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### Moral Values and the Law.

The topic of my paper is the relation between moral values and the law, and I shall proceed upon the point stressed by Neil MacCormick that “human beings are norm-users, whose interaction which each other depend upon mutually recognizable patterns that can be articulated in terms of right versus wrong conduct, or what one ought to do in a certain setting”.<sup>1</sup> MacCormick adopts the perspective of the norm-user rather than the perspective of the norm-giver, but I shall consider both perspectives. The perspective of human beings as norm-users can be illustrated by the account by Michel Montaigne, referring to “custom’s imperial sway” by reference to the Persian King Darius: “Darius asked some Greeks what it would take to persuade them to adopt the Indian custom of eating their dead fathers (for that was the ritual among Indians who reckoned that the most auspicious burial they could give their fathers was within themselves): they replied that nothing on earth would make them do it. Then he made an assay at persuading those Indians to abandon their way and adopt that of the Greeks (which was to cremate their fathers’ corpses): he horrified them even more” and Montaigne comments “We all do likewise: usage hides the true aspect of things from us”.<sup>2</sup> The modern sciences, anthropology, sociology and psychology, have established the truth that there is a variety of moral norms relative to particular social and cultural understandings. This raises in turn philosophical questions that I wish to address in this paper.

Thus the Swedish philosopher Axel Hägerström begins his inaugural lecture by citing the story told by Herodotus in order to arrive at the view that that there are no universal moral norms.<sup>3</sup> Hägerström supports this by reference to the different norms endorsed within Christian morality and ancient Greek morality as well as the norms between different social classes as manifested in the conflict between capital and labour. And nowadays we have the conflict between Christian and Muslim values. This leads to the view that what is just according to Christian morality may be unjust according to the Muslim morality. This view is also known as moral relativism that denies that there is a universal set of ultimate moral norms since there are only particular sets of moral norms by which persons and their actions are to be judged. The opposing position is known as moral absolutism, but a better term is moral universalism since the term “absolutism” is used to refer to the nature of moral norms according to which moral norms are absolute in the sense that moral norms can have no exceptions. By contrast moral universalism holds that there are global and universal norms among human beings that are used to derive local and particular norms for people. Moral universalism proceeds upon the distinction between universal moral values and particular moral values. The former are valid for all people at all times and in all places and expressed in universal norms that can be used to derive particular norms of positive morality consisting of norms of actions for individuals within a particular group or society as well as specific positive laws introduced by the appropriate authorities to regulate and guide the conduct of people with the state.

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<sup>1</sup> Neil MacCormick, *Institutions of Law*, Oxford 2007, p. 20 cf. p. 303.

<sup>2</sup> Michel de Montaigne, *On habit: and never easily changing a traditional law*, in *The Complete Essays*, transl. M. A. Screech, Harmondsworth 1991, Book I, Essay 23, p. 130f. Montaigne draws upon the story told by Herodotus in his *Persian Wars*.

<sup>3</sup> Axel Hägerström, *On the Truth of Moral Propositions* (1911), in *Philosophy and Religion*, ed. and transl. Robert T. Sandin, London 1964, p. 77-96. On Hägerström’s moral philosophy see my article, *Ought and Reality. Hägerström’s Inaugural Lecture Reconsidered*, in *Scandinavian Studies in Law*, vol. 40, *Legal Theory*, ed. Peter Wahlgren, Stockholm 2000, p. 11-72.

Moral relativism may be welcomed since it presents an account of moral diversity and moral disagreement among people and offers a solution to adhere to the particular norms of one's culture and society. However, it is important to notice that there are varieties of relativism that differ in the study of moral norms in terms of empirical inquiries, normative inquiries and analytical inquiries.<sup>4</sup> The empirical inquiries are pursued within anthropology, sociology and psychology and expressed in empirical or factual propositions and called sociological relativism. The sociological relativist claims that the question we should ask is not the question "Which positive morality, e.g. the Christian or the Muslim morality, is the right one?" but rather the proper question is: "What do human beings sharing a positive morality choose to do?" This is an empirical question and the answer is provided by reference to the account of the dominant social understandings of moral norms in order to arrive at the truth of the following empirical or factual propositions: that there is a diversity of moral norms relative to a set of particular social and cultural understandings, that an individual human being's moral beliefs and attitudes are not inborn but learned from their social, cultural and religious environment, and that human beings are group centred or ethnocentric believing that the moral norms of their social and cultural background are the only norms for anyone to live by since these norms provide the justificatory reasons for what there is reason to believe, to feel and to act. Thus sociological relativism may be adduced to support moral relativism that denies the existence of universal norms. The rejoinder to sociological relativism is that it overlooks that people may agree that there are universal moral norms that are used to derive particular moral norms within a society or culture. To return to the story by Herodotus, it is evident that the moral norms of the Greeks differ from the moral norms of the Indians, and the Europeans and the Muslims may adhere to other norms concerning the proper conduct with respect to funerals. However, these different norms share a common element, that is to say the universal moral norm or principle to show respect for the dead. This view can be called sociological universalism that proceeds upon the distinction between universal moral values and particular moral values and this casts doubt on sociological relativism, and raises empirical questions that cannot be addressed in this paper. Suffice it to say that as a matter of fact there are agreements as well as disagreements concerning the values and norms among people. And this raises the question if empirical inquiries in terms of sociological relativism and sociological universalism can be adduce to support normative theories concerning what is right and wrong conduct.

Although moral relativism denies the existence of universal norms it is a normative perspective with respect to what human beings have reason to believe, to do and to act. If moral relativism relies upon sociological relativism then the result is that what is right and wrong conduct is conceived in terms of the current and local norms. This implies in turn that it may be difficult to criticize these norms since there are no universal and global norms that can serve as moral standards for the evaluation of whether the local norms are good or bad, just or unjust for the life of human beings. As the saying goes "when in Rome, do as the Romans do".<sup>5</sup> This piece of advice may be useful for travellers, for example in Serbia, where the travel guide informs that the Serbian custom is that once one has been invited for a drink in a café or to a restaurant, the host will pay the whole bill. But as a piece of information with respect to moral norms, the advice offers no guidance. As Ernest Gellner puts it, "the reason for this is simple. In the world as it now is, there are no 'Romans' and no 'Rome', whom we could emulate in conduct or in belief. To work as a recipe, relativism requires

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<sup>4</sup> See Paul W. Taylor (edt.), *Problems of Moral Philosophy*, Belmont 1967, Ch. 2 for

<sup>5</sup> As St Ambrose puts it: "When I am here (at Milan), I do not fast on the Sabbath, when in Rome, I do", *Letters to Augustine*, 4<sup>th</sup> C, quoted from *The International Thesaurus of Quotations*, compiled by Rhoda Thomas Tripp, Penguin Books 1970, entry 985.4, p.649.

the existence of identifiable ‘cities’, i.e. units in terms of which the alleged relativity is to work”.<sup>6</sup> And this is just the problem to identify the relevant city which may be the individual human being or various groups of human beings. Even if the city can be identified, moral relativism faces the moral question what determines whether the moral norms are good or bad, or just and unjust. The relativist answer is that this is determined by social consensus. But this raises analytical or philosophical questions within moral epistemology concerning the justification of moral beliefs and the related questions concerning the meaning of the moral vocabulary and the ontological status of moral properties. These questions are also addressed within moral relativism by reference to the authority of social consensus. Thus moral relativists may believe that some human beings are by nature slaves devoid of any reason and hold that for this reason it is both expedient and right to treat them as slaves. The rejoinder is that even a complete social consensus on slavery would not settle its authority and justify the validity of moral norms that treat some human beings as “a living tool”, to use Aristotle’s expression.<sup>7</sup> The moral relativist overlooks that there is a crucial distinction between what people believe is right conduct and what is right conduct and the reason why is that the what is believed to be right conduct is identified with what is right conduct. Thus there is the possibility that the moral beliefs held by human beings may be mistaken. Of course this presupposes that there is a way of finding out whether moral beliefs are true or false and thus arrive at moral knowledge.

This question is addressed by Hägerström in his lecture mentioned above that leads him to the view that there are no moral beliefs at all since there are no moral properties or moral facts. This view is called non-cognitivism, claiming that morality is not a matter of belief as expressed in moral propositions as reasons for belief and action but rather a matter of feelings as expressed in imperative sentences to influence the behaviour of human beings. Hägerström’s non-cognitivism depends upon his ontological view that there is but one world, the sensible world in time and space, and his epistemological view that the world is there to be known by experience. Hägerström is known for his attack upon metaphysics, but the metaphysics he denies is that there is a super-sensible world beyond the world in time and space. The world in time and space consists of things and events that make an impact upon the human mind and recorded in meaningful words in terms of concepts that are used in meaningful sentences to express true propositions and thus arrive at knowledge of what there is. The truth of a proposition is the reality of the thing and this accounts for the difference between propositions made by ordinary people and scientific propositions since scientist have more experience and are in a better position to arrive at the truth than ordinary people who are carried away by feelings whereas scientist are committed to the search for truths as neutral and judicious spectators of the physical world. Thus people can rely upon the authority of scientists informed by Hägerström’s philosophy that demonstrates the logical character of the physical reality and can be called rational naturalism.

Hägerström’s rational naturalism also informs his inquiries into the nature of morality since the logical character of the physical reality implies that it is devoid of any values. It follows that there can be no moral reality or moral facts and thus no moral and normative concepts either but only the use of words expressing feelings. Thus Hägerström rejects moral theories that define moral concepts in terms of empirical facts, for example pain and pleasure according to the principle of utility put forward by Jeremy Bentham. As Bentham puts it, “Take away pleasures and pains, not only happiness, but justice, and duty, and obligation, and virtue – all which have so elaborately held

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<sup>6</sup> Ernest Gellner, *Legitimation of Belief*, Cambridge 1974, p. 49.

<sup>7</sup> Aristotle, *Nicomachean Ethics*, transl. W. D. Ross, revised J. O. Urmson, Book VIII, § 11, 1161b4, in *The Complete Works of Aristotle*, ed. Jonathan Barnes, Princeton 1991, vol. 2, p. 1835.

up to a view as independent of them – are so many empty sounds”.<sup>8</sup> Bentham’s utilitarianism is a version of cognitivism grounded in experience that “nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of cause and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think”.<sup>9</sup> If we follow Bentham, the meaning of moral or normative concepts can be established by experience by reference to the properties in any object, thing or action, that tend to produce pleasure, benefit, happiness, good or to prevent the happening of pain, mischief, unhappiness, evil to human beings. This view faces the objection known as the naturalistic fallacy put forward by G. E. Moore that the concept of good cannot be defined.<sup>10</sup> Bentham defines the concept of good in terms of happiness-producing but if so then it is quite proper to ask if a good action really is happiness-producing. According to Bentham’s definition, this question means that a happy-producing action is happy-producing and this is not what is meant by the question what a good action is. For Moore, the answer is that the concept of good, like the concept of yellow, “denotes a simple and indefinable quality”. Thus Moore dismisses the view that the concept of good has no meaning whatsoever. The concept of good has a meaning by reference to non-natural properties of things in the world that can be known by intuition or cognitive insight. Another moral question concerns the actions human beings ought to perform and in this respect Moore holds that the concept of ought or duty can be defined in naturalistic terms of what “will cause more good to exist in the Universe than any possible alternative”. Thus Moore adheres to a version of utilitarianism with respect to conduct since what is right conduct is related to experience of what kind of conduct brings about good consequences.

Utilitarianism is committed to the view that there are moral facts in the world that are there to be known by experience. By contrast, Kant holds that “when we have the course of nature alone in view ‘ought’ has no meaning whatsoever. It is just as absurd to ask what ought to happen in the natural world as to ask what properties a circle ought to have. All that we are justified in asking is: What happens in nature? What are the properties of the circle?”.<sup>11</sup> For Kant, “so far as nature is concerned, experience supplies the rules and is the source of truth, in respect of the moral laws it is, alas, the mother of illusion! Nothing is more reprehensible than to derive the laws prescribing what *ought to be done* from what *is done*, or to impose upon them the limits by which the latter is circumscribed”. It is important to notice that Kant does not reject empirical information concerning the existence of laws but he insists that moral laws and concepts cannot be justified in naturalistic terms but are grounded in reason. There is only one reason that can be used either theoretical or practical. The theoretical use of reason is concerned with the way in which we arrive at knowledge of the world in terms of the a priori forms of intuition (space and time) and the pure concepts or categories (quantity, quality, relation, modality) that establish the conditions for the possibility of experience and likewise the conditions of the possibility of the objects of experience. It follows that objects beyond our ability to experience are not legitimate objects of knowledge since knowledge is confined to objects of experience and expressed in descriptive propositions stating empirical truths. The practical use of reason is concerned with the capacity to act and expressed in moral or

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<sup>8</sup> Jeremy Bentham, *Deontology. Together with a Table of Spring of Action and Article on Utilitarianism*, ed. Ammon Goldworth, Oxford 1983, p. 89.

<sup>9</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), ed. J. H. Burns and H. L. A. Hart, with a new introduction by F. Rosen, Oxford 1996, p. 11.

<sup>10</sup> G. E. Moore, *Principia Ethica* (1903), Cambridge 1948, p. 6, cf. p. 10 and p. 148 for the next quotation in the text.

<sup>11</sup> Immanuel Kant’s *Critique of Pure Reason* (1781), transl. Norman Kemp Smith, London 1976, p. 473 (A547/B575), and p. 313 (A318/B375) for the next quotation, Kant’s italics..

normative propositions stating moral or normative truths. Although human beings are animals, there is a crucial difference between animals and human beings since animals behave according to laws of nature whereas human beings are rational beings or persons having the capacity to guide their actions by normative principles of their own making that are grounded in the will or practical reason. As Kant puts it, “a person is a subject whose actions can be *imputed* to him. *Moral* personality is therefore nothing other than the freedom of a rational being under moral laws. From this it follows that a person is subject to no other laws than those he gives to himself (either alone or at least along with others)”.<sup>12</sup> Thus human beings are moral agents having the capacity to be authors of laws as well as subject to these laws concerning the actions to be performed. This means that moral agents have autonomy in the sense that they are “sovereign over the employment of their rational capacities. One’s exercise of one’s reason is not subject to the governance of any external authority, or to any standards other than those generated by one’s reason”.<sup>13</sup> Thus human beings are norm-givers as well as norm-users since they have the capacity to put themselves under laws as legislators and at the same time be subject to these laws as responsible citizens. As Kant puts it “Everything in nature works in accordance with laws. Only a rational being has the capacity to act *in accordance with the representations* of laws, that is in accordance with principles, or have a will. Since *reason* is required for the derivation of actions from laws, the will is nothing other than practical reason. If reason infallibly determines the will, the actions of such a being that are cognized as objectively necessary are also subjectively necessary, that is, the will is a capacity to choose *only* that which reason independently of inclination cognizes as practically necessary, that is, as good”.<sup>14</sup>

The representation of a law for a will is called a command of reason and the formula of the command is called an imperative and expressed in normative propositions in terms of an ought presenting a possible action for the will of a rational being. Kant proceeds upon a distinction between hypothetical imperatives and categorical imperatives. The former represent the practical necessity of a possible action as good in terms of a means to achieving an end whereas the categorical imperative represents an action as objectively necessary of itself or good in itself without reference to another end. Morality is expressed in the categorical principle that enjoins human beings to “*act only in accordance with that maxim through which you can at the same time will that it become a universal law*”. Persons are legislators in the sense that they confer authority on moral laws by using the categorical imperative as the general moral law or principle in order to arrive at specific moral laws or moral norms. But they are not legislators in the sense of lawgivers that can determine the content of the categorical imperative since this is a law of reason with respect to human conduct that enjoins: “*So act that you use humanity, whether in your own person or in the person of another, always at the same time as an end, never merely a means*”. This is grounded in reason which demonstrates that human beings are free and equal persons who must be regarded as ends in themselves. As Kant puts it, “a human being regarded as a person, that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is he possesses a dignity (an absolute inner worth) by which he exacts *respect* for himself from all other rational beings in the world”.<sup>15</sup> The categorical imperative can be used as a legislative

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<sup>12</sup> Kant, *The Metaphysics of Morals* (1797), in *Practical Philosophy*, p. 378 (6:223), Kant’s italics.

<sup>13</sup> Andrews Reath, *Agency & Autonomy*, Oxford 2006, p. 173.

<sup>14</sup> Kant, *Groundwork of The Metaphysics of Morals* (1785) in *Practical Philosophy*, transl. and ed. Mary J. Gregor, General introduction Allen Wood, Cambridge 1996, p. 66 (4:412), p. 81 (4:431), p. 73 (4:421) 80 (4:429) for the next quotations, Kant’s italics.

<sup>15</sup> Kant, *The Metaphysics of Morals*, p. 557 (6:434), Kant’s italics.

procedure by human beings as autonomous persons to act as norm-givers in order to conceive of particular moral norms that create duties, rights, and permissions, to accept these moral norms as reasons for belief and action, and act accordingly as norm-users. Thus the categorical imperative is used to provide the justification for the validity of particular moral norms that must be acknowledged by everyone to guide their decisions to act.

For Kant, the fundamental moral principle is the principle of autonomy which implies that moral agents are not just subject to moral norms, but are their authors in the sense that it is their will that makes a law a valid moral law in terms of authoritative reasons for belief and action. Kant claims that “by explicating the generally received concept of morality we showed only that an autonomy of the will unavoidable depends upon it, or much rather lies at its basis. Thus whoever holds morality to be something and not a chimerical idea without any truth must also admit the principle of morality brought forward”.<sup>16</sup> The principle of morality is the categorical imperative grounded in the use of practical reason which implies that Kant rejects that morality is grounded in empirical principles, e.g. the principle of utility put forward by Bentham and John Stuart Mill. Mill refers to Kant’s *Groundwork of the Metaphysics of Morals* only to reject the categorical imperative “So act, that the rule on which you actest would admit of being adopted as a law by all rational beings”, since Kant “fails, almost grotesquely, to show that there would be any contradiction, any logical (not to say physical) impossibility, in the adoption by all rational beings of the most outrageous immoral rules of conduct”.<sup>17</sup> Hägerström advances a similar objection, claiming that if we follow Kant “any exploitation of man would be justified”.<sup>18</sup>

The objection fails and it is rather Hägerström’s view of morality that is a chimerical idea without any truth. It is a chimerical idea because it reduces the use of the normative vocabulary of reasons for human conduct to the use of meaningless words concerning human behaviour that is related to his view that human beings are not persons acting for reasons in relation to valid norms but rather intelligent animals using language to regulate human behaviour in terms of cause and their effects. I side with Kant that human beings are rational persons and responsible agents having the capacity to set ends for themselves and using the normative vocabulary to be norm-givers as well as norm-users and establish moral norms in terms of the positive morality and legal norms in terms of positive law. This invites the question concerning the relation between morality and the law that has been answered by H. L. A. Hart, claiming that there is “no necessary connexion between law and morals, or law as it is and law as it ought to be”.<sup>19</sup> This claim has been called the separability thesis and considered to be a distinguishing characteristic of legal positivism.<sup>20</sup> For support, Hart refers to John Austin’s view that “the existence of law is one thing; its merit or demerit is another. Whether it be or not is one inquiry; whether it be or be not conformable to an assumed standard, is a different inquiry”. However, Hart’s claim or the separability thesis can be contested since Austin holds that the positive law as it is necessarily embodies moral norms, e.g. norms protecting life and property. It is another question whether the identification and knowledge of a positive law involves moral

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<sup>16</sup> Kant, *Groundwork*, in *Practical Philosophy*, p. 93 (4:445). The objection fails; see Allen W. Wood, *Kant’s Ethical Thought*, Cambridge 1999, p. 84.

<sup>17</sup> J. S. Mill, *Utilitarianism* (1863), ed. Roger Crisp, Oxford 1998, p. 51.

<sup>18</sup> Hägerström, *Philosophy and Religion*, p. 82. This is false, see my *Ought and Reality* for discussion. .

<sup>19</sup> H. L. A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. with a Postscript ed. by Penelope A. Bulloch and Joseph Raz, Oxford 1994, p. 302. See also Hart, *Positivism and the Separation of Law and Morals* (1958) in *Essays in Jurisprudence and Philosophy*, Oxford 1983, p. 52 referring to John Austin, *The Province of Jurisprudence Determined*, ed. H. L. A. Hart, London 1955, p. 184.

<sup>20</sup> See Jules L. Coleman and Brian Leiter, *Legal Positivism*, in *Blackwell Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson, Oxford 1996, p. 241.

norms, and in this respect Austin's answer is that this is not the case since the law is there to be known by experience. For Austin, the positive law as it is sets the standard of what is just and unjust, and this implies that the positive law cannot be assessed in terms of justice, but it possible to assess the positive law in terms of goodness or utility. This leads Austin to distinguish between the inquiry into what the positive law is or legal science on the one hand and the inquiry into what the positive law ought to be according to the standard or principle of utility or moral science on the other. Bentham proceeds upon a similar distinction and so do natural law and natural right theories. Influenced by Austin, the German scholar Karl Bergbohm arrives at the view that there can be no room for moral science since moral norms are neither grounded in experience or reason but are the expression of feelings or desires.<sup>21</sup> Thus legal science is confined to the exposition and systematization of the positive law, and this view has been a very influential position. However, it ignores that the crucial question is not whether the positive law embodies moral norms but rather the question is what morality should law embody, and the related question what kind of moral arguments can be used in the making and application of legal norms.<sup>22</sup>

The positive law depends upon the constitution that authorizes some people to act as legal officials in terms of legislators, judges and administrative officers, to regulate human conduct in relation to various ends and also introduces the procedures and criteria for the making and application of norms as valid legal norms as well as putting limits on the authority they can exercise in terms of constitutional rights. In contrast to the making of moral norms, the legislators are norm-givers in the sense that they have the authority to determine the content of legal norms, using the constitutional procedure as well as reasoning based upon moral values and political considerations to create valid legal norms. In this respect, it is important to notice that the concept of validity is used in a legal or technical sense to demarcate the area of legal norms from the area of non-legal norms. The concept of validity is also used in a moral sense to claim that the valid legal norms are authoritative and conclusive reasons. In this respect, the legislators, representing the people, are considered to be authors of the obligation for people to accept valid legal norms as reasons for belief and action. As MacCormick puts it, law is institutional normative order and "the proper purpose of such an order is the realization of justice and the common good".<sup>23</sup> This is, perhaps, a combination of the Kantian perspective stressing justice grounded in human dignity and the utilitarian perspective stressing happiness grounded in human nature. For Kant, "a constitution allowing *the greatest possible human freedom* in accordance with laws by which *the freedom of each is made to be consistent with that of all others* – I do not speak of the greatest happiness, for this will follow of itself – is at any rate a necessary idea, which must be taken as fundamental not only in first projecting a constitution but in all its laws".<sup>24</sup> By contrast, Bentham holds that any constitution "has for its general end in view, the greatest happiness of the greatest number: namely, of the members of this political state: in other words, the promoting and advancement of their interests".<sup>25</sup> This raises the issue between the Kantian perspective and the utilitarian perspective what counts as relevant conditions not only for the making of positive law but also for the moral assessment of positive law.

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<sup>21</sup> See Jes Bjarup, Continental Perspectives on Natural Law Theory and Legal Positivism, in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding and William A. Edmundson, Oxford 2005, Ch. 20, p. 287-299, at p. 292.

<sup>22</sup> See Jes Bjarup, *The Genres of Law: Law and Jurisprudence*, in *Associations*, vol. 8, 2004, p. 115-134.

<sup>23</sup> MacCormick, *Institutions of Law*, p. 264.

<sup>24</sup> Kant, *Critique of Pure Reason*, p. 313 ((A316/B373)).

<sup>25</sup> Jeremy Bentham, *Leading Principles of a Constitutional Code, for any State*, in *Bentham's Political Thought*, ed. Bhikhu Parekh, London 1973, p. 195.

This is illustrated by the treaties that establish the European Union in terms of organs such as the Commission, Council of Ministers, The European Parliament, and the European Court of Justice making the Union is “a new legal order of its kind”, since the various legal norms made by these organs have primacy over the legal norms of the member states and thus have direct effect to create rights and obligations for European citizens within the areas of competence transferred to the Union.<sup>26</sup> The end of the Union is stated in the treaty of Lisbon in article 1a which is incorporated in the Treaty on the European Union as article 2 that “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. The Lisbon treaty must, like any other EU treaty, be ratified by all member states before it can become valid law. In Ireland, the Irish constitution requires a referendum that was held on 12 June this year where the Irish people rejected the treaty by a vote 53% to 47%. Whether the Lisbon treaty eventually will be ratified is an open question. But the moral values are not valid because they are mentioned in the Lisbon treaty, but the treaty mentions these values because they are valid and constitute the framework for the making and application of laws within the Union. This raises the question what the basis is for these values. An answer is suggested by the preamble to the Treaty of Lisbon, referring to that the basis is found by “drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”. The text of the preamble is ambiguous since it can be understood either in a descriptive sense or a normative sense. The descriptive sense is used to advance the empirical claim that the moral beliefs of European peoples have their origin in the cultural, religious and humanist inheritance. This is true and may in turn lead to support the normative sense to advance normative relativism that holds that the moral values of human rights, freedom, democracy, equality and the rule of law are necessary for the maintenance of the European way of life but these values are not universal and global values but particular and local values that apply to and bind the peoples of the European Union as opposed to the values of the non-European peoples. By contrast, it can also endorse moral or Kantian universalism that holds that reason demonstrates that there universal and global moral values that are valid or binding for all people at all places and at all times. Thus the treaty of Lisbon raises a philosophical question whether the moral values are to be conceived in terms of universal and global values or rather in terms of particular and local values? The answer is important for people considering whether or not to join the European Union, since any European State applying for membership must respect the moral values set out in Article 6, see Article 49 of The Treaty on the European Union. The answer is also important within the Union since people may hold that although the values of the Union are common and universal values for the working of the Union these values may conflict with the particular or national values of people within the Union and this may in turn lead to consider the Union as a threat to the national values of a people. It follows that the issue between moral universalism and moral relativism is important for the debate among people in relation to various values that govern their conduct with respect to what there is reason to believe, to do and to feel.

To illustrate this issue I shall consider the publication of cartoons depicting Mohammed in the Danish newspaper Jyllands-Posten in 2005. The alleged purpose of printing the cartoons was to defend the right of freedom of expression, but the editor also had the intention of provoking controversy in relation to Islam since the publication of any image Mohammed is offensive to many

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<sup>26</sup> MacCormick, *Institutions of Law*, p. 48.



Muslims. The newspaper was successful since the cartoons did provoke some Muslims, especially the cartoon depicting Mohammed with a bomb in his turban. The result was a complaint by the Muslim Ambassadors to the Danish Prime Minister, asking for a moral condemnation of the printing of the cartoons. This was rejected by the Prime Minister with the argument that the Danish government cannot interfere with the press and its constitutional right to freedom of expression that is crucial within a liberal democracy. The cartoons proved more provocative than the editors foresaw, leading to angry demonstrations throughout the Muslim world, burning of the Danish flag and violent attacks on Danish embassies that led to the loss of human life. The cartoon depicting Mohammed with a bomb has recently been reprinted in all leading Danish newspapers this year, as a response to the arrest by the Danish police of 3 persons, one with Danish citizenship and two citizens from Tunis, charging them with the intention to murder the cartoonist. This has in turn led to renewed moral condemnation by Muslims and the boycott of Danish goods in Muslims countries, as well as bombing of the Danish embassy in Islamabad resulting in the death of people and the threat of new violent attacks until an apology is offered for the printing.

This conflict raises the question which of these moralities, the Danish or the Muslim morality, is right? The Danish morality of freedom of expression informs the Danish Constitution of 1953, stating in article 77 that “any person is entitled to publish his thoughts in printing, in writing, and in speech, provided that he may be held answerable in the courts of justice. Censorship and other preventive measures shall not again be introduced”. The Danish paper *Jyllands-Posten* was sued in a Danish court for violation of the Danish Penal Code, but was acquitted. Thus the official Danish view stated by the Danish Prime Minister is that freedom of expression is not only a moral right but also a legal right. This is also reflected in the treaty of the European Union that subscribes to the right of freedom of expression as a human right that ought to be believed and respected by people as a reason for belief and action. This is a normative position that is different from the empirical position that what is believed to be right in one society may be believed to be wrong in another society. Thus the peoples of the European Union may believe that it is right to print the cartoons and the Muslim people may believe that it is wrong. If so then this is an empirical truth that must be admitted by all. What the normative relativist means to claim is not this empirical truth but rather the moral claim that what is right for the Danish or European people may be wrong for the Muslim people. This is tantamount to moral relativism that is advanced by Gilbert Harman that “moral right and wrong (good and bad, justice and injustice, virtue and vice, etc) are always relative to a choice of moral framework. What is morally right in relation to one moral framework can be morally wrong in relation to a different moral framework. And no moral framework is objectively privileged as the one true morality”.<sup>27</sup> The moral framework of freedom of expression is used to inform the making and application of legal norms within the European Union but if we follow Gilbert this framework is not a universal framework but only a local framework that may be valid for the Europeans but it is not valid for the Muslims. Moral relativism is often thought to contribute to tolerance among people subscribing to different moral norms. As Edward Westermarck puts it, “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 other hand more critical in their judgments”.<sup>28</sup> The rejoinder is that tolerance is a moral claim, and moral relativist cannot hold that this claim is a

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<sup>27</sup> Gilbert Harman, *Moral relativism*, in Gilbert Harman and Judith Jarvis Thomson, *Moral Relativism and Moral Objectivity*, Oxford 1996, p. 6.

<sup>28</sup> Edward Westermarck, *Ethical Relativity*, London 1932 p. 32, cited from Taylor, *Problems of Moral Philosophy*, p. 64 from an extract of Walter Terence Stace, *The Concept of Morals*, London 1937. A similar view is put forward by Hägerström, see *Philosophy and Religion*, p. 94, and by Hans Kelsen, see my chapter *Kelsen's Theory of Law and Philosophy of Justice*, in *Essays on Kelsen*, ed. Richard Tur and William Twining, Oxford, 1986, p. 300.

universal truth, but only a relative truth in relation to a specific group of people. Thus we have the moral claim (a) that it is morally and legally right for people to print the cartoons according to some Danes appealing to the moral framework of the European Union and another moral claim (b) that it is morally wrong for people to print the cartoons, put forward not only by Muslims, but also by some Danes criticizing the Danish paper. These normative claims seem to be contradictory claims, since if (a) is true, (b) is false, and conversely, if (b) is true (a) is false. But the moral or cultural relativist holds that both (a) and (b) are true, because the claims stated in (a) and (b) are incomplete or elliptical and should be understood as follows (c) it is morally right for people to print the cartoons according to the European framework and (d) it is morally wrong for people to print the cartoons according to the Muslim framework. And claims (c) and (d) are not contradictories, but they raise the question which framework, if any, is the true framework for making moral judgements.

The answer is that the European framework is the true framework based upon the freedom of expression as a moral and universal human right. This informs the European Union to hold that the freedom of expression of expression is also a legal and universal right. It is, however, important to notice that although the freedom of expression is a universal legal right, it is not an absolute right. This has been overlooked by some Danes, including the Prime Minister, claiming that freedom of expression is an absolute right. But surely the right of freedom of expression can be curtailed in relation to the protection of the life and security of human beings. Even so, there is a case for toleration of the printing of the cartoons as a universal truth that is justified by the fundamental principle of respect for the dignity of human beings. Thus Kant holds that “tolerance is a universal human duty. Men have many faults, real and apparent, but we have to put up with them. Tolerance in regard to religion is found when a person can endure without hatred the imperfections and errors of religion in another; even though he does not like them. He who holds to be true religion, what according to mine is an error, is nevertheless in no way an object of hatred. I ought to hate nobody, unless he be a deliberator author of evil; even insofar as he purposes to do good by way of evil and error, he is not an object of hatred”.<sup>29</sup> The principle of respect for the dignity of also puts a limit to the duty of tolerance since actions that fail to show respect for human beings are not to be tolerated. In this respect the Danish cartoons fail to respect Muslim people and are subject to moral criticism, and perhaps even legal action. However, the use of force against human beings in general, and the Danish cartoonist in particular for offending the feelings of some Muslims cannot be justified. If some people nevertheless resort to the threat of using force, and also put the threat into effect, the Danes and other human beings as well as their governments have the right to strike back and use force against them to prevent harm to innocent people. But the proper way is moral education and the use of arguments. As Kant puts it, “the spirit of persecution for the sake of God’s honour is at war with everything, and respects neither benefactor nor friend, neither father nor mother; everyone regards it as a merit to burn others at the stake in honour of God. In matters of religious truth, it is not force that must be used, but reasons. Truth can defend itself, and an error persists longer if force is employed against it. Freedom of inquiry is the best means of getting at the truth”.

Freedom of inquiry depends upon freedom of thought and freedom of thought depends in turn upon freedom of expression. As Kant puts it, “of course it is said that the freedom to *speak* or to *write* could be taken from us by a superior power, but the freedom of to *think* cannot be. Yet how much and how correctly would we *think* if we did not think as it were in community with other to whom we *communicate* our thoughts, and who communicate theirs with us! Thus one can very well say

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<sup>29</sup> Kant, Collins’s lecture notes (1784), in *Lectures on Ethics*, transl. Peter Heath, ed. Peter Heath and J. B. Schneewind, Cambridge 1997, p. 208 (27:453) and p. 209 (27:455) for the next quotation.

that his external power which wrenches away people's freedom publicly to *communicate* their thoughts also takes from the freedom to *think* – that single gem remaining to us in the midst of all burdens of civil life, through which alone we can devise means of overcoming all the evils of our condition".<sup>30</sup> Thus what matters is the exchange of thoughts based upon experience and reason in order to arrive at truths, both empirical truths and moral truths, to be used by legal official in the making and application of the positive law to govern people within the European Union. And the task for legal scholars is not only to inform legal officials about the positive norms but also to assess the positive norms in order to see if the legal officials comply with the constitution for the making and application of valid legal norms informed by empirical and moral truths.

Jes Bjarup

Horsens, 8. September 2008.

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<sup>30</sup> Kant, What does it mean to orient oneself in thinking ((1786), in *Religion and Rational Theology*, transl. and ed. Allen W. Wood, Cambridge 1996, p. 16 (8:144), Kant's italics.