Towards a Common Good: A Path to Utopia?

From Philosophy through Legislation to the Dignified Life

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The fact that the bonum commune belongs to the content of justice indicates that in this field no absolute assertions or even 'ultimate foundations' are possible, as some discourse theorists today would claim (Habermas, Apel). We operate in the area of value relativism. This doesn't mean that claims regarding the bonum commune have no meaning; it only means that one must not forget that these are risky claims.

Arthur Kaufmann

A. The Common Good Between Philosophy of Law and Positive Law

Determining the common good for society as a whole depends on the values chosen by each individual.[1] These are then expressed through various associations, for example, in the nineteenth century the Germans sought the common good of their people in gymnastics clubs, the *Turnvereine*; the Italians sought it with the *Carbonari* or *Giovine Italia*. These values are then carried over to the State which interprets and acts upon them, albeit not always in a disinterested manner. The current crisis of political parties is also due to the fact that they no longer pass on to the State demands of civil society; as a result, the 'good' decided by State institutions is often not 'common'. Whence comes the importance of more or less organized social movements – though external to the State and political parties – that express what large sections of the population perceive to be the common good.

When jurists refer to the common good, they place themselves in the world of values, i.e. natural law, which can also be translated into positive legal norms. For the jurist, however, the common good remains a value that may be able to motivate law, but it nevertheless predates law and hence it is not

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[1] This article is an expanded version of a paper entitled *Ein Pfad nach Utopia? Von der Philosophie, über die Gesetzgebung bis zum würdigen Leben*, presented at the 'Kolloquium über *Bonum Commune*' organized by the Swiss Academy of Social and Human Sciences in Bern, 22-26 September 2002.

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constituted by it. The variety of *bona communia* indicates that they represent values that change in time and space; hence, the law which refers to these standards is a natural law having variable content. This concept gives rise to two central assumptions underlying this article: 1) the common good is determined not only by the State but also by people brought together at the infra- and supra-State levels; 2) the common good changes over time and in space, namely it embodies relative values. As the philosopher of law Arthur Kaufmann states, "we operate in the area of value relativism".[2]

Kaufmann supports the arguments put forward, but not yet proven, in this paper. Kaufman states

> I am aware that the assumptions I've started with are problematic. However, we always begin with similar assumptions in discussing content. These assumptions may be implied, or we can explicitly formulate them. I've chosen to do the latter. But I can't be expected to spell out in detail all of my initial assumptions: the result would be an analysis completely different from the present one.[3]

If one accepts the relativism of values, one also accepts the existence of concepts that do not share these two assumptions. Although this is not the place to examine these diverging concepts, mention must be made of a conference in 1998 specifically dedicated to the *Bonum Commune*.[4] The conference revolved around a conservative or neo-Thomist view of society, namely by principles very different from the ideas put forward in this paper. In the 1998 conference the perception of the 'common good' was based on natural law and hence precedes the State: "It rests on the foundation of human nature, independently of the specific form of the State in question." Also,

> The principle of the common good is not directly connected to a given form of the State, or rather, constitutional State or democracy; it's not even connected to the modern State. The common good is universal and, as the idea of justice, exists independently of any individual form of the State: it derives, in fact, from human nature.[5]

Support for the natural law basis of the common good is not difficult. However, after that debates arise.

According to the conservative view a community knows what the common good is, probably through divine revelation and can thus decide to delegate the task of implementing it to the State. The most appropriate State structure for the realization of the common good is a federal State with a liberal-democratic rule of law, organized according to the principle of subsidiarity,[6] and whose main

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[2] A. Kaufmann, Negativer Utilitarismus. Ein Versuch über das bonum commune 8 (1994). The introductory citation is also taken from this page.
[3] *Id*., at 5.
[4] Verein zur Förderung der Psychologischen Menschenkenntnis (Ed.), Mut zur Ethik. Bonum commune – Ethik in Gesellschaft und Politik (1999), Feldkirch Conference Proceedings. Voralberg, Austria. 4-6 September 1998.
[5] R. Rothe, *Gemeinwohl, in* Verein zur Förderung der Psychologischen Menschenkenntnis (Ed.), *supra* note 4, at 53.
[6] *Supra* note 4, at 15, 566, 570.

duties are to safeguard the security of the biological and political existence of the people, the territorial integrity of the State and the natural environment, the preservation of national unity, of the form of government and of the constitution along with its accompanying human rights.[7]

On the basis of these characteristics, the most appropriate State or the realization of the common good looks like the hypostatization of the conservative concept of the Swiss Confederation. Any other State form is rejected as incapable of realizing the common good. "Anyone who supports Marxism cannot dedicate themselves to the common good."[8] Luhmann is a "theorist of the left" who reduces the common good to an "empty formula."[9] "Luhmann's formula, thought through to the end, would be contrary to justice, contrary to human dignity, contrary to freedom and equality, contrary to democracy, contrary to the rule of law and contrary to the social aims of the State."[10] In this context, that rejects value relativism, one may ask what the 'Islamic perspective' of the common good might be. This is a topic analysed by a cosmopolitan Palestinian professor[11] at the 1998 conference. His article, however, addresses the general principles of Islam without discussing the common good. The choice of not dealing with the common good is in fact justified since Islam, even in its most modernist forms, could not easily be identified with the forms of government described in the conference as being ideal for the realization of the common good.

The theses presented at the conference encapsulate the participants' underlying ideas in favour of the traditional family[12] ('as the basic unit of social cohesion'); of the school as the instrument for transmitting the unifying values for future generations (in order that they become citizens 'capable of living in a community'); and of the State's non-interference in religion and ideology,[13] as well as in scientific research.[14] The position taken in this conference against globalization and dictatorships of the left is instead quite radical: the 'feverish racket' over globalization makes it difficult to understand that

> in fact, aggressive off-shore capitalism, along with the highly active networks of the International of the left, are carrying out a joint attack against the nation State,

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[7] *Supra* note 4, at 55.
[8] *Supra* note 4, at 65.
[9] *Supra* note 4, at 54.
[10] *Supra* note 4, at 55.
[11] N. Nazzal, *Bonum Commune – Ethics in Society and Politics: The Islamic Perspective*, *in* Verein zur Förderung der Psychologischen Menschenkenntnis (Ed.), s*upra* note 4, at 80-88.
[12] *Supra* note 4, at 568.
[13] *Supra* note 4, at 570. It does not seem possible to reconcile this claim with others: "Those organizations that are heirs to the communist parties and the continuators of international communist movements, their initiatives and campaigns […] must be denied any possibility of organizing society according to their conceptions, of exploiting the solution to problems and conflicts in order to carry out their socialist and communist claims to power" (*supra* note 4, at 567).
[14] *Supra* note 4, at 571.

> culture and religion in order to open the road towards a monopoly of power and the global organization of the world.[15]

As I do not share the positions presented at the 1998 Swiss conference, what I have to say regarding the common good is based on the two relativist principles stated above. By more closely connecting the philosophy of law to the notion of the common good, I would like to refer to a short essay by Arthur Kaufmann. He traces the *bonum commune* to 'negative utilitarianism', which Tammelo defined in the following terms:

> The greatest good of the system of justice consists, in my view, in the elimination or the greatest possible reduction of misery. I am instead doubtful of the principle of positive utilitarianism according to which one must seek the greatest possible happiness for the greatest possible number of people […]. In short, I'm more inclined towards negative utilitarianism, that is, towards that utilitarianism according to which – by the means and to the extent possible – one must seek to avoid the unhappiness of the greatest possible number of people.[16]

These principles are the basis of the analysis presented in this paper. The diversity of theories is also reflected in the terms used to denote the common good. As synonyms for 'common good', a number of relevant terms are used in the philosophy of law. These include the terms 'legal opportunity', 'social justice', 'justice of the common good' and 'human dignity' or 'dignified life'. The latter is an expression that is also found in a number of constitutional texts.

Over the past centuries and especially following the *Déclaration des droits de l'homme et du citoyen*, the concept of human dignity has been increasingly taken up by legislation. Whether and to what extent norms inspired by this have in fact become reality or have actually been applied, is a question that I will address via a number of examples. In any case courses on human rights have become fairly common in Western universities.[17]

The transformation of human rights into positive law takes place in the arena of both national and international law. The best and most current examples of this are the international courts for war crimes and especially the International Criminal Court at the Hague. Consequently, theoretical considerations about human rights must be compared with the exegesis of not only the norms of positive law but also of the jurisprudence of international courts.

Positive law and the common good, though connected, do not coincide: "the common good 'is there'," writes Arthur Kaufmann, "even independently of its determination in positive law; however, it's only by the latter that it's

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[15] *Supra* note 4, at 566.

[16] I. Tammelo, *Ungerechtigkeit als Grenzsituation*, 61 Schopenhauer-Jahrbuch für das Jahr 1980 30 *et seq.* (1980).; *reprinted in* I. Tammelo, Zur Philosophie der Gerechtigkeit (1982), at 127 *et seq.*

[17] At the University Carlos III in Spain, for example, the subject of human rights has been placed at the center of the law program and the rector, Gregorio Peces-Barba, has edited, among other things, a book in several volumes on the history of human rights, *see* G. Peces-Barba, Historia de los derechos fundamentals (1988).

transformed into a juridically relevant entity."[18] However, the increasing transformation of human rights into positive law must not deceive us: the basis of every discussion in this field will always be a philosophical one. It is irrelevant whether this debate takes place in the academic arena of ethics, the philosophy of law, or political philosophy, since the boundaries of these disciplines are unclear and fluid. The only thing that is important is that the discussion never loses sight of the initial theoretic basis. Philosophy of law has often served as the mediator between moral and political philosophy, on the one hand, and legislators on the other. In recent decades, however, there has been increasing talk of a crisis in the philosophy of law. And it is not only talk: it is a crisis that is felt daily.

B. The Philosophy of Law of Philosophers and the Philosophy of Law of Jurists

The distinction between the philosophy of law of philosophers and the philosophy of law of jurists characterises the history of philosophy of law, even if for the most part it remains unexpressed.[19] Firstly, philosophy of law is deductively derived from a system of thought that tries to explain the universe. Secondly, it is inductively constructed, bringing together individual parts or aspects of separate legal phenomena into increasingly abstract structures. Jurists have tried to take into account these two approaches by distinguishing a philosophy of law (in the philosophical sense) from a general theory of law (in the juridical sense), or rather, a philosophy of law (in the area of continental Europe) from Jurisprudence (in the area of Common Law). These branches of theoretical legal thought are set apart by certain features.

Classical systems of philosophy of law are deductive systems in which individual branches of philosophy are developed on the basis of given axioms. Such is the case, for example, with philosophy of law as developed by Hegel, Kant or Fichte. In these systems, however, the practioner notes a deficiency. Although deduction certainly descends from the heights of abstraction, it does not reach all the way to the institutions of positive law and the individual norms which practioners apply on a daily basis. In fact, the philosophers' philosophy of law deals with law *in general*. It examines the relationships between individual parts of the philosophical system among which the law as a whole is taken into consideration. Even if at times it takes account of certain norms of positive law, this does not change the general structure of the approach.[20]

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[18] Kaufmann, *supra* note 2, fn. 8, at 6.

[19] This topic was discussed during a philosophy conference in 2000 organized by the Alexander-von-Humboldt-Stiftung (2000): *Rechtsphilosophie der Philosophen und Rechtsphilosophie der Juristen* (unpublished proceedings).

[20] A detailed description of this stage of systematic thought is given in M. G. Losano, Sistema e struttura nel diritto: Dalle origini alla Scuola storica (2002). Further descriptions can be found in the literature herein cited.

It is interesting to see how a philosopher and political scientist handles the subject of the common good from this general point of view. Arno Baruzzi raises the problem

> of the nexus between freedom and the common good. The law is […] the bridge that can and must join freedom and the common good together. […] The law must above all serve the common good. But what is the common good, what does it consist of? The answer to this question does not try to leave the level of general ideas, of the 'diverse' forms assumed by the whole, such as nature, or, from the political point of view, the common good.

In particular, it does not seek to identify ethical-political norms of behaviour nor does it seek to determine desirable, albeit not yet existing, legal norms; it does not even criticize existing yet undesirable behavioural patterns. "From the point of view of philosophy," writes Baruzzi, "this is impossible. The aim of philosophy is completely different from that of law."[21] The value of Baruzzi's approach is that it is argued in a modern and thorough manner; yet, it is directly opposed to the approach that lies at the basis of this article. And with this philosophy of law that, *à la* Hegel, does not want to teach us 'how the world must be,' we will take leave of the philosophers' philosophy of law.

The jurists' philosophy of law moves in the opposite direction. Jurists apply single, positive legal norms. At a first level of reflection they begin to group together norms having common features. Among these clusters of norms one may find even more general features, leading to an ever more extended and abstract aggregation of norms.

In the vast majority of cases this inductive process has a philosophical system as a point of reference, which provides the necessary framework at the final levels of the inductive undertaking. In short, jurists navigate in the wake of the philosophical system and as a result their legal-philosophical system reveals a density at its lower levels that is close to practice, a density that then becomes increasingly lighter and ethereal as one moves towards the higher levels of abstraction.[22]

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[21] A. Baruzzi, Freiheit, Recht und Gemeinwohl. Grundfragen einer Rechtsphilosphie (1990), at xi *et seq*.

[22] The best example of this kind of systematic thought in Common Law is perhaps found in Welsey Newcomb Hohfeld's Fundamental Legal Conceptions (1964), first published in 1919. Regarding his cultural biography and his sources, *see* M.G. Losano, *Hohfeld comes to Yale*, 21.2 Yale Law Report, (1974-75), at 16-18, 47-48; M.G. Losano, *Le fonti dei concetti giuridici fondamentali di Wesley N. Hohfeld. Con un'appendice di 14 lettere inedite di W. N. Hohfeld a R. Pound*, 6 Materiali per una storia della cultura giuridica 319-416 (1976); and M.G. Losano, *Wesley N. Hohfeld e l'università americana. Una biografia culturale*, 8.1 Materiali per una storia della cultura giuridic*a* 133-209 (1978).

Similar systematic considerations can also be found in Parsons, especially in his debate with George Homans. T. Parsons, *On Building Social System Theory: A Personal History*, 99 Daedalus. Journal of the American Academy of Arts and Science 826-881 (1970); and also T. Parsons, *Die Entstehung der Theorie des sozialen Systems: Ein Bericht zur Person*, *in* T. Parsons, E. Shils & P.F. Lazarsfeld (Eds.), Soziologie – autobiographisch. Drei kritische Berichte zur Entwicklung einer Wissenschaft 1-68 (1975).

With the help of an image, it can be stated that at the upper levels of abstraction the philosophers' philosophy of law consists of a dense fabric that gradually becomes more attenuated as these people study in greater detail specifically legal topics. The dark line of abstraction fades towards the bottom in an increasingly transparent *pointillé*. The opposite occurs in the jurists' philosophy of law. The latter consists of a dense fabric near the lower, dark line of positive legal norms, becoming increasingly lighter and fainter when moving to the top. In short, the philosophy of law of philosophers never reaches the dense lower limit of positive law, just as the philosophy of law of jurists never reaches the dense upper limit of philosophical axioms. This image thus reveals two decidedly dark, concentrated areas – at the upper and lower ends – corresponding to abstract axioms and the norms of positive law respectively. Between these two extremes one finds all the shades of grey and in the middle, a colourless no man's land. In this no man's land one finds subjects such as the 'general theory of law' and Anglo-Saxon Jurisprudence. The different configuration of these two subjects is conditioned by the different structure of continental European law (Civil Law) with respect to that of Common Law.

In Civil Law, it is the abstract, general norm that prevails. The general theory of law does not therefore try to answer the first questions of law, such as 'What is justice?', 'What is the basis of the binding nature of law?' etc. Rather, it seeks to understand the internal relationships amongst the various elements of the legal system, the structure of legal norms and the basis of sanction. Contrary to Civil Law, in Common Law it is the binding precedent that prevails. Jurisprudence seeks to provide to the Anglo-American jurist, overwhelmed with judgments, a helping hand by deriving certain general principles from the multitude of cases. These two disciplines – the general theory of law and jurisprudence – avoid digging too deeply and flying too high: they operate instead in a golden intermediate space.

The great philosophical systems of classical German philosophy always contain specific considerations regarding justice, the State and law as parts of a general philosophical system. In the dichotomy between physics and metaphysics, the normative subsystems of morality and law fall within the domain of metaphysics. The overall structure of the philosophical system thus directly affects the treatment of law and its separation from morality within the philosophical system.

Until the eighteenth century, theology, philosophy and law were closely linked subjects, though subject to constraints that gradually drew them apart. These constraints were evident equally in practice and in teaching. In fact, law was as much State law, for the most part of Roman origin, as canon law. It was in theology that one found the first roots of systematic thought that would eventually affect philosophy and later law.[23] It is not surprising that law came to be considered as a whole or, in other words, a system. When actual legal

[23] One of the first comprehensive descriptions of systematic thought was written by a theologian: O. Ritschl, System und systematische Methode in der Geschichte des wissenschaftlichen Sprachgebrauchs und der philosophischen Methodologie (1906).

practice offered only incomplete and chaotic material, the 'construction' of a system was undertaken: an activity intensively carried out by German Pandectists of the nineteenth century. However, it was in the nineteenth century that law began to become increasingly more complex and was in fact separated from morality. In the meantime other social and human sciences had also become independent disciplines. Law withdrew to a 'splendid isolation' that found its theoretic foundation in legal positivism.[24] Following this separation, jurists could no longer look to morality for a validating and binding basis for law: they had to find it in law itself. When jurists began to reflect upon their own subject, a philosophy of law took shape that only indirectly referred to philosophical systems.

An example of theories of legal positivism is Hans Kelsen's theory, which is purposefully called the 'pure theory of law' by its creator: pure, in the sense of being free of ethical, psychological and political influence. In my view, Kelsen's theory is the most characteristic example of the jurists' philosophy of law. But even here it cannot avoid drawing on philosophy: namely, neo-Kantianism in the case of Kelsen.

The grand theories of the twentieth century that cover and explain everything no longer come from philosophers, but from social scientists: one need only think of Jürgen Habermas and Niklas Luhmann. Because of this evolution, which is only generally outlined in this article, modern philosophy of law has come to find itself in a situation that could be called a crisis of identity. These theories try to apply to law the various philosophical trends that once were the dominant schools (or became a dominant fashion). This has been an attempt to construct a legal structuralism, a legal cybernetics, a postmodern theory of law *à la* Derrida, and so on. It is not important to establish, at this time, whether or not these attempts were successful; rather, one needs to see to what extent the jurists' philosophies of law are still valuable for jurists, namely whether they are still able to serve as a bridge between law and morality, between the State and the *bonum commune*.

The philosophy of law of philosophers at the beginning of the 1800s and the philosophy of law of jurists during that century had direct influence upon legal practice, that is, in shaping a concept of law that penetrated deep into lawyers' firms and courtrooms. The emblematic figure embodying this movement was the German Pandectist. Savigny, Puchta, and Jhering were at the same time theorists of law, historians of law and practicing jurists.[25] With modern theories,

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[24] In legal science, the term 'positivism' has several meanings: 1. there were legal positivist concepts in Auguste Comte's sense – for example, those linked to Social Darwinism; 2. the logical positivism of the Vienna Circle influenced the students of legal logic in various ways; 3. legal positivism, in its most common sense today, is the doctrine that considers law exclusively as a set of State-enacted laws (*ius positum*). It is in this latter form of legal positivism that complete separation between law and morality takes place. *See* W. Ott, Der Rechtspositivismus. Kritische Würdigung auf der Grundlage eines juristischen Pragmatismus. Zweite, überarbeitete und erweiterte Auflage (1992).

[25] This focus on the practice of law is seen in the numerous opinions written by Pandectists on the most current issues of their time, such as the construction of the railroads. *See, for example*, R.

this connection between the theory of law and legal practice has been lost. Habermas' communicative society and Luhmann's autopoietic law – not to mention Teubner's autocatalytic theory of law – are topics that are only discussed by hyper-specialized scholars. Judges and jurists, instead, reason and act according to pragmatic models or antiquated conceptual ones, inherited from the tradition of the profession.

C. The Philosophy of Law Shapes Legal Praxis: 'Pure Theory of Law' and Constitutional Jurisdiction

At this point I would like to illustrate the diversity of the relationships between law and philosophy using two examples.

a) *Hegel's philosophy* influenced the 'universal legal systems' of Eduard Gans and Josef Unger in the nineteenth century. They are a reflection of nascent globalization (or better yet, *mondialisation*, as the French tend to say in reference to that period) and, for legal science, represent the first scientific approach to comparative law. Yet, the philosophy of law that motivated them had only an indirect influence on the practice of law. Hegel, in fact, influenced the work of jurists who in turn influenced the first scholars of comparative law that first acknowledged independence to their discipline only at the turn of the twentieth century.[26]

b) *Kelsen's pure theory of law* offers an example of a jurist's philosophy of law that is capable of shaping reality creatively. His theory has taken up the neo-Kantian notion of 'ought' (*Sollen*) and has constructed on this basis a theoretical system, whose theoretical consequence gave rise to modern constitutional jurisdiction.[27] Kelsen's legal system is represented as a pyramid in which the validity of a lower-level norm depends on that of an upper-level one. For Kelsen, the 'validity' of a norm coincides with its own 'existence'. In Civil Law, the lowest-level norm is the judgement, whose legality depends on statutes. At an intermediate level stands the statute (in the formal sense) that derives its validity from the constitution. At the highest level lies the constitution. And here begin the internal problems of the Kelsenian system.

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von Jhering, Rechtsgutachten in Sachen der Stadt Bern contra Centralbahn zu Basel betreffend Schiessplatz Wylerfeld (1877).

[26] A detailed description of the the universal legal systems is found in M.G. Losano, Sistema e struttura nel diritto: Dalle origini alla Scuola storica (2002), ch. 6, at 108-150. An earlier version was translated into Spanish in Buenos Aires as *Los grandes sistemas jurídicos*, 17 Anuario de Filosofía Jurídica y Social 137-174 (1997).

[27] Obviously, oversight of constitutional validity already existed prior to Kelsen, *see* J. Luther, Idee e storia di giustizia costituzionale nell'Ottocento (1990). Regarding Kelsen and the Austrian Constitutional Court, *see infra*, n. 29.

The validity of a constitution relies, in fact, on an earlier constitution; yet, this *regressio* does not lead to an *ad infinitum*, but ends with the constitution that was historically first. But then, what underlies the validity of this historically first constitution? In order to close his system at the theoretic level, Kelsen must satisfy two conditions: 1) he must find a principle that gives validity to his entire system; and 2) this principle cannot be found outside of law since Kelsen's theory – conceived as the 'pure' theory of law – cannot take its own foundation from outside the law itself.

A pragmatic (and hence 'impure') view of law could find this foundation in the power of the State, for example. Although this solution would be in keeping with reality, it would endanger the 'purity' of the pure theory of law. Yet, Kelsen himself initially argued for this view when he wrote that the problem of natural law cannot be resolved in either the absolute truth of metaphysics or the absolute justice of a natural law. For Kelsen, the problem of natural law consisted in determining what was *behind* positive law. The historically first constitution is the last solid foundation for positive law and so, also, for the positive-law theorist: but on what is the historically first constitution based? In other words, what conclusions can be drawn from looking behind it, in trying to discover the foundation of the validity of this historically first constitution? In 1927 Kelsen wrote:

> The problem of natural law is the eternal problem of what lies behind positive law. And whoever seeks an answer finds, I'm afraid, neither the absolute truth of a metaphysics nor the absolute justice of a natural law: *whoever lifts the veil without closing their eyes is blinded by the Gorgon of power*.[28]

Kelsen later found a solution within his system, substituting the Gorgon of power with the neo-Kantian 'ought' (*Sollen*): the system is closed by a 'basic norm' (*Grundnorm*) that divides the nearly mystical 'ought' between lower-level norms.

Setting aside the various criticisms and discussions of the basic norm, I will focus instead on one fact: the conceptual framework of a jurist's philosophy of law was completed by drawing on a philosophical system. What are the practical consequences of this? Two can be identified:

I. If only the norms that comply with the upper level of the legal pyramid exist (i.e. are valid), then there must also exist a State structure that guarantees the system's coherence, i.e., that norms at different levels do not contradict one another. For the courts and parliaments, the legal tradition has already found a solution. Yet, how can a contradiction between the statute and the constitution be resolved? As a practitioner Kelsen found a solution: for the new Austrian Republic he designed the Constitutional Court that later became the model for other European constitutional courts.[29]

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[28] H. Kelsen, *Gleichheit vor dem Gesetz*, 3 Veröffentlichung der Deutschen Staatsrechtslehrer (1927).

[29] Kelsen is often called 'the creator of the Austrian constitution.' Concerning Kelsen as creator or

II. In the 1930s Kelsen also dealt with the systematic problem of international law. The solution he proposed could not at that time be translated into a concrete institution, even though it had a significant effect on the debate concerning the relationship between national and international law. Let us return to the Kelsenian pyramid which describes the legal system: from the point of view of theory, it was necessary to establish whether international law should be placed immediately below the basic norm or below the constitution. In practice, however, placing international law above State norms means that State norms that contradict international law are not valid. Conversely, placing national law above international law means that international norms are valid only if they are adopted by State law.

Let us now carry these theoretic abstractions over to the actual historical situation of the 1930s when Kelsen – who was Jewish and a socialist – lived in exile in Geneva. The world-State and perpetual peace: these two concepts show up even in the debate between Kelsen and Campagnolo. In commenting on Campagnolo's doctoral thesis, Kelsen wrote:

> The construction of the world-State can take place in two ways: either a State extends its 'sovereignty' over other States by force (this is the way of imperialism); or individual States voluntarily unite in a universal federation of States from which, by way of increasing centralization, a confederation and ultimately a unified State may gradually emerge. This is the way of federalism.[30]

In contrast to the prevailing theory, Kelsen argued that international law superceded national law.

D. The Philosophy of Law's Silence on the Common Good

Let us now return to the crisis of the philosophy of law. Since in the era of legal positivism philosophers of law did not address the connection between the norms of positive law and justice, the problem of morality and justice fell to moral philosophers.[31] Thus, the philosophy of law's 'vital space' became increasingly smaller. On the one hand, the empirical verification of legal cause and effects had in the meantime become the object of independent disciplines,

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only co-author of that constitution, *see* G. Stourzh, *Hans Kelsen, die österreichische Bundesverfassung und die rechtsstaatliche Demokratie*, *in* Die Reine Rechtslehre in wissenschaftlicher Diskussion 7-29 (1982).

[30] H. Kelsen & U. Campagnolo, Diritto internazionale e Stato sovrano. Edited by M.G. Losano. With an unpublished text by Hans Kelsen and an essay by Norberto Bobbio (1999). *See* H. Kelsen, Les rapports de système entre le droit interne et le droit international public (1927), at 267: "L'unicité nécessaire du système normatif."

[31] Cases such as Gustav Radbruch's conversion from legal positivism to natural law are an exception and can be traced to the devastation wrought by World War II.

such as sociology of law and psychology. On the other hand, theoretical reflection about issues such as the relationship between norms and justice or between norms and morality returned to the protective wing of moral philosophy. The crisis of modern philosophy of law is thus not a crisis of growth but a 'crisis of contraction'. The inability to address the topic of justice, which is typical of traditional philosophy of law, is seen at the very moment in which the problem of justice has acquired a new institutional dimension and is subject to greater attention on the part of courts and legislative bodies.

While the legal philosophy of jurists is mute, the scientific development of present-day society has even greater need of the jurists' currently speechless philosophy of law. The subject of justice – and hence the central problem of the philosophy of law – is currently discussed not only in theory but also in organizations whose aim is increasingly to regulate the problem by legislative means. One need only think of the numerous commissions and committees that, in conjunction with governments and parliaments, ought to give the 'final' word on experiments with animals, genetic manipulation, birth control, the protection of personal data, environmental protection and so on. Within these organizations one finds a mounting number of theorists (but few philosophers of law) who are trying to establish a connection, useful even in practice, between moral philosophy and theology on the one hand and legislature on the other. These institutions have a difficult task: they must mediate between value judgments belonging to a certain society and the system of positive law, or in other words, they must reconcile existing positive law with established values or bring forth new standards that take these established values into account.

The suspicion that these organizations are a 'big idea' devised by politicians to ease[32] their own burden is not unfounded. These commissions certainly ease the work of politicians; but the latter can also unload the weight of responsibility for unpopular moral decisions by way of these organizations. 'Ethics Committees' confer a scientific aura to proposals whose content depends in fact on the compositions of the committee itself. And at the end of the day it is once again politicians who decide on the group's composition.

This crisis of the philosophy of law does not mean that there are fewer legal philosophers or theories of law today than before. On the contrary, there are even too many. What is worrying is that philosophers of law tend to talk only amongst themselves which makes their conjectures more esoteric. Thus their language is accessible only to a smaller number of followers and they continue to develop a more sectarian, 'Scientology-like' mentality, without enjoying the latter's same proselytizing success.

As for modern theories, a short list will suffice: Ota Weinberger and Neil MacCormick's neo-institutionalism; John Rawls' theory of justice; critical legal studies in the U.S., with the alternative law variant of South America; Richard Posner and Guido Calabresi's economic analysis of law; Niklas Luhmann's systemic theory; Ronald Dworkin's 'constitutionalist' theory; Jürgen Habermas

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[32] In Italian, *alleggerire*: the author plays on the ambiguity of the verb which can mean 'to ease' or 'to lighten', but also 'to unburden' or 'unload' [translator's note].

and Robert Alexy's communicative view of law, morality and democracy; John M. Finnis or Arthur Kaufmann's natural law theory.[33] In this fragmented landscape, the danger is that the abyss between theory and praxis, between theoretical thought and positive legislation, becomes insurmountable.[34] Theorists and philosophers of law will increasingly debate amongst themselves, while legislators will be increasingly influenced by the *Realpolitik* or even by private interests holding power (any resemblance to the current Italian situation, though not purely coincidental, is unavoidable). I do not envisage a 'government of wise men', a purely utopian dream. I only claim that a philosophy (of law) that does not address praxis and a social theory that does not seek to be applicable to a given community, are doomed to become a glass bead game, and hence fail. What's more, legislation that ignores the ideal elements on which it is based will soon become the maidservant of power.

At this point I would like to mention the way in which one can link (legal) theory with (legal) praxis. In particular, there are cases where the noble discourse on human rights and human dignity motivates actions that may be of help to people. In this way we will reach certain central topics placed at the heart of the common good: individual and collective rights; the conflict between individual rights and the common good; risks and advantages; rights and duties.

The dialectic between individual and collective rights can be shown with two examples:

a) the protection of personal data as a 'right of luxury' characteristic of an opulent society. This point will only be analysed briefly in the context of this article;[35] I will limit myself to its shortest possible exposition. In sections E and F below I will only discuss the current dilemma about the protection of personal data in the era of global terrorism.
b) survival as a minimal right of the poor, since one can only speak of a dignified life if one is alive; section G outlines a number of solutions that may attenuate certain problems in poverty-stricken countries while noting at the same time some problems that are raised by these very solutions.

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[33] One can, of course, debate whether one or the other of these theories is of a juridico-philosophical, politico-philosophical or ethical nature. As a basis for this list, I took the authors proposed by G. Zanetti (Ed.), Filosofi del diritto contemporanei (1999), Introduction by Carla Faralli.

[34] In faculties of law, one consequence of this crisis is the marginalization of theoretic subjects in favour of legal-positive subjects that are directly relevant to the practice of the legal profession.

[35] An argument in favour of a reasonable application (and possibly also of a limitation) of the current protection of personal data is found in M.G. Losano, *Introduzione, ovvero Dei diritti e dei doveri: anche nella tutela della privacy*, *in* M.G. Losano (Ed.), La legge italiana sulla privacy. Un bilancio dei primi cinque anni (2001), at v-xx.

E. The *Bonum Commune* and Privacy: the Fight Against Terrorism and/or the Protection of Personal Data

To what extent can the individual right to privacy clash with the collective right to safety or health? This problem refers to databases as well as security cameras in banks, stores and streets. This also concerns health policy measures for combating epidemics such as AIDS and SARS.

Those holding (whether knowingly or not) a (neo-)liberal position tend to emphasize the individual right to privacy. In Italy, the results of senior-year exams in high school (*maturità*) are no longer posted, as publishing them may harm student privacy. Neo-institutionalists (or communitarians) argue instead for the opposite view: "a given individual right cannot be used to trump all other considerations, including the common good." In particular, if the protection of the common good is not possible through any other means, then it is permissible to limit the individual right to confidentiality concerning their private sphere.

In the fight against AIDS mandatory testing of newborns has clashed with the need for the mother's prior consent. In fact, with mandatory testing, sharing the test results with medical staff violates the privacy of the mother by revealing her HIV status without her consent. Yet, the child's right to life and health takes precedence over the mother's right to privacy. Thus, for Etzioni, if soon after delivery pediatricians discover that the baby is HIV positive, they may inform the mother so that she can take the necessary precautions: for example, not breast feeding the baby. Contrary to what has been argued, sharing this information is not a violation of the mother's privacy since it prevents harm to the baby. Etzioni explicitly recommends balancing privacy against the common good.

Following the attacks on the Twin Towers on 11 September 2001, modern society had to come to terms with a dilemma. To what extent can an individual's private life be limited in order to guarantee safety for the community? And conversely: Is there a danger that the community's safety can be used as a cover for other political or economic interests that may place freedom and democracy in jeopardy?[36] For European countries, terrorism is not new. Germany had the RAF, Italy the Red Brigades, Spain ETA and Great Britain the IRA. Yet, these were predominantly domestic problems: despite the international links of these individual movements, terrorist activity remained

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[36] Unfortunately, this is not a new problem, given the great similarity between terrorism and organized crime; and the protection of personal data is a safeguard as much for honest citizens as it is for criminals. *See* M.G. Losano, *Datenbanken, Datenschutz und der Kampf gegen das organisierte Verbrechen*, *in* M.-T. Tinnefels, L. Philipps & K. Weis (Eds.), Die dunkle Seite des Chips. Herrschaft und Beherrschbarkeit neuer Technologien 117-135 (1993). This discussion was further developed in M.G. Losano, *Databases, Privacy and Organized Crime*, *in* H.-W. Meuer (Ed.), Facing the New World of Information Technology 13-29 (1994); translated in Spanish as *La democracia, el crimen organizado y las leyes sobre la privacy*, 1 (14-15) Doxa. Cuadernos de filosofia y derecho 447-466 (1994).

within the borders of individual States. Yet, even at that time governments had to drastically limit certain freedoms.

After 11 September, terrorism became one more global phenomenon, typical of our globalized world. One may wonder whether the methods used to combat it, which until now have turned out to be more or less effective, are still capable of resolving the problem. Global terrorism means trans-border flow of money. It means the inability to identify the nationality, place of residence and even the personal identity of those arrested. In Italy, one person arrested was known to the police under 50 different aliases. The difficulties begin with the multiple transcriptions of the Arabic alphabet – which confuses databases – and continue all the way to the falsification of identity documents.

A foreign legion of unknown individuals is fighting on a global scale against the rest of the world without making any distinction between civilians, police or military personnel. The response cannot therefore be a traditional one. Thus, in searching for a solution, we are confronted with the eternal question in times of crisis: to what extent can a democracy defend itself through 'anti-democratic' means? As in Spain with the GAL,[37] can democracy fight terrorism with terrorist methods? Where is the boundary between an anti-terrorist group using highly aggressive tactics and a death squad in a South American dictatorship? Where is the margin between the limits on already acquired democratic freedoms and the abandonment of the basic principles of democracy? In short: Must democracy be the victim of the coherent respect of its own basic values? Or rather, must it temporarily waive these basic values in order to defend and maintain them?

I. What Part of the *Bonum Commune* is Most Important?

Faced with such an alternative, politicians are tempted to react in a *radical* and *pragmatic* way. Radical, because they feel responsible towards their frightened constituents: constituents must feel safe, otherwise they will vote for someone who can protect them better at the next election. It is telling that the majority of Russians approved of the bloody attack of the anti-terrorism unit when hostages were taken in Moscow in October, 2002, even though it resulted in the death of nearly 200 of those being held captive. Pragmatic, because an incident like the attack on the Twin Towers had never happened before. For American decision-makers it was an unprecedented event, just as it was for the Russians when spectators in a crowded Moscow theater were taken hostage. In neither case there was enough time to law and decision makers for subtle, strategic reflections. The only option was to act with the greatest speed thought advisable and to learn from this experience for the future because one thing was certain: similar events were bound to reoccur.

In future one can thus expect a *radical* and *pragmatic* reaction in similar cases. But to what degree can one make radicalism and pragmatism comply with the common good? On 9 November 2001, Attorney General John Ashcroft

[37] *Grupo Antiterrorista de Liberación*, 'Anti-terrorist Liberation Group' [translator's note].

and the FBI announced a radical plan. Nearly 5000 men aged between 18 and 33 and having Middle Eastern features were temporarily held by the police for questioning. It is important to keep in mind that these men were not accused of any crime; they were only suspected of having some kind of connection with Al Qaeda or other terrorist groups.

The United States unexpectedly found itself faced with a reversal of fronts. Some local police departments, often criticized for excessive use of force against Hispanics and African-Americans, refused to follow orders. The Oregon State police, for example, disagreed from the very beginning with the directive; while the state police turned out to be more or less willing to carry out preventive detention in California and other states with a significant Middle Eastern or even Afghan population. A Pandora's Box was thus opened. Indiscriminate police surveillance of those young men – whose crime consisted of having Middle Eastern features and even sporting moustaches, an aggravating circumstance – came very close to racial profiling. The United States had witnessed decades of heated debate over this very practice. Attorney General Ashcroft's decision could have endangered a decades-long campaign against racial profiling, a campaign that, generally speaking, was to some extent successful.

Questions arose regarding the 1,100 people arrested as part of the investigation into the events of 11 September. They were not accused of terrorism: their arrest was based on the violation of immigration or other similar laws. Yet, the 'special' prisoners were closely monitored: even their meetings with their lawyers were openly surveilled. Amnesty International strongly objected to these violations of democratic freedoms. More than one year after the beginning of the campaigns in Afghanistan there were still Guantanamo prisoners.

The proposal to bring those accused of terrorism before a specially appointed military tribunal was pursued even more forcefully. The constitutionality of this solution faces serious doubts: the least important and most formal of them being that the US president had always declared that the anti-terrorist operations in Afghanistan did not constitute war.

However, when one begins to encroach upon basic freedoms, one sets in motion a slide down an apparently endless slippery slope. Which common good is most worthy of protection: constitutionally guaranteed basic freedoms or security? Generalizing this question, we see that the present-day situation is not as unprecedented as one would have thought. At the beginning of the previous century the United States experienced a wave of anarchist attacks that led to radical and pragmatic measures. At that time, Mediterranean-looking immigrants were also arrested. There were prisioners like the anarchists Sacco and Vanzetti who were sentenced to death and whose names were cleared only in 1977 when their innocence was finally recognized.

But Pandora's Box is now open. From it now come reforms of the intelligence services. Just like Germany, Italy also wants to give the secret services greater maneuvering space. Similar measures will be or have been adopted in all Western countries. I will briefly examine the Italian reform plan

since the same situation – albeit with other characteristics – will occur again in other countries.

II. A Greater Common Good through a Greater Secret Service?

What is new in the proposed reforms of the Italian secret services can be summarized in a few points:

- the cryptic expression 'functional guarantees' means that agents cannot be punished if they commit a crime while performing their duties. Theft, wiretapping and indirect surveillance of individuals can be carried out without a judge's authorization. The only prohibition is that they cannot injure or kill someone;
- the prime minister must give written authorization for all these operations;
- an agent cannot contact judges, but must inform the police, who in turn can forward the information to judges;
- actions related to these operations remain confidential for 15 years;
- parliament has preventive control only over expenditures for these operations and the government is not required to keep parliament regularly informed.

As far as Italy is concerned, this more than justified reform of the secret services occurs at a time that is not very favourable for the protection of personal data. I will first examine briefly the aura surrounding the post-war history of the Italian secret services and then turn to the expected legal reforms concerning the protection of personal data. The post-war history of the Italian secret services is particularly worrying. The fact that the secret services are subject to less oversight and enjoy greater power is even more disturbing. Their less than edifying history can be summed up in a few words. Following the war, agents from the Fascist period remained in or returned to service. From that moment onward the secret services (or, rather, the branch that was called the *servizi deviati* or the 'deviated services') were always very sympathetic in investigating crimes committed by right-wing extremists. The history of the *anni di piombo* – the period of intense political terrorism from 1969 to the end of the 1970s – is the first dark period of the secret service: unauthorized gathering of information on politicians and political parties; an attempted *coup d'état* by General De Lorenzo in 1964 (the so-called *Piano Solo*); the communication of erroneous or misleading information to prosecutors in Milan who were investigating terrorism. As a result of these and other recurring scandals, the secret services were reorganized on several occasions, but the personnel remained unchanged.

The current reform of Italian intelligence comes at a time of serious tensions as the *Carabinieri*[38] were declared a fourth army corps, next to the regular Army, Navy and Air Force: both the State police (*Pubblica Sicurezza*) and customs police (*Guardia di Finanza*) have found hard to swallow this *de facto*

[38] The *Arma dei Carabinieri* fulfills both civil and military police duties [translator's note].

subordination to their so-called cousins. Despite these internal divisions and suspect history, the secret services might now receive nearly unlimited and unchecked powers. This heralds hard times for Italy in general and for the protection of personal data in particular.

III. How Much Privacy is There in the Common Good?

Along with the reform of the secret services, the Italian law on privacy is also now being discussed. On 21 November 2001, the Italian government addressed the following subjects:

- modifying the Italian Data Protection Act (no. 675 of 1996), currently in effect;
- revising the norms concerning wiretapping, as regulated by Decree 171 of 1998;
- subjecting data archives resulting from Internet traffic, direct marketing or closed-circuit video surveillance to deontological codes;
- introducing a new category of data: 'quasi-sensitive data';
- modifying the entire system of sanctions regarding the protection of personal data, with the reduction of penal sanctions against employers;
- unifying in a single act all the currently existing norms regarding the protection of personal data.

It is quite clear that these modifications will be influenced by the spirit of September 11. These are, in short, bad times for privacy.

F. Limiting the Limits on Freedom in the Name of the Common Good

Before concluding, it is necessary to refer to the folklore of Italian politics and specifically to the conflict of interests affecting the Prime Minister. This has been the subject of on-going criticism in the Italian and foreign press.

The Italian government recently passed an act on letters rogatory that hinders collaboration with other European countries and with Switzerland in particular. This has resulted in considerable difficulty in prosecuting money laundering, which is closely connected to arms and drug trafficking, which in turn are important channels for financing international terrorism. Italy thus found itself in a contradictory situation. On the one hand, it had actively assisted the United States in the war in Afghanistan (even if one is not allowed to speak of 'war'): the Italian navy had been patrolling the Indian Ocean off the Somali coast for some time, which could become a possible post-Afghan target in the US war against terrorism. In the fall of 2002 a thousand Alpine troops were preparing for combat in Afghanistan where they arrived at the beginning of 2003. Yet, the Italian parliament – schizophrenically passing laws – is considering both to renew and intensify the protection of personal data as well as to provide the

secret services with unchecked freedom of action regarding *everyone's* personal data. In the end, due to the Prime Minister's personal legal difficulties, that is due to a conflict of interests, the letters rogatory were made much more complex just at the time when they should have been broadened in order to facilitate the fight against terrorism.

Returning now to the age-old question in times of crisis: to what extent can a democracy defend itself and the common good with 'anti-democratic' methods? Where is the legitimate boundary between limits on democratic freedoms already acquired and the abandonment of the basic principles of democracy itself? In short: must democracy be the victim of the coherent application of its own principles?

a) Current developments in information tehcnology make it possible to invade the private sphere to an extent previously unimagined. One may resignedly conclude that "every advance in technology brings with it a small increase in tyranny." In the age of world-wide computerization and global terrorism, a certain increase in technological tyranny seems inevitable. However, just as every technology carries with it specific dangers, it also offers the means for counteracting them. This technical duplicity is represented quite well by the Greek term *Phàrmakon*, which stands for both 'medicine' and 'poison': the meaning depends on the dose of the medicine. *Phàrmakon* can thus both be a remedy and poison simultaneously.
b) Due to the rise in terrorism in past decades, Europeans have experienced at the national level a reduction in basic liberties. Today, privacy is a 'freedom of luxury'. In a difficult time such as the present, it must necessarily be limited; otherwise, the fight against terrorism becomes ineffective. The limitation of certain basic rights is pragmatically compatible with the Western concept of democracy if it is accompanied by clear and precise conditions. These conditions can be reduced to at least three:
    I. Limits placed on basic freedoms must be *precisely* formulated by way of a formal statute.
    II. The use of special instruments permitted in exceptional circumstances must be subject to democratic, i.e. parliamentary control, which cannot be of a merely formal or preventive nature.
    III. Insofar as possible, limits on privacy and other basic freedoms must ultimately be regulated by 'sunset statutes'. Thus, one could use the legislative method of restricting the duration of these limits on basic freedoms. In other words, the laws should have an expiration date in order to prevent the creation of a 'praxis' in bureaucracy and an 'insensitivity', or 'dullness', towards the freedoms of citizens which would be incompatible with the common good. It was along these lines that, for example, the Ethics Council proceeded in the debate over stem-cell research. Three years after the law came into effect,

> Parliament had to decide whether the law was still needed or whether it would have to be modified or repealed.

In the first fall of the third millennium a struggle erupted involving the basic values of Western democracy. In this struggle, the rights to certain freedoms must now be limited to the extent that they represent an obstacle to the struggle itself. Even the protection of personal data finds itself a part of this battlefield. In the coming months this protection will experience limitations which will undoubtedly be numerous and perhaps even profound. In the face of this, the task of the philosopher and the information technologist of law is to assure that these restrictions are in fact appropriate (that is, they help in the fight against terrorism and not serve other ends) and that they are eliminated as soon as possible when they are no longer necessary.

In short, this is a task belonging to the politics of law that the original advocates of privacy could not have imagined, given that ten or twenty years ago the current situation was unthinkable. Yet, after September 2001 in New York, after October 2002 in Moscow and after March 2004 in Madrid, we must confront on a daily basis problems that were once unimaginable. Even for the protection of personal data we must find a balance that may be neither easy nor stable. The protection of privacy will certainly suffer as a result: but how and to what extent depends on all of us. We must address this dilemma. On the one hand, the problems of global terrorism must not blind us to the values of liberal democracy. On the other hand, our loyalty to liberal democratic values must not blind us to the dangers of global terrorism, which we can neither ignore nor underestimate. Between these two extremes, where is the common good to be found?

G. *Bonum Commune* and Life: Survival as a Minimum Right of the Poor

While philosophers debate amongst themselves, millions of people die of hunger, disease and inhuman living and working conditions. It is not surprising then that the underdogs fill the ranks of international terrorism. Those living in brutal conditions are ready to sacrifice their own lives, even through suicide attacks. As a modern variant of the question: can one write poetry in times of war?, one may ask today: is it moral to dedicate oneself to pure theory, without helping others? Is there not the risk for Max Frisch's 'ethical schizophrenia'?

Max Frisch raised this dilemma in October 1946 when the horrors of the war were still very much alive in public memory. If, in re-reading his diary, we substitute the word 'art' with 'philosophy of law', we find once again the problem of overly abstract thought, the bane of this age anesthetized by mass media and consumption. Frisch writes,

> A letter from a friend takes up once again this problem: if among the duties of artistic activity one can include that of dealing with current problems. There is no

> doubt that it is a civil and human duty. But the work of art, he writes, should raise itself to a higher level. Perhaps he is right; but the firm 'no' that he himself gives to his own question is no less dangerous than a 'yes'. The best answer to this question, which always comes up again and again, was given by Brecht: 'What times these are, in which talking about trees is practically a crime since it means keeping silent on so many misdeeds.'

This problem preoccupied Frisch even in the days that followed, to the point that he concluded,

> The letter certainly doesn't speak of an art that avoids problems by escaping towards loftier levels. But the fear of such an art, which proposes supreme greatness and tolerates baseness, is perhaps the reason why I disagree. Art in that sense, art as an ethical schizophrenia, would in any case be contrary to our duty; as for the rest, it remains to be seen whether artistic duties can be separated from human duties. The sign of an authentic spirit, like that which we need, is not just any kind of talent (it represents only an addition), but responsibility.[39]

Thus, we return once more to the question: Is it moral to dedicate oneself to pure theory, without helping others?

Socialism and its most radical variant, communism, tried to answer this question. After the extinction of the communist States and their ideology, it seems that this worrying problem has been replaced by the neo-liberal imperative, 'Get rich!'. The disappearance of the question does not mean, however, that the problem has also gone away – a problem to which the movements opposed to globalization are trying to draft a yet confused and contradictory response. It is not possible here to even outline these enormous problems: they are only raised as background scenarios against which certain concrete actions can be clearly sketched, and actions can be undertaken on the basis of a concept of solidarity. This concept belongs to the Enlightenment and positivist trends (from which the socialist theory also derives); yet, it has not yet reached the necessary conceptual development to be regarded as a complete political theory. It still remains a benevolent disposition coming from the heart but not a rational construction of the mind.

The starting point lies in the observation that modern society does not distribute goods equally. It is a factual observation. Yet, this inequality in the distribution of goods is felt to be unjust: and it is with this judgment of value that the paths between 'communitarians' and 'neo-liberals' (to use a rough dichotomy that may, however, help clarify my line of argument) split. The entire electoral campaign for the presidential election in Brazil in the fall of 2002 could be seen as a competition between these two views, which – with radically different methods – proposed a solution to the problem of inequality. Neo-liberals view inequality in the distribution of goods as a natural fact: this is the way the market is. Political practice based on this point of view consists in not hampering the market and in promoting the social mobility of individuals most able to compete. *L'intendance* – that is, social legislation – *suivra*, perhaps

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[39] M. Frisch, Diario di antepace 1946-1949 (1962), at 112 *et seq*.

in the long run. In essence, it is a *déjà entendu*: nature prefers those fit for survival. The (social) State must not interfere in the process of selection.

The communitarian view maintains that the natural situation must be rectified specifically to the advantage of the underprivileged. Although social differences cannot and must not disappear, they need to be corrected in certain arenas: namely, where human beings live in inhumane conditions. Progress today consists in the fact that, compared, for example, to 100 years ago, everyone can live better and longer. The market cannot be of help in this, while the State can; but in the meantime it would be better if everyone rolled up their sleeves and gave a hand. Medieval compassion was replaced in the nineteenth century by solidarity among workers according to organized forms that were as Christian as they were socialist, until the social State stepped in. Today, social collaboration is taking on newer and less distinct forms: this is the so-called third sector, that is non-governmental organizations (NGOs) and the various forms in which volunteers are organized.

It is towards these forms of solidarity in post-industrial society that I would now like to turn our attention.[40] Once again, at the center of these considerations is property, what Cesare Beccaria called 'the terrible right'.

I. The Common Good as the Struggle against Poverty: But What is Poverty?

The reduction of excessive social diversity consists in reducing the unequal distribution of property. The complex system of volunteer organizations dedicated to this end is immediately seen as a set of networks that greatly differ in nature and size as the lack of property, i.e. poverty, cannot be unambiguously defined. The indigent of Western Europe cannot be compared to the indigent of Bangladesh. Being poor in a tropical country is not like being poor in a cold one.[41] For this reason it is impossible to trace the entire system of volunteer organizations to the lowest common denominator. The various forms of paucity influence the even more diverse forms of organizations that seek to offer assistance.

However, an initial methodological warning is necessary. Poverty in the so-called first world, is often taken to signify statistically verified poverty. National statistics institutes establish a threshold of poverty that serves as the basis of comparison for the social classification of citizens in various countries. Hence, this threshold differs from country to country; but it also depends on the

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[40] Here, I am speaking only of 'authentic' NGOs. The current lack of transparency and control regarding their organization and administration has left room for the emergence of NGOs who assist those who provide help, and not those who need to be helped, or of NGOs which have been infiltrated by multinational corporations that have found in them a new form of lobbying. They are even used as a perfect cover for certain intelligence services. This degeneration complicates the overall framework, but cannot be dealt with in the present discussion.

[41] In the debate of the conference (*supra* note 1), the psychological dimension of poverty has also rightly been taken into consideration.

precision with which statistical data is gathered and processed. In Greece and Italy, the so-called 'underground economy' represents nearly one-third of the gross domestic product (GDP). This imaginative claim does not, however, correspond to reality. If Italy is the seventh industrial power in the world, one-third of its gross domestic product is not something one can resume in a metaphor. It is a matter of an enormous quantity of raw material that is illegally acquired or imported; of workers who have no social security and pay no taxes; of workplaces that do not respect laws regarding fire hazards, environmental protection, or workers' safety; of illegally distributed products that are not taxed and hence represent unfair competition to the legal economy. It would therefore be correct to define this 'underground economy' as an economy unknown to the tax authorities and hence also to statistics. Data on poverty in these countries must therefore be evaluated with care.[42]

If the collection of economic data is imprecise, then the measurement of poverty in certain countries also becomes imprecise, which in turn means that policies for combating it rest on a repudiation of reality.[43] It is estimated that 30% of the buildings in southern Italy have been illegally constructed, i.e., built without the necessary permits. Leaving aside all other problems connected to the violation of the law, this situation subtracts a significant amount of economic goods from statistical and fiscal surveys. Yet, even those who own an illegally constructed house are subject to significant disadvantages since, from the legal point of view, their house does not exist. If, for example, the homeowner needs a loan, the bank will not accept the house as security. If the homeowner wants to sell the house, they can only transfer it unofficially to the buyer who, after payment, becomes the possessor but not the owner since there is no registered deed to the house. The often inevitable consequence is a succession of complex questions of sale and inheritance that, however, cannot be brought to trial. As a result, these problems are at times resolved *all'italiana*: the not infrequently bloody settlement of accounts.

Such a situation can arise for a variety of reasons. In many developing countries, the underground economy is the result of an non-existent or poorly functioning bureaucracy. When Kemal Atatürk westernized Turkey, the new government encountered a series of problems, for example, determining when citizens reached the age of majority, since public registrars worked in an approximate manner. Because of this bureaucratic deficiency it was impossible to know exactly when young people needed to register for military service, whether they were old enough to marry or enter into contracts.[44]

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[42] The social fabric of the underground economy is the patriarchal or extended family which still forms the backbone of certain areas of southern Italy, the south of Spain and Greece. On this topic *see* C. Giordano, *Das entfremdete Gemeinwohl. Zur sozialen Produktion von Misstrauen in Gesellschaften am Rande Europas*, presented at the conference, *supra* note 1.

[43] An attempt at showing that poverty is at times only apparent poverty (i.e., that the boundaries between the underground economy and poverty are often fuzzy) is found in H. de Soto, The Mystery of Capital. Why Capitalism Triumphs in the West and Fails Everywhere Else (2000).

[44] M.G. Losano, L'ammodernamento giuridico della Turchia (1839-1926) (1985); regarding family law, *see* at 39-46; on the problem of land titles, *see* at 53-64.

A more precise statistical survey of wealth is therefore part of that bureaucratic organization of the State that is already the source of dissatisfaction among many citizens of the first world. But economic growth and the resulting improvement in the standard of living are closely linked to this bureaucratization of society.

Since modernization has almost always coincided with 'westernization', developing countries organized or received a State apparatus that reproduced Western systems. The resulting bureaucracy was often an obstacle to the development of the legal economy since – leaving aside the problem of corruption – it generated enormously complicated procedures. For example, in order to cultivate a plot of desert in Egypt, one first needs to pass through more than thirty bureaucratic offices. The outcome of this suffocating bureaucracy is the illegal cultivation of many plots of land cut out from the desert, which create relative sufficiency for their owners, but in the eyes of the law do not exist. The *fellah* who has brought a piece of desert to live and wants to improve his situation is, however, unable to receive a bank loan, despite having shown entrepreneurial spirit.

It is thus that the underground economy expands. The immigrant who returned to Sicily and illegally built a house, the young Turk whose parents delayed recording his birth with the public registrar and even the small Egyptian farmer who illegally cultivated a piece of desert, cannot receive any kind of legitimate loan. They must therefore turn to usurers, thus generating yet another link in the infinite chain of the underground economy. Similar situations also occur in the so-called first world.

For now, we will settle with the claim that, in developing countries, the purely statistical or official assessment of poverty generally yields an indication that cannot serve as an adequate basis for effective action against poverty itself. Those lending assistance must work *on site* in order to know the *real* situation. Such direct knowledge is often lacking in large international organizations such as the World Bank, the International Monetary Fund, etc., creating at times tensions among the cooperating organizations of various nationalities and size.

After these methodological observations, we will turn our attention to the concrete problems.

II. Realistically Promoting the Common Good: Four Examples

Poverty is the lack of money: an obvious truth in the modern world. The poor of the third world cannot escape their sad situation since they do not have any starting capital, however small. Since they do not own anything, they cannot offer the bank any collateral by which they can obtain the small sum that they need to start a venture. These people are thus forced to remain in an eternal state of poverty. However, certain volunteer organizations have started to provide loans even to those who cannot offer collateral. Yet there are as many forms of poverty as there are of unrecorded wealth. These organizations must therefore know their clients and their clients' society in great detail.

It is possible to classify the various forms in which solutions to poverty are proposed, making necessary adjustments as they shift and change from country to country.

1. The Poverty of the Poorest of the Poor in the Third World: Bangladesh

The Grameen Bank, or the 'bank of the poor', was founded in Bangladesh in 1976 in order to help the poorest segments of the population after the disasters of 1974.[45] Yunus' Grameen Bank does not deal with small farmers since they already have a minimum basis for their own survival. In Bangladesh there are those who find themselves even further down the poverty scale. The system of micro-credits used in Bangladesh is today applied even in the United States (in Arkansas, South Dakota and Chicago). An interesting aspect of the activity carried out in Bangladesh is the fact that the loans are made directly to poor women, without going through the approval of the husband: a passage that should in fact be unavoidable in a Muslim country. Economic independence is in this way linked to a step (often the first) towards the emancipation of women.

2. Poor or Landless Farmers: Agrarian Reform in Brazil

Brazil is a country of tremendous contrasts: next to landed estates as large as Holland or Belgium live small farmers having barely enough to eat, while there are some who possess absolutely nothing. These people joined together in the 'Movement of the Landless' (*Movimento Sem Terra*, MST) and are seeking to accelerate agrarian reform in the country by occupying non-producing land estates.[46] Thanks to the distribution of plots of land and the provision of starting capital, a number of small farmers have achieved economic independence (however, a number have also lost the land they received, since farming does not tolerate improvisation: 'Grains of rice do not fall from the sky,' as a Chinese proverb says). Other positive results of this movement are the oversight of the fair distribution of plots of land and the acceleration of bureaucratic procedures which are often too slow. In recent years this movement has even expanded to large cities and megalopolis, where a parallel movement has emerged using the same acronym MST: *Movimento Sem Teto* ('Movement of the Homeless').

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[45] M. Yunus, Vers un monde sans pauvreté (1998); an expanded edition was published in Italian as M. Yunus, Il banchiere dei poveri (2000).

[46] A description of this movement and the legal consequences of its activity can be found in my book Función social de la propiedad, latifundios ocupados y los Sin Tierra de Brasil (2006) and my article *Gesetz und Hacke: Ursprünge und Entwicklungen des alternativen Rechts in Europa und Südamerika*, *in* R. Helmholz (Ed.), Grundlagen des Rechts. Festschrift für Peter Landau 1023-1063 (2000); published in Italian as *La legge e la zappa: origini e sviluppi del diritto alternativo in Europa e in Sudamerica*, 30 Materiali per una storia della cultura giuridica 109-151 (2000); and in Spanish as *La ley y la azada: orígenes y desarrollo del derecho alternativo en Europa y en Sudamérica*, 5.8 Derecho y Libertades. Revista del Instituto Bartolomé de Las Casas 275-324 (2000).

Given that the inequalities in Brazil are as vast as the country itself, MST has become a major social movement in Latin America and has acquired even greater importance domestically with the arrival to power of Luiz Inácio Lula da Silva's *Partido dos Trabalhadores*. The occupation of land is clearly illegal, but the conditions of these disinherited people are often so unjust that some judges have sought to bend the law in their favour.[47] The solution to the land problem is for Brazil such a macroscopic case of the realization of the common good that results achieved by these movements may affect Brazil's political stability and, hence, the South American continent.[48]

3. Poverty in the First World: the 'Ethical Bank' of Padua

Even in Veneto, one of the wealthiest regions of Europe, attempts are being made to make starting capital accessible for small economic initiatives, even to those who cannot provide any collateral.[49] It is, apparently, an unprecedented approach. Since the concept of poverty is relative, the Ethical Bank of Padua seeks to reduce the large social inequalities that exist even in affluent societies. Compared to the poor of Bangladesh or the Brazilian 'landless', clients of the Ethical Bank are relatively well-off. Yet, they are unable to work as craftsmen or undertake any other business activity since they have no starting capital and do not receive assistance from the banks, or they are craftsmen or small businessmen unable to surmount a temporary shortage in liquidity.

The ethical bank's initiatives reduce existing social tensions in a wealthy society and prevent small and healthy business endeavors (which also means 'legal') from stalling on the ground or falling into the hands of usurers (thus being swallowed up by the underground economy). However, more capillary and complex initiatives are also possible in helping to avoid the everyday problems of many individuals, impoverished in these last years due to a stagnant economy. A credit card has been introduced by which benefactors contribute 1% of the value of their purchases to a charity fund. The store or company where the purchase was made matches the contribution. Caritas thus provides individuals in need with a pre-paid debit card from the charity fund: it is a small sum decided on a case-by-case basis aimed at preventing a temporarily difficult moment from turning into a case of chronic poverty.

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[47] M. Varejão, *Le sentenze sull'occupazione delle terre in Brasile dal 1995 al 2003*, 3 Sociologia del diritto 139-171 (2003); M.G. Losano, *Gesetz und Hacke: Ursprünge und Entwicklungen des alternativen Rechts in Europa und Südamerika*, *supra* note 46.

[48] For this reason, a number of studies have been dedicated to this topic, including: S. Branford & J. Rocha, Cutting the Wire: The History of the Landless Movement in Brazil (2002); W. Walford, & A. Wright, To Inherit the Earth. The Landless Movement and the Struggle for a New Brazil (2003).

[49] M. Pasini, *Promozione di un'economia civile e solidale – la Banca Etica*, *in* Fede e denaro 71-82 (2002); I. Barbuscia, *Per un'efficace lotta contro l'usura*, id., at 83-89; G. Stiz, Cooperativa Il Seme, Guida alla finanza etica. Come investire i propri risparmi in modo socialmente responsabile (1999).

4. 'Islamic Banking' in the West and East

An 'Islamic banking system' turns the focus from poverty to religious orthodoxy. Despite this profound difference, many of the problems of Islamic Banking are similar to those faced by Western charity organizations since, in both cases, when dealing with money one also has to take into account multiculturalism.[50] However, the situation of the Islamic bank is completely different from that of the three cases examined so far since generally the potential client of an Islamic bank could very well be a potential client of a Western one. Indeed, such a client may already have a Western bank account, but would rather not use it due to religious reasons: Islam's prohibition on interest underlie this attitude.

One may note a certain similarity between the Islamic bank and ethical investment funds of the West. For the latter, it is not investment capital that is lacking; rather, it is the investor who requires that the fund managers take investment decisions that conform to their ethical principles. Stocks must be invested in companies that, for example, do not use child labour; that respect labour and environmental laws; that do not make weapons, and so on. For example, the Christian Brothers Investment Services (a US investment firm that manages the funds of Catholic religious schools and orders) required the computer colossus Cisco to periodically publish a list of 'internal inequalities' in order to 'protect the most vulnerable, that is, the least paid workers.' In fact, in the years of the 'market bubble', the difference between the earnings of senior executives and those of ordinary employees had reached ethically unacceptable proportions: from 40:1, this ratio later reached 1000:1.

With the ethical investment fund one operates in an area free of poverty in which capital is already available for investment: yet, it must not be invested exclusively according to the criterion of profit.

This classification of the various forms of aid and organizations demonstrates how these institutions adapt to varied aspects of poverty. The element that they have in common lies in their starting point: both donor and beneficiary operate in a market economy in which the individual must be the owner of the means of production. In other words beneficiaries are assisted so that they can become a property owners. They promote the accumulation of capital but even though they have a social vision of the role of capital, they consider the Soviet, Yugoslavian or Algerian models of production as being long since obsolete. Even if these organizations speak of cooperatives and self-management, they refer to collaboration between individuals and not to a State-guided economy.

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[50] M.G. Losano, I grandi sistemi giuridici. Introduzione ai diritti europei ed extraeuropei 365-367 (2000). See F. Al-Omar & M. Abdel-Haq, Islamic Banking: Theory, Practice and Challenges (1996); M.K. Lewis & L.M. Algaoud, Islamic Banking (2001), reviewed in *Il Sole 24 Ore*, 16 December 2001; N. D. Ray, Islamic Banking and the Renewal of Islamic Law (1995); N. A. Saleh, Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking (1992).

As a starting point for a debate on the current situation of the fight against poverty, one could state that globalization-inclined neo-liberals, as much as their opposing movements, place the individual at the center of their very different world views. Yet, the methods adopted as a means of seeking self-fulfillment are not only dissimilar but even contradictory. To what extent is solidarity compatible with the market? And to what extent is the market compatible with solidarity? One thus returns to the eternal question of political science: is a third way possible towards achieving the common good?