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## LAW, MORALITY, AND VIRTUE\*

*In recent times, the concept of virtue has regained a prominent role in public discourse and in academic ethics as well. However, it has not yet been dealt with very much in contemporary political theory and legal philosophy. This paper aims at clarifying the relationships between law and moral virtues in two respects. First of all, there is the question as to whether and to what extent the law may urge its addressees to be virtuous by enforcing or fostering the respective character dispositions. The second question is whether and to what extent a well-functioning legal order is dependent on moral virtues of the citizens. As to the first question, the paper defends the widely shared view that a legitimate legal system must not enforce virtues and may foster them only to a limited extent. This view results from considering the proper aims of the law: determining and enforcing the rights and duties that are based on fundamental moral obligations; establishing and enforcing arrangements of rights and duties that aim at the fulfillment of weak moral obligations that are not sufficiently realized by individual action without coordination; and establishing duties which are justified by generally acceptable policies, such as the provision of public goods. By contrast, the discussion of the second question leads to the result that a legal order will operate appropriately only if it is backed by supportive moral virtues of the citizens. In order to show this, it is argued that law would necessarily fail when its officials and addressees were pursuing nothing more than their self-interests. Particularly, virtues are necessary for strengthening the force of legal threats, making possible an effective enforcement of legal norms, preventing superior legal officials from corruption, submitting the exercise of legal powers to sufficient public control, and providing moral attitudes for an appropriate process of legislation. As a result, law does rely on civic virtues which it cannot produce by itself.*

Key words: *Morality. – Virtue. – Aims of Law. – Rights and Obligations.*

In recent times, the concept of virtue has regained a prominent role in public discourse and in academic ethics as well, by contrast to previous decades in which this concept was widely deemed as old-fashioned and

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\* I wish to express my thanks to Philip J. Ivanhoe, Rebecca Walker, and Edith Titz for their helpful comments to an earlier draft of this paper.

conservative. This turn does not only manifest in a huge proliferation of popular publications on virtues, but also in a renaissance of ‘virtue ethics’ in philosophy, i.e. ethical theories in which virtue plays a central or constitutive role (Chapman & Galston 1992; Crisp & Slote 1997; Stratman 1997). Even if this fact may mirror, to some degree, a trendy fashion in the cycle of intellectual tides, there are good reasons to believe that it also reflects a proper demand: the insight that virtue is an indispensable element of morality and good life.

In my view, virtues play a significant role in ethics because of their importance for moral practice, although I doubt that they can provide a sufficient ground for the justification of morality. I would like to demonstrate this with respect to the relationships between law, morality, and virtue. With this aim in view, I am going to proceed in three steps. First of all, I’ll try to work out the notions of virtue and morality more precisely in order to illuminate the functions of virtue in morality. Secondly, I’ll discuss the relationship between morality and law in regard to the question as to whether and to what extent the law may be used as a legitimate means of enforcing or fostering moral virtues. Thirdly, I’ll deal with the problem whether and to what extent a well-functioning legal order itself is dependent on moral virtues of the side of its citizens and officials.

## 1. THE ROLE OF VIRTUE IN MORALITY

The concept of virtue refers to the *character traits of persons*, their practical attitudes or dispositions, which have some motivating force for their conduct. There are, however, lots of attitudes which are widely regarded as virtues, as well as there is a great number of dispositions that count as vices. As to virtues, I want to mention just the most prominent examples: prudence, courage, moderation, and justice (these are so-called cardinal virtues); reasonableness and truthfulness; honesty and sincerity; goodness and benevolence; helpfulness, generosity and politeness; open-mindedness and tolerance; fidelity and loyalty; reliability and punctuality; sensibleness and expertise; diligence and carefulness; humility and modesty; piousness, obedience, and the like. It seems obvious that it highly depends on the respective viewpoint and context, whether or not a certain disposition is deemed a virtue. Sometimes it is even possible that a human attitude may be regarded as a virtue in one context, whereas it appears as a vice in a different context.

In order to put this variety of possible virtues in a systematic order, it is helpful to make use of some traditional distinctions that enable us to

differentiate between different types of virtues. The most fundamental distinction is the one between *intellectual* and *practical* virtues (Aristotle NE: 1103 a 14 ff). Whereas the intellectual virtues, such as reasonableness and truthfulness, are aiming at correct theoretical insight or true knowledge, the practical virtues are directed to right conduct, for example justice, prudence, and reliability. In the present context, I am interested only in practical virtues which themselves can be divided up into two different sorts, namely *non-moral* and *moral* virtues (Höffe 1998: 47).

*Non-moral virtues* are character traits that motivate individuals to behave in a way that is good for themselves or fellow beings for whom they feel sympathy, such as diligence, modesty, and obedience. So these virtues are instrumental to the pursuit of particular interests of certain individuals or collectives. By contrast, *moral virtues* are directed to moral conduct, a conduct that seems desirable from a general and impartial point of view, such as justice, benevolence and honesty. There are, however, borderline cases which cannot be easily assigned to one category or may belong to both sorts. For instance, prudence, understood as the pursuit of one's reasonable self-interest, is a controversial case: Some authors advocate the view that its proper exercise is always in accordance with the basic demands of morality, while others think that it can also be directed to immoral ends. But this question is of no importance for the following considerations that will deal with moral virtues only.

A *moral virtue* can be conceived of as a character disposition that motivates to a certain way of conduct which, in the light of the accepted moral standards, appears desirable, be it approvable or even laudable. This definition, which is in accordance with the usual understanding of virtue from Aristotle (NE: 1105 b 19 ff) to Rawls (1971: 192), is sufficiently narrow in order to understand virtue as a specific aspect of moral life, and it is also wide enough in order to be compatible with different conceptions of morality. This leads to the question of the role of virtue in morality.

In order to decide whether a character disposition is a moral virtue, morally indifferent or a moral vice, we need a more fundamental conception of morality that tells us whether the corresponding conduct is morally laudable, approvable, permissible or unacceptable. Accordingly, it is impossible to reduce a sound conception of morality completely to the idea of virtue, as some advocates of virtue ethics believe, since, without any prior moral standards, we could neither identify moral virtues nor determine their content (Gert 1998: 277 ff). This insight is clearly manifest in most modern moral theories (e.g. by Hobbes, Locke, Hume, Kant, Mill, and Sidgwick), whose basic elements always consist in certain standards in the form of general principles on which all other moral notions depend. But this also applies to Aristotle's theory which

counts as the paradigm case of virtue ethics because of the central role that it attributes to virtues in achieving *eudaimonia*, a human life that is intrinsically good from the individual's viewpoint and the general perspective as well. For it is hardly possible to define the goodness of such a life completely in terms of virtues without any reference to additional features of *eudaimonia* that make it desirable both from an individual and a general viewpoint (Ackrill 1995: 39 ff). So a conception of moral virtues can never provide a complete account of morality, since it presupposes further normative standards that cannot be reduced to virtues.

This, however, does not imply that virtues are of minor significance in morality. To be sure, virtues are extremely important, because a moral practice can never rely on the insight in moral norms alone, but also requires appropriate human attitudes and dispositions that motivate people to behave according to those norms (Baier 1995: 7 ff, 89 ff). Nevertheless, the standards of morality, be they principles or rules, represent the primary elements of morality, since they are necessary to determine the content of moral attitudes. For delimiting moral standards from other practical standards, like those of prudence, social etiquette or law, I want to characterize them by three features (Koller 1997: 255 ff).

First of all, moral standards are *autonomous standards* in the sense that they have binding force only for those persons who accepted them freely and voluntarily. This feature distinguishes them from the heteronomous norms of law and social etiquette, but not from the standards of prudence and personal taste. Secondly, moral standards *claim universal validity* in the sense that people who accept them regard them as binding also for other people. This distinguishes those standards from personal desires, the recommendations of prudence and social habits, but not always from legal norms. And thirdly, moral standards have a *special weight* in the sense that they are deemed to be more important than other guidelines of human conduct, in some cases even so important that they take absolute priority over other guidelines, such as those of personal taste and prudence. On the basis of these features which leave room for a great variety of different conceptions of morality, it is possible to introduce two more specific concepts of morality, namely the concept of a *conventional* morality on the one hand, and the idea of a *rational* morality on the other (Körner 1976: 137 ff).

A *conventional morality* is a set of moral norms that have effective validity in a certain aggregate of people, be it a social group, a society, a culture, or even humankind in general, because they are acknowledged by a vast majority of its individual members as supreme standards of their conduct. Such moral norms create, within the respective social aggregate, a certain degree of social pressure which results from the interplay of the

individuals' positive or discouraging reactions to the behaviour of others. Consequently, a conventional morality, though it is based on autonomous individual moral attitudes, always develops some heteronomous force too, because its norms are connected with corresponding social sanctions that enforce them even vis-a-vis those people who do not accept them. Of course, the mere fact that moral norms are widely acknowledged by the members of a social aggregate leaves completely open the question as to the reasons of their recognition. Thus, a conventional morality may be more or less rational, arational, or even irrational. However, when people enter in a critical consideration of their received moral attitudes, they transcend conventional morality and engage in the enterprise of rational morality (Baier 1995: 214 ff).

A *rational morality* is a set of moral standards that are based on good reasons rather than mere convention or non-rational beliefs. Moral standards are based on good reasons, if there are sufficient reasons to assume that these standards should be unanimously acknowledged by all individuals possibly concerned as generally binding guidelines of human interaction from an impartial viewpoint and in consideration of all relevant information. And I suppose, without entering in a discussion of the various conceptions of moral justification, that this is the case, if the general observance of those standards, according to all available knowledge of the relevant facts, would result in outcomes that, regarded from an impartial point of view, accord to everyone's fundamental interests better than any alternative (Habermas 1996: 59 f).

Yet, we can never be completely certain whether or not a moral standard is rationally justified. This is true even of those moral standards which are commonly accepted for the best reasons we know, because it may be that there are reasons that question these standards. This fact, however, provides no reason for moral scepticism. For moral discourse is, like any other rational discourse, an ongoing enterprise in which we have to consider any moral standard in the light of all reasons for and against it, in order to accept those standards which seem to be based on the best reasons available. So the idea of a rational morality can play a very important role in moral life, since it provides a critical viewpoint for individual moral consideration and public moral discourse as well, a viewpoint which helps us to reflect on our individual moral attitudes and scrutinize the standards of conventional morality. Accordingly, the public moral discourse in a society can be understood as an ongoing interplay between its received conventional morality and the quest for a rational morality.

Now I want to turn to the various sorts of norms of which a morality usually makes use in order to guide human conduct. For a first approximation to this matter, it is helpful to recollect two well-known

distinctions that differentiate between moral norms according to their respective normative force.

The first distinction, which can already be found in the classical theories of natural law, but is better known from the works by Kant and Mill, differentiates between perfect and imperfect moral duties. *Perfect duties* are understood as strictly binding moral demands that have absolute normative force under certain circumstances and, therefore, ought to be complied with without exception under these circumstances. Paradigm examples are the widely accepted negative duties of not harming others. By contrast, *imperfect moral duties* are conceived of as moral demands that leave us a certain degree of discretion as to the circumstances and the extent of their fulfillment, and, therefore, are not strictly binding in the same way as perfect duties. According to common opinion, these duties include certain general duties to positive action which would ask too much of us, if we had to fulfill them in any particular case (Kersting 1989).

The second distinction is the differentiation between *moral duties* in the sense of compulsory moral demands and *supererogatory ideals* that exceed proper moral duties. Unlike moral duties, which include both perfect and imperfect moral duties, supererogatory ideals refer to ways of conduct that, from an impartial point of view, are valued as highly good or desirable, but do not appear morally obligatory, because their fulfillment would require sacrifices that cannot reasonably be expected from everyone. When we face violations of moral duties, we are in the habit of responding with disapproval and censure, since we regard their fulfillment as a matter of course. In contrast, we do not blame people who fail to pursue supererogatory ideals, but rather praise and applaud those persons who distinguish themselves by acting in a commendable way.

By combining these two distinctions, which are partly overlapping, we come to a classification of *three kinds of moral guidelines* that differ in the degree of their normative force. I want to name them ‘strict moral demands’, ‘restricted moral demands’, and ‘commendable moral ends’.

(1) *Strict moral demands*: These demands express strict moral duties requiring a certain way of conduct under certain conditions, duties that have priority not only to considerations of prudence, but also to weaker moral guidelines. There are good reasons to assume that this sort of moral demands include the widely accepted moral duties of not harming other people, such as the duty not to kill or to hurt others, to refrain from deceiving others, to respect the property of others, and to keep promises. Furthermore, it appears reasonable to strengthen some of these demands by ascribing to each individual certain basic moral rights of non-interference, such as rights to life and physical integrity, to liberty and free movement.

(2) *Restricted moral demands*: These demands require a certain way of acting which is directed to a morally acceptable state of social affairs that can be achieved by a sort of moral division of labour only. Therefore, the individual duties cannot be determined completely for any particular case in advance, and must be restricted to the extent in which their fulfillment can be reasonably expected from an impartial perspective. It is widely agreed upon that this sort of demands contains most of those general moral duties that require positive action in favour of others to whom one has no special obligations, especially the duties of charity, such as the duty to help people in need; and some people seem to think that no further moral norms belong to that set. In my view, however, imperfect moral demands do also include all those moral requirements that result from a reasonable account of distributive social justice, since these requirements can only be met by a particular assignment of moral duties and rights to special people or institutions.

(3) *Commendable moral ends*: These are guidelines recommending ways of acting, the performance of which appears highly desirable, but cannot be generally required of individuals, because such a requirement does not appear rationally acceptable from an impartial point of view. Examples are beneficial activities for people in need that entail significant sacrifices, or heroic actions of political resistance against a despotic regime.

This classification of moral guidelines enables us to determine the function of virtues in moral life more precisely. Moral virtues, understood as character dispositions to morally guided human conduct, have, first of all, the *general function* to strengthen the weak motivating force of moral norms, which often compete with our self-interested preferences and, therefore, are highly susceptible to defection. By creating ‘internal’ sanctions, namely feelings of good or bad conscience, our internalized moral attitudes provide us with some additional, though often rather weak incentives to comply with acknowledged moral norms even in cases where external sanctions are insufficient or missing. In this way virtues contribute to the effectiveness of morality. Since such moral attitudes, however, will flourish only in a supportive social environment that is reinforcing and fostering them, it is necessary that we pay appropriate tribute to their appearance. That’s why we are in the habit of acknowledging and praising persons of whom we learn that they have behaved or are still behaving in a morally desirable way beyond the degree that can be expected of average people as a matter of course.

When the general function of moral virtues is applied to the three sorts of moral rules mentioned previously, it can be differentiated in three *special functions*. (1) As to *strict moral demands*, which, in general, are not only rather clear, but also not very demanding, virtues have the

function to motivate individuals to a regular and lasting compliance with these rules. For although it may be regarded as a matter of course that one complies with one's strict moral duties in particular cases, it is certainly not a matter of course that one behaves in such a way all the time, even in cases where one could easily violate such duties without risking any social sanction. (2) In regard to *restricted moral demands*, which are even more susceptible to defection than strict moral duties, because, in general, they are more demanding and less precise, virtues can help to counteract the permanent and significant temptation to an insufficient compliance with the duties stated by these demands. So we may feel moral shame, when we are confronted with the social injustices and evils that result from the fact that the uncoordinated behaviour of individuals fails to achieve a morally acceptable state of social affairs, a moral shame which itself may lead us to contribute to social reform. (3) As far as *commendable moral ends* are concerned, moral virtues serve the purpose to motivate individuals to act in ways that exceed their moral duties, but are desirable from a general point of view (O'Neill 1993; Gert 1998: 285 ff).

So much about the role of virtues in the context of morality. Now, I turn to the relationships between law and virtue. In the next section, I want to deal with the question as to whether and to what extent the law may legitimately urge people to be virtuous by enforcing or fostering the respective character dispositions.

## 2. THE MORAL FUNCTIONS OF LAW

Morality and law have, essentially, the same object, namely the social interaction of people, and they serve a similar function, namely making a just and efficient social life possible. Yet, they refer to that object in different ways, and they fulfill this function with different means. In contrast to morality, law is a system of heteronomous norms which are based on authoritative enactment rather than voluntary acceptance and made effective by formal enforcement rather than informal social pressure. And this fact also explains why legal norms, in general, are mainly concerned with the external behaviour of people rather than their internal convictions and traits (Hart 1961: 163 ff).

In spite of these functional differences, any law is connected to morality in the sense that it requires a moral justification. It needs such a justification for two reasons. First of all, under social conditions where a conventional morality alone cannot secure a just and peaceful social order, establishing an appropriate system of law is itself a moral imperative that is directed to the ultimate aim of any law: namely to ensure



a just and generally advantageous social life. Insofar as the law demands strict obedience to its norms and threatens with the use of force in cases of their non-observance, it actually does claim moral legitimacy. Secondly, any law must take the moral convictions of its addressees into account in order to gain their acceptance without which it cannot achieve sufficient effectiveness. A legal system that deviates too far from the moral attitudes of its addressees drives them permanently into moral conflicts which will motivate many individuals to refuse not only the acceptance of legal norms, but also their obedience whenever they can.

Although every legal system claims moral bindingness and, consequently, needs moral justification, the legitimation of law differs from the rational justification of moral standards in several respects. First, the formal and organized force connected to the law makes its legitimation more complicated: Since the existence of this force not only represents a bad as such, but also includes significant dangers of misuse, its negative consequences and side-effects must always be balanced with its utility. Furthermore, the legitimation of legal norms is not only based on moral arguments alone, but must also take into consideration the viewpoints of efficiency and practicability, with the result that the consequences of such considerations often differ from moral justification.

These two features of legal legitimation explain why some strict moral demands, e.g. the duty of truthfulness, appear much less important within the law: The costs of the legal enforcement of these demands would heavily outweigh its utility. And they also explain why the law is not an appropriate means for enforcing inner convictions, attitudes and virtues: Using it for this purpose unavoidably would turn it into an instrument of terror. Notwithstanding, a legal system must enforce the most fundamental and well-founded rules of morality to a certain degree, so that it can claim moral legitimacy. Understood in this way, it is certainly not wrong to characterize the law as an ‘ethical minimum’ (Radbruch 1999: 47). This characterization, however, is not very illuminating, since it leaves the moral content of law too indeterminate. So it is necessary to investigate a bit further wherein the minimum of morality consists that the law ought to enforce.

A possible approach to this question is perhaps Kant’s distinction between ‘duties of right’ (Rechtspflichten) and ‘duties of virtue’ (Tugendpflichten) which, in his view, is coincident with the previously mentioned differentiation between perfect and imperfect moral duties. According to Kant, *duties of right* are all those moral duties which may and must be enforced by the law, because other persons have a right to their fulfillment; and he was of the opinion that such duties could only be perfect moral duties. By contrast, he regarded *duties of virtue* as imperfect moral duties that are not connected to correlative rights, with

the result that their legal enforcement appears neither necessary nor permissible. Furthermore, Kant thought that duties of right are always negative duties commanding the omission of some acts, whereas all duties to positive acts are mere duties of virtue which could never justify the use of legal force. Consequently, his conclusion was that only negative duties would be capable of being enforced by the law (Kant 1968: 347 ff, 519 ff).

This conception, however, is not convincing. In view of the significant costs of organized legal force, it seems hardly plausible that all perfect moral duties ought to be enforced by the law, even if they are connected to correlative moral rights, e.g. the duty of not telling lies to others. Furthermore, it is not acceptable that all imperfect moral duties should be left legally unregulated, for the law provides an effective means for coping with the insufficiencies of such duties, as, for example, the duty to render help to people in need. Law can establish special institutions which are responsible for their fulfillment which cannot be achieved by the uncoordinated behaviour of individuals. Finally, the view that only duties of right, or perfect duties, may be legally enforced would also make it impossible to use the law in order to pursue *collective goals* that are in the common interest of the citizenry without being morally required, such as the provision of public goods like public roads, means of transport, parks, or museums. As a result, a legitimate legal order has many more aims than Kant would admit. I think that these aims are the following.

First of all, law has to determine and enforce those fundamental rights and duties of individuals which flow from well-founded and widely acknowledged *strict demands* of morality, insofar as their enforcement serves the protection of essential interests of people which outweigh the negative consequences of legal force; in my view, these rights and duties not only include the familiar *negative duties* of non-interference and their correlative rights, but also a few modest *positive duties*, such as the duty to render help in case of emergency, if such help can be reasonably expected. Secondly, a legal order should aim at establishing and enforcing an arrangement of individual rights and duties that makes possible the cooperative fulfillment of those *restricted moral demands* the realization of which is in the essential interest of individuals, but can only be achieved by coordinating their behaviour in an appropriate way; this is obviously true of those *positive rights* and their correlative duties that flow from the requirements of social justice, such as the rights to democratic participation, equal opportunity, and economic justice. And thirdly, law should issue and enforce individual rights and duties which are necessary for achieving *collective goals* that need cooperative interaction, if their pursuit has been decided on in an appropriate way, even

though these goals are not morally required in themselves; so law may establish rights and duties in order to provide public goods to the citizens' common benefit.

On the other hand, a legitimate legal order has *definite limits* that are also set by rational morality. First of all, law must not enforce eccentric moral ideals that are not aimed at the protection of essential human interests common to all people concerned. Secondly, it is not its function to enforce commendable moral ends that exceed the duties generally acceptable to all people concerned from an impartial point of view. And thirdly, law is also not a legitimate means of enforcing inner moral convictions or moral virtues.

That the law must not enforce *eccentric moral ideals*, such as the prohibition of soft drugs or the prevention of homosexual relationships, results immediately from its ultimate aim to guarantee a just and generally advantageous social order. The legal enforcement of such ideals creates significant costs to those individuals who do not share them without serving the realization of generally acceptable aims. But even when certain *commendable moral ends* may appear generally desirable, it is not the law's job to enforce them, if they exceed the moral duties the fulfillment of which can be reasonably expected of average individuals, such as donating a kidney to somebody who needs one for survival, or rescuing a person by risking one's life. By enforcing such commendable ways of conduct, a legal order would ask too much of its subjects and, thereby, create social affairs which appear even less desirable than the continued existence of the dangers that could possibly be diminished through the enforcement of those ways of conduct. Neither is legal force an appropriate means to bring forth *moral virtues*, since any attempt of achieving this goal unavoidably leads, at best, to public hypocrisy, or, even more likely, to a total repression of free thought.

This does not mean, however, that law cannot contribute to stimulating moral virtues at all. Quite the opposite: moral virtues will hardly flourish without a legal order that encourages them. Yet, its contribution consists in the *indirect support* rather than the direct enforcement of virtues. There are at least two options.

First of all, the legal system may contribute to the flourishing of moral virtues by setting a framework of conditions of social interaction under which moral conduct is beneficial to the individuals rather than to their disadvantage. This becomes particularly obvious when such a framework of conditions does not exist: In a state of social affairs which is dominated by corruption, lawlessness, and injustice, individuals have little incentive to develop moral dispositions, such as honesty, reliability, justice, trust, and benevolence, since these dispositions would be to their

detriment. Conversely, a legal order which, by and large, succeeds in preventing people from dishonesty, injustice, exploitation and the like will support the diffusion of moral virtues by making them beneficial to its subjects. Thus, a legitimate and functioning legal order is a necessary precondition of the emergence and continuing existence of moral virtues, even though it is not its job to enforce them.

Secondly, a legal order may foster moral virtues by providing appropriate *positive incentives* in order to support them. It can pursue this goal in various ways that include the application of suitable methods of education, the encouragement of desirable social activities, and the provision of special awards for people who distinguish themselves by laudable ways of conduct. So, for example, a legal order may support private activities of charity by the tax system, contribute to a climate of tolerance and solidarity through the regulation of public education, encourage public spirit and democratic commitment by a suitable arrangement of political decision procedures and and civil rights, and the like. It is true that the provision of such positive incentives also requires expenditures which must be raised from the members of the respective community by the use of legal force. As this legal force, however, takes a rather indirect and weak form, it can be justified by the argument that the moral virtues which it promotes have the character of a valuable public good that eventually is to the benefit of all members.

So much to the relationship between morality and law in general and the question as to whether and to what degree law may enforce or foster moral virtues in particular. As far as the enforcement of virtues is concerned, my conclusion is, not very surprisingly, *negative*. Now, I turn to the question of whether and to what degree a legal order needs moral virtues on the side of its officials and addressees in order to operate in a sufficient way.

### 3. THE SIGNIFICANCE OF VIRTUE IN LAW

An influential approach in modern social philosophy, an approach which can be traced back to Thomas Hobbes and today is represented by the so-called *Rational Choice Theory*, begins with the premise that human beings, in general, are rational egoists who pursue only their own self-interest and, therefore, always attempt to act in a way that maximizes their respective utility (Elster 1986).

If this approach is applied to the question of how to achieve a peaceful and well-ordered social coexistence among individuals, it recommends the view that such an order needs nothing more than a legal system which, by setting appropriate negative and positive sanctions in

the form of penalties and gratifications, induces its addressees to behave in their own self-interest in a way that leads to the desired result. In other words: A peaceful and well-ordered social order is possible if, and only if, the law provides framing conditions of human interaction which make it advantageous for any individual member to act in a way that contributes to bring about such an order. Consequently, a well-functioning legal system ought to be arranged to the effect that it is appropriate even for individuals who seek only their own benefit and have no moral scruples.

This view seems plausible to me, if it is understood in the sense that a legal order should not rely on the virtuousness of its subjects, but create framing conditions of social interaction that encourage individuals with regard to their own self-interest to behave in a way which leads to the desired social state of affairs. Understood in this sense, it is certainly expedient to reckon with the worst case and design legal rules and institutions in a way that they meet their goals even in the case when people usually pursue their own benefit without caring about morality.

Yet, the view mentioned above has been interpreted by many advocates of a strict rational choice approach – from Hobbes and Spinoza to Gary Becker and James Buchanan – in a much stronger sense, namely in the sense that a peaceful and advantageous social order may be guaranteed by the means of legal regulation alone without the support of corresponding moral attitudes of the individuals (Becker 1976; Buchanan 1975). Understood in this strong sense, the view implies not only the modest and highly plausible recommendation that, when designing the rules and institutions of law, one should reckon with the worst case, but rather the strong position that a well-functioning legal order could emerge and persist even then when all people concerned were mere egoists without any moral motivation. This position, however, seems completely wrong to me. I think, there are at least five objections that can be raised against it.

First of all, the sanctions that can be used by a legal system in order to influence the conduct of its subjects, especially its threats of force and punishment, are certainly not sufficient to provide the individuals with appropriate incentives to abide by the law, when everybody only pursues his or her self-interest. For whatever means of force the legal order may use, there will always remain many opportunities to violate its commands without risk, and the more means the law mobilizes in order to diminish such opportunities, the more restrictive its rules and the higher the costs of legal force become. If the fear of legal force were the only incentive of individuals to comply with the law, the enforcement of a legal order would not only be extremely weak and incomplete, but also so expensive that it would forfeit any legitimation. As a result, a

legal order cannot sufficiently function without the support of corresponding civil virtues of its subjects supplementing the legal threats, such as a sense of justice, fairness, honesty, and public spirit (Baurmann 1996: 261 ff; Höffe 1999: 195 ff).

Secondly, an effective and extensive enforcement of law requires that individuals are willing to cooperate with the law enforcing institutions, e.g. the police and the courts. But why should people do that? It is certainly true that, in many cases, some individuals are immediately interested in rendering such assistance, because the enforcement of legal rules serves their own benefit; and it may also be true that most people, even when they are not themselves immediately concerned, have an indirect self-interest in the existence of a well-functioning legal order, since such an order is also to their own benefit in the long run. The cooperation with legal institutions, however, causes some costs and disadvantages too: namely, in any case, a loss of time, often also certain financial costs, and sometimes even a danger to life and limb. Since these costs will frequently exceed an individual's expected utility of legal enforcement, which is especially probable in those cases in which one does not have an immediate interest in it, the question arises how legal persecution can work at all. This question cannot be answered satisfactorily on the assumption that all people actually pursue only their self-interest. Consequently, an effective legal enforcement can only be achieved, if there is a sufficient number of individuals who, at least in some cases, are willing to contribute to legal enforcement for the sake of justice rather than their own benefit (Pettit 1990).

Thirdly, any legal order stands or falls with the sense of justice of its highest office bearers, including the leading politicians, judges, and officials, since there is no way to induce these persons to comply with the law by means of legal threats alone. It is true that there is an appropriate method of diminishing the risk of misuse of legal power by distributing it among different independent institutions who control each other. Yet, this method can neither completely prevent any corruption of legal powers nor create an affirmative attitude of its bearers towards the existing legal order. Thus, a legal system will not function properly without the inclination of its rulers to comply with its principles and defend it against corruption (Hart 1961: 107 ff). And it is pretty obvious that this inclination does not flow from their self-interest alone, but must be backed by moral dispositions, since otherwise it could not be explained why, all other things being equal, some officials misuse their powers unscrupulously to their own profit, while others resist all temptations to corruption and strive to exercise their powers as correctly as possible. As a consequence, a legal order will operate in a proper way only under the provision that at least a part of its officials – judges, civil servants,

government members – are, to a certain extent, motivated by moral virtues, including loyalty to the law, justice, integrity, impartiality, correctness, and truthfulness.

Fourthly, a functioning legal order requires some organized authority which, in developed societies, takes the form of the state with a monopoly of power. This fact, however, creates significant dangers, particularly the danger of corruption of power which increases in proportion to the concentration of power that lies in the hands of that authority. In order to counteract this danger, there is need for an effective control of power which, to a certain extent, may be exercised by special legal institutions, but also requires the commitment of the citizenry (Baurmann 1996: 176 ff). Although one can assume that citizens have a rational self-interest in the public control of state power, this self-interest is hardly sufficient to lead them to appropriate activities, because, in most cases, the individual costs of such activities will override their individual utility. Consequently, people are confronted with a *cooperation problem* by which they unavoidably fall into a trap, if each of them is seeking only his or her individual utility. As a result, public control of power will not take place, unless there is a sufficient number of citizens who are lead not only by their self-interest alone, but at least to a certain degree by moral attitudes, such as political commitment, benevolence, truthfulness, and courage (Höffe 1999: 208 ff).

Finally, moral virtues are also necessary for a process of legal development that is directed to produce a just and efficient legal order. Such a process includes two elements: first, an appropriate procedure of legislation which itself must be accepted by most members of the legal community in order to guarantee the acceptance of its results, and second, an ongoing public debate in which citizens seek to form their opinion and reach an agreement on the legal regulation of their common affairs. Both the legislative procedure and the public debate, however, will lead to acceptable results only under the provision that participants are prepared to distance themselves from their particular interests to a certain degree, in order to consider the common interest of all people concerned (Habermas 1996: 277 ff). But this would certainly not be possible, if all individuals were always acting as pure egoists. Thus, a successful process of law-making also rests on the condition that the participants are capable of balancing their own interests with the interests of others in an impartial way and acknowledge legal regulations that are generally acceptable. And this requires that a sufficient number of citizens and politicians have internalized supportive moral attitudes, of which tolerance, fairness, public spirit, and devotion to the commonwealth are of particular importance (Höffe 1999: 199 ff).

If these considerations are, by and large, correct, then it follows that a well-functioning legal order requires the support of moral virtues on the side of its subjects and officials for several reasons. In summary, such virtues are required for the following aims: (1) for compensating the weak and insufficient incentives of legal sanctions, (2) for making possible an effective and complete enforcement of legal norms, (3) for leading legal officials to comply with the law, (4) for guaranteeing the necessary control of legal power, and (5) for enabling an appropriate process of legal development. So a legal order cannot function in a proper way without moral virtues of the individuals involved. This result raises some problems which I want to address very briefly at the end.

I have argued that a well-functioning legal order needs the support of moral virtues which, however, cannot be produced by means of legal force. So law is dependent on moral resources that must be provided by *civil society*, the social community of the people concerned. This somewhat paradoxical result leads to the question of how civil society may produce the moral virtues that are required in order to guarantee a well-functioning legal order. This is a very complex question which I cannot answer satisfyingly, if there is a satisfying answer at all. Yet, I want to mention three features which, in my view, are important for the formation of moral dispositions: moral empowerment, public discourse, and social solidarity.

By *moral empowerment* I mean the creation, encouragement and reinforcement of basic moral capacities through a supportive social practice rather than preaching moral values and norms. These capacities, that combine cognitive and emotional attitudes, mainly include the following: the inclination to empathize with other human individuals and sentient beings; the willingness to consider the interests of others and balance them with one's own desires from an impartial point of view; the capacity of acting on social rules and orders that appear generally acceptable; and last but not least, the habit to activate appropriate emotions vis-a-vis good and bad, such as, for example, satisfaction, guilt, shame, compassion, and indignation. These capacities are neither inborn nor emerging naturally. Rather, they develop and flourish preferably in social surroundings in which they are conveyed to individuals from birth through a loving and understanding guidance, and reinforced by an ongoing social practice (Rawls 1971: 453 ff).

Even if most members of a legal community have the basic moral capacities, it may be that they do not share a common conception of a just and efficient legal order. Such an order, however, requires a *public morality*, a set of widely shared fundamental moral standards. The only acceptable means to generate and renew a public morality is an ongoing process of *public discourse* that must be open to all people concerned and



sensitive to any intelligible concern. Such a discourse can foster a moral consensus because it does not only provide the participants with better information about the relevant facts and aspects of the issues under consideration, but also create a situation in which they must respect each other as equals and attempt to reach an agreement on the regulation of their common affairs. And to the degree in which such an agreement can be reached, the agreed on moral norms will gain increasing force, for it becomes more probable that their obeying or violation will cause appropriate social reactions, be they positive or negative (Habermas 1992: 399 ff).

The motivating force of moral norms, however, has its limits, too. In general, its strength depends on the extent of reciprocity of human interaction. Therefore, a public morality needs a social world in which individuals feel bound together by ties of *social solidarity*, a shared interest in mastering their problems of existence cooperatively, based upon an effective social practice. Without such an idea, we will hardly succeed in establishing a widely acknowledged political and legal order, since the voice of morality will not be strong enough to gain attention against the parties' selfish interests in their struggle for power and benefit. It is, therefore, an important task to create and preserve a climate of social solidarity in order to bring forth the moral virtues without which a well-functional legal order cannot exist.

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