Pénal (1791 and 1810), laid the foundation, together with other actors, of a criminal code that aligned with an anti-despotic system of government and with the civic model of society. Foqué and 't Hard rightly point out that Portalis's codification and related legal theory served a political end: "to have people forget the activism of the revolution and the social unrest connected to it."[89]

The Enlightenment view of mankind forms the structure of the view of mankind that underpins human rights. Briefly summarized, the Enlightenment view of mankind is based on three universal principles:

1 All people are, in principle, rational beings.
2 All people need physical and mental protection from the (government) powers (the longing for freedom).
3 People are autonomous subjects.

Let us now take a look at article 1 of the Universal Declaration of Human Rights (1948): "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Man as a *person*, free from any ideological or religious categorization, is the starting point of human rights. The character of the individual reflects the *person* as a free and equal being. Freedom of choice, without fear of ideological institutions or state interference, is *conditio sine qua non* to be a person at all. This view of mankind is individualist and deeply connected to the civil society that, so far, seems to be the only kind of society that enables people to, as *persons*, have freedom of choice in their lives. In other words, liberal society is the only society in which human rights can be respected. Liberal society is an open society that is baseless, with many precipices.

It is no coincidence that the proclamation of human rights coincides with the birth of the constitutional democratic state. In the modern world, a democracy without human rights, as well vice versa, human rights without democracy, would not be possible, because human rights safeguard the functioning of democracy and democracy is the only safeguard for the realization of human rights. Together, democracy and a culture of human rights form the ultimate limitation of "politics" (public space), of which citizenship is the rationale and

88 Foqué, H. and 't Hart, A.C., *Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie*, Gouda Quint, Arnhem 1990, pp. 39–51.
89 Foqué and 't Hart, Ibid., p. 44.

essence. What is the position of human rights in all of this? Is the social contract protected and refined by human rights?

(Popular) sovereignty and human rights are competing concepts that confront the modern world of the law with extremely complicated questions. It is 50 years since the Universal Declaration of Human Rights was proclaimed from the top of the ruins of modernity. Argentinian writer Jorge Luis Borges (1899–1986) called the 20th century, "the century of death." It is with this dark historical inheritance that criminal law scholars have to shape the laws, prescriptions, and prohibitions. This is the historical perspective in which we place the idea of human rights.

Sometimes people are viewed as political abstractions. The abstracted man is, in the end, the axis of political ideologies that seek to set man in motion, not as a concrete being but as an anonymous mass. Opposite the political abstraction of man, we place legal abstraction. The legal abstraction of human rights indicates a universal delineation of the intention of an idea about the world. This notion needs to be concretized further by the law and legal practice. Or, put a different way: the idea of human rights is enclosed by imaginary limits. Within these limits, endless restrictions have to be sought. This legal—or human rights—abstraction enables a legal practice in which any claim by a concrete person becomes a restriction, which then heralds a dissolution of the abstraction. On the other hand, this abstraction prevents the emergence of political-ideological practice. That this too is of great importance is proven by the modern history of Europe. After all, what did the political abstraction of the human of human rights lead to in that history? The total *Endlösung* of everything that fell outside of the "own" sovereign political ideology might be blamed first and foremost on the abstracted political definition of man. It was a brief period of crimes with far-reaching and massive consequences, anonymous perpetrators, and unknown victims.

Generally speaking, we can observe that the history of human rights features two important moments: (1) the proclamation of these rights; and (2) the actual pursuit of their realization. Metaphorically speaking, the first point can be expressed by the phrase: "from the rights of Englishman towards the rights of man."[90] However, there was no legal mechanism to effectuate human rights. The conflict between sovereignty and universal human rights played a crucial role in this. For instance, Jewish refugees were suddenly confronted with an unprecedented problem:

> On the contrary, the victims shared the disdain and indifference of the powers that be for any attempt of the marginal societies to enforce human rights in any elementary or general sense. … What is unprecedented is not the loss of a home but the impossibility of finding a new one.[91]

90 Arendt, *The Origins of Totalitarianism*, p. 175ff.
91 Arendt, Ibid., pp. 292–293.

Moreover, it was necessary to proclaim a new declaration of human rights. This was not about a proclamation of the idea itself, but of a realization mechanism. In it, the rights would also be further specified.

The European Convention on Human Rights and Fundamental Freedoms (ECHR) is a unique attempt to combat the political abstraction of man. Shortly after the Second World War (1948), at the "Congress of Europe," the *European Movement* expressed the wish to draft a European charter for human rights. After the indescribable totalitarian horrors, the participants wanted to realize that of which the revolutions of the modern era—such as the French—with their philosophers and philosophies, had not been capable. The institutionalization of human rights as the foundation of political power and legal relationships was the goal people passionately pursued. There are impressive examples from meetings of the *Consultative Assembly* that are illustrative of the atmosphere in which the establishment of the ECHR was debated:

> Mr. President, while I was in the Gestapo prisons, while one of my brothers was at Dachau and one of my brothers-in-law was dying at Mauthausen, my father who was also a member of our French Parliament, was interned at Buchenwald. He told me that on the monumental gate of the camp was this outrageous inscription: 'Just or unjust, the Fatherland'. I think that from our First Session we can unanimously proclaim that in Europe there will henceforth only be *just* fatherlands. I think we can now unanimously confront 'reasons of State' with the only sovereignty worth dying for, worthy in all circumstances of being defended, respected and safeguarded – the sovereignty of justice and of law.[92]

In this monumental quotation, we see how people wanted to bury the modern concept of *popular* sovereignty once and for all, in order to replace it with human rights that were meant to constitute the sovereignty of justice and right. The ECHR is the treaty in which, for the very first time, human rights function as the highest category of legally binding and testable norms. In the eyes of legal theorists with a positivist bent, such as H.L.A. Hart, international law was a problematic area of law.[93] His reasoning, and that of other writers, was that international law is a primitive legal system. As a consequence, the rights that belong to international law might be "primary rules of obligation," but they lack "secondary rules to make, recognize or enforce primary rules."[94] We can scarcely imagine that there could be a legal theoretician in our time who would call the ECHR a primitive legal system, considering its influence on the

92 These words were spoken by P.H. Teitgen. See: M. Janis, R. Kays, and A. Bradley, *European Human Rights Law, Text and Materials*, Oxford University Press, Oxford 1995, p. 20.

93 Hart, H.L.A., *The Concept of Law*, Oxford University Press, Oxford 1961, pp. 209–231.

94 Janis, Kays, and Bradley, *European Human Rights Law, Text and Materials*, p. 5.

law and legal practice of Europe. That is why the ECHR is an important turning point in political and legal history. After all, it turned the law into a reasonably autonomous area that functions both as the foundation of power and its limitation.

But an absolutization of human rights in which democracy and popular sovereignty are in danger of being nullified is also a threat to an open society. There exists an ideological movement that, in the name of humanity, seeks to conserve and simplify constitutionalism. The absolutization of human rights within the democratic legal order is one of the symptoms of such an ideological movement that is characterized by legal activism. The worldview of legal activists is oftentimes a continuation of the classical leftist, Marxist tradition that intends to abolish the state, and with it civil society. How can that be achieved? Through a total judicialization of the state, which in turn will lead to its complete depoliticization. This depoliticized state will then no longer be a state. Legal activism is characterized by a contempt of democratic political processes. In his inaugural lecture, *Een primaat van politiek* (a primacy of politics), Jos de Beus (1952–2013) wrote that: "In the nineties, politics was mostly a servant of two masters: the market and the courts. The terms are as ugly as the trends: economization and juridification."[95] In a democracy, primacy indeed resides in politics, so in the citizens, not in the law. Nevertheless, here too, there is a strict separation between the law, power, and knowledge. The law, through human rights, tries not to dominate politics. The law only guards the outer limits of politics as they were once set by the citizens.

95 Beus, Jos de, *Een primaat van politiek*, oratie Universiteit van Amsterdam, Amsterdam 2001, p. 6.

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