

Political Justice

OTFRIED HÖFFE

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For Evelyn

POLITICAL JUSTICE

*Foundations for a Critical Philosophy
of Law and the State*

Otfried Höffe

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Translator's Preface

In rendering Otfried Höffe's book into English, I have had the good fortune of the author's assistance. Professor Höffe's fluent acquaintance with English has been immeasurably helpful.

A number of German terms, common in political theory and philosophy, have resisted successful English translation for centuries. The most important of these are *Recht* and *Herrschaft*. For the former, I have settled on "law," except in those cases where "rights" are at issue. In translations of Kant and Hegel, and some others, the term "right" is often used, and readers should be advised that Professor Hoffe is drawing on those traditions as well as the discipline which in the Anglo-American world goes by the name of philosophy of law or legal theory.

For *Herrschaft* I have adopted the somewhat risky course of not translating it at all. An incomplete catalogue of the English translations of the term would include "hegemony," "mastery," "domination," "governance," "government," "rulership," and "rule." If readers can manage to keep all those alternatives in their heads when they encounter the term in the text, then the experiment will have been a success. It should be apparent from the list that all the English renderings amount to evaluations of some sort or another, and it is precisely such pre-judgement that Professor Hoffe seeks so scrupulously to avoid.

Professor Höffe, Andrew Winnard and I have each made some revisions to the original German text, none very substantial. Thomas Pogge is the godfather of this translation. Kelly Rogers's Greek was indispensable. Andrew Winnard of Polity Press was an exemplary editor. Monica Feinberg Cohen was an inexhaustible source of both ideas

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Introduction

1

A Reassessment of the Discussion of Justice

Something happened in ancient Greece, most of all in Athens, which has long come to be taken for granted, but which, in the perspective of world history, is truly extraordinary. For the first time, laws and even the form of the state were no longer to be recognized unconditionally and challenged only in cases of extreme hardship or injustice. Political conditions were henceforth to be subjected to a conceptual and argumentative discussion and made the object of a philosophical critique.

This philosophical critique can be carried out from various perspectives. Whenever it has been informed by an idea of suprapositive obligation, especially of moral obligation, the Western tradition has spoken at first of divine law, later of natural law, and more recently of rational law, or (more neutrally) of political justice.

JUSTITIA NOT LEVIATHAN

Any political community has, in one form or another, coercive powers in virtue of which it is an institution of *Herrschaft*¹ which can take the threatening form of a state with unlimited authority, an omnipotent or absolutist state. Hobbes provides us with the original metaphor for such an institution. Writing for an audience well acquainted with the

Bible, he named the insuperable political authority after the sea monster Leviathan from the Book of Job.

A critique of law and the state carried out in the name of political justice amounts to a moral critique of *Herrschaft*. Such a critique investigates the conditions and criteria of a just *Herrschaft*, juxtaposes just and unjust forms of *Herrschaft*, and uses moral arguments to impose limits on the otherwise naturally expanding power of the state.

Since its beginnings, philosophy has had as one of its primary tasks the conceptual clarification of the idea of political justice, as well as, when possible, the conversion of this idea into practical standards or principles of justice. Indeed, if we think of Plato and Aristotle, then of Augustine, Aquinas, and Ockham and then, in the modern era, of Hobbes, Spinoza, Locke, Rousseau, Kant, Hegel, and Marx, we find that not only are most of the great philosophers also important political and legal theorists, but also that political and legal theory is largely written by philosophers, and that the moral perspective plays a central role in it. Political discourse, then, takes the form in large part of a *philosophical ethics of law and the state*.

Yet there is a break in this tradition in the nineteenth century. A number of great philosophers of that century pay only passing attention to legal and political issues. More interested in social criticism, hermeneutics, phenomenology, and theory of knowledge, they leave political and legal theory to the lawyers. The latter, of course, do not shed all contact with philosophy. The school of historical jurisprudence (Savigny, Jacob Grimm, Jhering, Gierke) is inspired by Hegel and Herder; Hans Kelsen is influenced by neo-Kantianism; and H. L. A. Hart stands in the British tradition of Hobbes, utilitarianism (Bentham) and analytical philosophy of law. But these philosophical orientations involve very little in the way of moral commitments. Historicism and positivism, which dominate

in these schools, both mistrust the moral perspective and often expressly challenge it. Along with this *alienation* of philosophy from political and legal theory, there is an alienation of legal theory from ethics and morality.

This double alienation can be overcome, and both philosophy and political theory can be reconciled with ethics, under the banner of political justice. There have of course already been significant efforts in this regard since the late 1960s. Most importantly, in the intense debate which has arisen around John Rawls's *Theory of Justice*, the systematic and philosophical discussion of justice has become once again a matter of course. This revived discussion of justice has also fulfilled other important conditions for a promising debate. The discussion is interdisciplinary; it exploits the most advanced means of argument such as decision and game theory, and as a result avoids moralizing undertones. Not least, this new discourse has a deep historical dimension: it draws on important political philosophers such as Hobbes, Locke, Rousseau, and Kant, and rehabilitates the classical social contract arguments.

Despite these excellences, though, the new discussion of justice raises certain doubts. It does not take adequate account of the considerations which led to the double alienation from, and resultant withering away of, the traditional discussion. These trends were not the result of a fashionable change of theme; they were arguments – or at least convictions – which brought the meaningfulness and the possibility of a systematic philosophical ethics of law and the state into serious doubt. A self-conscious discussion of justice, then, needs to take a step back. It needs to reconstruct the principal doubts and to seek, through engagement with them, systematically to reassess both the discussion of political justice and that of political theory in general.

A THREEFOLD CHALLENGE

The reassessment is best taken up in the contemporary discussion as shaped by Rawls. With his *Theory of Justice*, Rawls seeks to develop an alternative to the utilitarian model which has dominated Anglophone political theory, and to defend inviolable individual rights against utilitarianism's principle of collective welfare. Closer inspection reveals, however, that Rawls has managed only a half-hearted new proposal. On the one hand, he takes the perspective of justice for granted as a normative starting-point and seeks merely to specify it in a way that will gain universal assent. Utilitarianism, however, recognizes justice not as a basic normative concept, but only as a function of collective welfare. Thus, an effective critique of utilitarianism cannot content itself with an explication of the standpoint of justice.

On the other hand, the principles of justice which Rawls proposes in place of the utilitarian principle of collective welfare concern the distribution of so-called social primary goods, which are in turn devoted to the same chief end as utilitarianism, namely human happiness. Granted, Rawls does not tie the primary goods immediately to happiness, but rather employs the idea of rational life plans as an intermediate concept. Thus he is only indirectly a utilitarian. Moreover, in the case of the highest-ranked primary goods, the various liberties, the orientation to happiness may reflect a misunderstanding of the significance of these liberties. Although for Rawls there are good grounds for deciding against a utilitarian theory of justice, what is needed is a more fundamentally new orientation in the discussion of justice. My own attempt to develop a more deeply grounded alternative to utilitarianism will begin with semantic considerations pertaining to the perspective of

justice and will then build on the substantive principle of freedom of action.

The reassessment of the discussion of justice, however, does not actually begin with the debate between Rawls and utilitarianism. It goes behind this controversy to discuss the premises which both sides of that debate accept as self-evident. These same premises were regarded with suspicion in the political and philosophical discussions of the nineteenth and early twentieth centuries. Out of the colorful bouquet of ideas and arguments against a discussion of justice, two objections, mutually hostile to one another, stand out. One is directed against the moral perspective contained in the idea of political justice, the other against its conditions of application, the institutions of law and the state.

Although utilitarianism does not recognize justice as a basic normative concept, it shares with Rawls an interest in normative judgement and the critique of social rules and institutions. It is legal and political positivism which rejects such a critique, either on general epistemological grounds or on grounds peculiar to political theory or even to social history. In contrast, the anarchist social utopias which have played a role in political discourse since the French Revolution abjure philosophical critique precisely in the name of justice. The idea of just *Herrschaft* is driven away by the idea of freedom from *Herrschaft*; a philosophical ethics of law and the state gives way to a critical theory of society. Each in their own way, then, political and legal positivism on the one hand, and anarchism on the other, cast doubt on the meaningfulness and possibility of a discussion of justice. And this twofold doubt has not lost its relevance.

The legal order, which governs our societies with coercive regulation by way of the powers of the state, consists of positive laws (including constitutional provisions). These

laws emerge from positive – namely parliamentary – decision procedures and are enforced by positive authorities (the executive). In cases of conflict, a further authority, the courts, are charged with interpreting the laws. The political and legal order is a complex structure of essentially positive rules, authorities, and powers. In such a complexly balanced yet unrestricted positive structure, the call for a supra-positive critique has lost some of its sense. The perspective of political justice apparently resides, politically speaking, in no man's land. In the view of the modern polity, it is merely utopian.

Once the question of justice is removed from the agenda, law and politics are studied only by way of positive science, in the form of political science, legal science, economics, social science, and history. Philosophy can provide theories of argumentation and methodology, and serve a preparatory and auxiliary role. But as a normative theory of law and the state, philosophy, as well as any philosophical critique of *Herrschaft*, has had its day. The Leviathan is immunized against limitations imposed from a moral perspective.

Equally good reasons underlie the second, anarchist critique of political justice. If the standpoint of legal positivism is rejected, and one relies instead on a critique of the existing powers of the state and its enacted laws, then the idea of political justice appears to amount to a half-hearted political and legal critique. This reproach is even more compelling when – as is the case with the reassessment of the discussion of justice – the principle of freedom is defended. Any political order, even one thoroughly “just,” involves commands and prohibitions which restrict the freedom of citizens and which, according to the character of the regime, secure obedience through either force or threat of sanctions. In this case, though, a political and legal critique directed against societies in

which citizens are oppressed or exploited is insufficient. The critique must be more radical. It must reject the political order outright. Instead of a just *Herrschaft*, this position defends the idea of freedom from *Herrschaft*.

Whereas political and legal positivism abstains from the question of legitimation, anarchism raises the question and responds in the negative. With freedom from *Herrschaft* as a principle of society, all political orders are judged illegitimate. In both cases, the idea of political justice is rejected, though the rejection takes place on different levels. In the one case, the moral and – more generally – critical perspective is shut out; in the other, the “conditions of application” for the moral perspective are held to be absent. When law and the state are no longer needed, political justice is as useless as lamplighters in a world of electric lights. In this situation, a systematic philosophy of law and the state cannot take the program of political justice for granted and proceed to seek specific principles of justice. It must rather first engage with both challenges and then undertake a reassessment of the discussion of law and the state by way of this double challenge. Against legal positivism, the moral perspective and the constraints it imposes on legal and political institutions must be defended; against anarchism, those institutions themselves must be defended.

At least in their strict forms, anarchism and legal positivism specify ground rules for the political world which are mutually exclusive. Between them there is an *antinomy* – that is, a conflict between two laws which each have considerable plausibility but which cannot coexist. Resolution of this conflict is not possible through the acceptance of one and rejection of the other position. Rather, it is a matter of examining both the justification for and limits of both laws, and of overcoming the contradiction by way of a “determinate negation.”

The thesis of strict political and legal positivism consists in the *carte blanche* of an unlimited endorsement of a political order; the antithesis of strict anarchism lies in the radical rejection of the same political order. The antinomy is rooted, then, in an absolute contrast of position and negation, in the opposition between pure legitimation and complete limitation. We can call the uncritical defense of a political order political dogmatism, and its uncompromising rejection political skepticism. The task of a philosophy of political justice, then, is to overcome the opposition between political dogmatism and political skepticism.

In order for this to be possible, we need a mediating position which combines a non-absolute acceptance with an equally mitigated rejection of legal and political authority. Moral legitimation is possible only by reference to some presupposed limitation; it is not “the state” that is legitimate, but the just state. In the spirit of legitimation, then, we reject freedom from *Herrschaft* as a principle of society. In the spirit of limitation, we oppose the tendency to absolutism. Accordingly we surrender Hobbes’s image of the political community. In place of the Leviathan which carries only the insignia of *Herrschaft* – for Hobbes the sword as well as the shepherd’s staff, hence the symbols of political as well as religious power – we install Justitia, whose symbol of *Herrschaft*, the sword, is henceforth placed in the service of justice.

THE POLITICAL PROJECT OF MODERNITY

The two great challenges to the discussion of justice are characteristic of modernity. For Machiavelli and (in a quite different form) for Hobbes, the polity’s moral character is relegated to the background, and political and legal

positivism begins to make its way in the world. Marx, on the other hand, contests Hegel's theory of the state as the "actuality of the ethical Idea" (1821: §257) and maintains that the state must dissolve and give way to a free communist society devoid of *Herrschaft*.

By the "political project of modernity," I mean any critical theory of law and the state which occupies itself with the mediation between the two opposing tendencies in modern political discourse, positivism and anarchism; and which relies for this mediation essentially on the concept of freedom (of action). This mediation represents, in a sense, the "culmination of modernity in the realm of the political." Significant intimations of this mediation are to be found in Kant's legal and political philosophy.

The political project of modernity is fueled by two basic experiences: on the one hand, the radical crisis of the political community and the shattering of the legal and political order; and on the other hand, the radical critique of the political status quo in terms of exploitation and oppression. The paradigm of oppression is the denial of basic human rights. Political and religious civil wars exemplify the shattering of the political order. These civil wars are part of the historical background for Hobbes's political philosophy; although such crises have been more moderate in pluralist democracies, they have been perpetuated in another form, that of the conflicting interests of various groups.

Depending upon which of these two experiences political philosophy takes as fundamental, it sets opposing tasks for itself. The experience of civil war has led to positivist legal theory and the idea of a state which answers only to positive law (in the milder democratic case of conflicting interests, to "legitimation through procedure"). The experience of political oppression, on the other hand, has generated support for the idea of freedom from *Herrschaft*

as a principle of society. The antinomy of the political, the opposition between political and legal positivism on the one hand, and anarchism on the other, is rooted in the different political experiences taken as fundamental.

In civil war, the need for basic political institutions is brought home vividly. Laws and the state are necessary in order to guarantee peace and to make possible the survival of human freedom and happiness. A political philosophy which focuses narrowly on the danger of civil war (in more recent times, on the less dramatic specter of ungovernability) thinks in categories of friend and foe, of decisions and their enforcement, of commands and obedience. This type of philosophy tends toward an absolutization of positive law and order. This characterization applies both to political and legal positivism and, in a weaker form, to purely procedural (liberal or functionalist) theories of democracy, according to which the standard of democracy lies exclusively in procedure and not also in the ends or goals of the procedure.

In all these species of political and legal philosophy, law and the state are conceptualized in terms of power and competition, and the concept of justice is denied a constitutive role. Law and the state are not only religiously but also ethically neutralized. These theories tend toward political amoralism and a cynical view of authority.

The opposing tendency proposes a critique of law and the state which starts from the other basic experience, that of exploitation and oppression. Passing over the significance of authority and conflict in politics, and shutting out fear of the extreme case of civil war, it plays down the need for a positive legal order and for public safety as assured by political authorities. The various forms of "critical theory" call attention to the sometimes hidden forms of oppression and exploitation and trace these phenomena to structural principles of society such as capitalist economics or the

institution of private property. These theories often lead to anarchism by designating political and legal order as such as the ultimate source of all oppression and by calling for its dismantlement.

In some cases critical theory targets only the “surplus value” of political *Herrschaft*, those political structures which undermine the idea of a just social organization. In such cases – if we leave aside some of critical theory’s more exotic concepts and diagnoses – justice-theoretical claims are still unproblematic. Doubts arise, however, as soon as justice is sought without any allowance for coercive public authority. At that point critical theory escapes the tendency toward cynicism characteristic of its positivist antagonists only by embarking on a slippery slope toward sentimentalism.

The experience of oppression and exploitation, to which critical theory rightly draws our attention, not only stands in opposition to the experience of civil war; it is also the antithetical moment in the experience of civil war itself. Civil war not only represents an anarchic situation which can be overcome by a politically assured peaceful order. It also results, in many cases, from massive injustices which citizens are no longer willing to bear. Thus civil war is not overcome by just any political authority whatsoever. True and lasting peace depends on respect for the basic claims of justice, disregard of which unleashes further unrest. Political justice, it seems, is no moral luxury, but rather a necessary condition for human social organization. *Opus iustitiae pax*: peace is a work of justice.

Exclusive orientation to one of the two basic experiences, and the consequent isolation of the concept of “law and the state” from that of “justice”, amount both to a philosophical mistake with practical consequences, and to a political prejudice with theoretical consequences. A political philosophy which will do justice to both basic political

experiences, the radical breakdown of the political community and the radical critique of its basic structure, must take account of all three concepts: law, justice, and the state. It won't do for the three concepts to be addressed independently and successively. The aim is not merely to represent human society in encyclopedic form. Rather, we seek a systematic connection, which can be formulated in the following three-part hypothesis: if human social organization is to assume a legitimate form, it must have the character of law; the legal system must aspire to be just; and the just legal system must be dedicated to the protection of a public legal order, i.e. the form of a just state. The three-part Main Thesis of political philosophy can thus be set out as follows:

- 1 The state has an obligation to justice.
- 2 Political justice is the normative-critical standard for all law.
- 3 A just legal order is the legitimate form of human coexistence.

Each of the constituent claims of this three-part Main Thesis has been contested. They are not, however, intended to stand each on its own, but rather as a three-part, interdependent conjunction. Only if justice is understood as a political and legal concept and not as a category of personal morality, and only when political justice is from the outset linked to its realization in the state, can the insights of political and legal positivism be granted and the cynical consequences of delegating legal and political authority to the arbitrary will of the political leadership be averted. Moreover, it is only when laws and the state are fundamentally devoted to justice that the rightful concerns of critical theory – categorical refusal of all oppression, exploitation, and despotism – can be addressed, and its more rapturous moments – according to which human community can take legitimate form only after the undoing

of all coercion and after the withering away of the state – can be filtered out and left behind.

The reassessment of the discussion of justice also plays a role, more generally, in current debates about ethics. The revival of philosophical ethics in recent years has yet to overcome the alienation of philosophy from political and legal theory. Thus, the discourse ethics of Apel and Habermas ignores the question whether there are moral obligations the recognition of which human beings owe to one another, and whether these obligations can legitimately be enforced by coercive legal and political authority. The same neglect is characteristic of the constructivist ethics of the Erlangen and Constance Schools. Rawls himself develops certain principles of justice for the basic structure of a society, but the legitimation of political and legal actualization of these principles does not figure in the theory's agenda; coercive authority is seen as a strictly Hobbesian issue (1971: §§38, 40). In the reassessment of the discussion of justice, this deficit must be made good. Ethics must be expanded into an ethic of law and the state, and the theory of justice must take the form of a theory of political justice. Coercive political authority must be discussed from a moral perspective.

The reassessment does not take aim one-sidedly against noninstitutional discourse theories. It also criticizes non-ethical theories of institutions. The modern theories of institutions, from Hobbes through Gehlen and Schelsky up to Niklas Luhmann, work within formal parameters which begin with the idea of selfpreservation as subhuman and thus so unproblematic that ethical reflection appears superfluous. For human beings, however, selfpreservation bifurcates into mere survival and a life worth living, and these two goals can come into conflict with each other. Moreover, neither for mere survival nor for a life worth living do individual and collective interests necessarily come together.

Consequently, these parameters, drawn from the subhuman realm, are not at all unproblematic. Contrary to the naturalistic tendency of modernity, a reflective theory of institutions is impossible without a discussion of its normative premises – that is, without ethics.

In a legal and political discourse oriented around justice, there is a certain skepticism toward a critical theory of society which rejects certain political and legal activities but systematically brushes aside the question whether, and under what conditions, political and legal acts are legitimate. Habermas, for instance, criticizes certain legislative and regulative actions as invasions of the familial, educational, and social realms (1981: VIII.2). His critique would be philosophically persuasive only if he discussed the legitimacy of coercively regulated coexistence and, if need be, provided foundations for principles of legitimation and limitation of coercive powers. A theory of political justice “takes a step backwards” relative to critical theory insofar as it appeals to such principles in order to designate certain (familial, educational, and social) political regulations as either an unwarranted incursion by the state or, on the contrary, as a legitimate responsibility of the state, perhaps even demanded by justice. It does not deny that a critique of *Herrschaft* may be justified, but it begins by investigating the basis for discursive critique.

A POLITICAL FIRST PHILOSOPHY

The political project of modernity, as it may be called from a socio-historical perspective, amounts, in systematic form, to a first philosophy of the political. Through a confrontation between legal positivism and anarchism, the reassessment of political and legal discourse can be radicalized to a point

where it attains the rank of first philosophy. The reassessment of the Leviathan will not, in the fashion of postmodernism, say “farewell to matters of principle” (Marquard 1981). Rather, it will welcome principles and seek, in a weak sense, foundations. It seeks to justify, to provide foundations for, all that is in fundamental dispute concerning law and politics. That which is undisputed, on the other hand, it employs as premises.

The perspective of first philosophy is to be understood here in two senses, the one modest and the other ambitious. If the radical reassessment is not to be superficial, we need to seek in the first instance only a foundation, not an all-encompassing system, much less some “moral-political discourse” which treats concrete problems of politics according to mediating principles of justice (see pp. 312–19 below). On the other hand, we must discuss any deep foundation which is essential to philosophically satisfactory justification of specific principles of justice.

Some liberal theorists raise a political objection to a first philosophy of law and the state. Radical reflection, they argue, involves deep foundations, and the political achievements of the liberal democracies consist in a certain indifference toward ultimate questions. This indifference, captured in the idea of the state that is neutral among worldviews, is the solution to the radical crisis of modernity brought on by the bloody religious wars. In lieu of bloody battles over ultimate questions (about God and other issues of faith), we substitute peaceful debate over penultimate questions. About the latter, agreement can be found, since, unlike ultimate questions, they lend themselves to compromise.

This objection rightfully emphasizes the neutrality of the modern state with respect to worldviews, and sees in this neutrality a sign of developed political culture. It overlooks,

however, the fact that liberal democracies also rely on agreement about deep issues. They presuppose, for instance, an affirmative answer to anarchism's question whether and according to what principles social coexistence in the form of a state can ever be legitimate.

What is most important for political and legal discourse is not the distinction between ultimate and penultimate questions, but rather the understanding that the ultimate questions of one or another person are not the same as those of a political community. It is not only in religious matters, but also, for example, in the choice of friends and careers, that we deny the role of the state. The reason for this is not that such choices do not lend themselves to compromise. Rather, these choices, like religious questions, belong to a realm of personal freedom which a political and legal order should facilitate and protect and never encroach upon.

Reflection on the foundations of law and politics is not animated by disinterested curiosity. A practical and political interest informs its treatment of the questions of legitimation and limitation of political structures. Thus, a philosophical discussion of justice can rehabilitate Aristotle's powerful albeit controversial idea of a philosophy of praxis as *practical philosophy*. Our reassessment takes on Aristotle's research program, though without committing itself substantively or methodologically to his concept of ethics and politics. The philosophy of the political becomes political philosophy, and the first philosophy of law and the state becomes a political first philosophy.²

The expression "practical philosophy" stands in contrast to "theoretical philosophy," and both expressions may sound somewhat odd, perhaps even provocative. Philosophy, after all, is itself a form of theory. Hence the qualification "theoretical" appears superfluous, while "practical" seems contradictory. "Practical" suggests the management of