



**Universität
Zürich** ^{UZH}

Rechtswissenschaftliches Institut

Introduction to Legal Philosophy

Chair of Philosophy and Theory of Law, Legal Sociology and
International Public Law

Prof. Dr. iur. Matthias Mahlmann

The Problem

The starting point:

Law is mandatory and is enforced, ultimately by physical force

How do we know that the law that is enforced is legitimate?

What are yardsticks for legitimate law?

What is the content of legal philosophy and theory?

- Descriptive and analytical theory. For example:
 - What is the structure of a fundamental right?
 - What is an «obligation»?
 - What does «validity» a norm mean?
- Explanatory theories. For example:
 - Law is the expression of culture (Is it?)
 - Law is caused by the structure of the economy (Is it?)

- Normative Theory:
- Questions of principle:
 - What is justice?
 - What do we owe to each other?
 - What is the nature, content and justification of human rights?
 - Legitimacy of public authority
 - The normative structure of the international order
 - Theory of private and criminal law
- Concrete questions:
 - What is the content of just law?
 - Is a ban of Burqas legitimate?
 - What rights of privacy are justified?

- The relation of law and morality
- What are the limits of legal insight and knowledge?
 - Epistemology
- What is the stuff normative propositions refer to?
 - Ontology
- Grotius and methodological secularism
- The question of universalism

The point of theory

- Theoretical insight important for successful practice
- Internationalisation of law
 - Understanding of general structures of law as a key to rise to challenges of internationalisation
- The intrinsic value of insight
- Critical normative yardsticks
- Consciousness of the sense of legal systems as a precondition for the survival of a decent order of law

Theory of Justice

- The foundations in the thought of antiquity (Socrates, Plato, Aristotle)
 - Justice a matter of insight, not of individual preferences or pleasure
 - Some things are just/unjust or good/evil independently of whether an agent thinks so
 - Content of justice
 - Give to everybody her due
 - Proportional equality
 - The contentious issue
 - The criterion of distribution
 - Performance? Need? Humanity?

- Justice as the foundation of the construction of society
 - Democracy? Oligarchy? Aristocracy? Tyranny
 - Plato's hierarchical vision?
- Justice and goodness and the happy life
 - Socrates: It is better to suffer injustice than to do injustice
 - The intrinsic good of an ethical life
 - The intrinsic good of a legitimate legal order

- Modern theory: John Rawls
 - Two principles of justice
 1. Universal freedom
 2.
 - a) Unequal distribution of material goods just if the worst off profits absolutely
 - b) Equal access to public office

A concept of Justice

1. Equality of standards
2. Equal application of standards
3. Equality as default principle
4. Reasonable determination of criteria of distribution
5. Preservation of equal dignity as human being

Theory of rights

- Rights and natural law
- Rights and social contract theory
- Enlightenment, practical reason and dignity
- Kant's categorical imperative
- The idea of universalisation:

“Act only in accordance with that maxim through which you can at the same time will that it becomes a universal law”.

- The principle of humanity:

“So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means”.

- The concept of right:

„Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom“.

- One natural subjective right:

„Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only right belonging to every man by virtue of his humanity“.

Contemporary human rights theory

- Why human rights?
 - Protection of agency and personhood?
 - Interests or needs?
 - Capabilities?
- A promising way forward:
 - A theory of basic universal human goods
 - Life; respect of the person; bodily integrity; freedom; legitimate equality
 - A political theory of realising basic universal human goods
 - Normative principles
 - Justice and solidarity as springs of rights