

Theorizing Transnational Law – Varieties of Transnational Law and the Universalistic Stance

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A. The Challenge of an Epoch

It is difficult to put a label on a historical period. Human history is full of variety, complexities and contradictory developments. Consequently, the precondition of grand theories of history is often their openness to unjustified simplification. On the other hand, some orientation is indispensable, and for this, general descriptions are helpful if one stays aware of their limited function and value. With this in mind it is possible to state that the post-war period is marked by what one may call a universalistic stance.

The universalistic stance is based on one central, leading idea: the content of central moral and legal norms is valid and can be legitimized irrespective of factors like historical and cultural genealogy or religion. This is not to mention other factors that have been deemed important in this respect by eminent thinkers, such as the climate or the position of the social class a person belonged to in the necessary historical development of human civilization.

This central idea is neither particularly new nor original. There are many universalistic moral theories, from Plato to Kant and beyond, and the same holds for the legal sphere. Here, the Natural Law tradition was inspired by it, classically formulated by Stoic thought in antiquity and continuing to be actively present until the dawn of modernity. After this, other modes of normative legitimation gained increasing prominence, though the idea of Natural law has never ceased to attract interest.¹ One can find more than traces of the universalistic stance in the history of public international law wherever the idea was formulated that there are norms which can claim validity beyond a limited group. There are other, much less obvious examples. From a certain perspective, the history of European private law since the rediscovery of Roman law is a potentially interesting manifestation of this idea, despite its cultural variety, which is unfolding not only along the

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¹ See H. L. A. HART, *THE CONCEPT OF LAW* 189 (1961) (describing the minimal content of Natural Law).

division lines between common and civil law countries. This is so, because the interesting question can be asked what common ground made this tradition possible, the latest chapter of which is currently written in the framework of the European integration, for instance, in respect to the foundations of contract doctrine or other basic institutions. The same observation can be made in the history of criminal law. The variety of its conceptions is only one part of its story. There are common structures and elements, such as the differentiated role of the *mens rea* in constituting a crime, the modern offspring of which is transformed in building blocks of the developing doctrines of international criminal law. These traces of the universalistic stance in legal history are not well explored topics, not least because there are often not explicit, but hidden in apparently differently oriented practices and theories, but they certainly merit some (new) thought. These developments and the questions they raise are evidently not limited to what is commonly understood as the European or Western culture. Similar questions can and should be asked for other legal cultures and their rich traditions.

Interesting as these examples are, they need not be pursued in detail here. Today, the core issue for understanding the impact of the universalistic stance for transnational law and the international legal culture of which it is a part is different. Transnational law has various meanings, including rules created by non-state actors which gain binding force. It is, however, best understood in a wide sense as any law that transcends the scope of traditional concepts of law, conceptualized within the limits of a nation state, be it by its source, its scope of application, subjects or addressees. The central topic for this kind of transnational law and the international culture in general is formed by the human rights culture that has grown in the post-war period. This human rights culture has various dimensions. At the national level, many constitutions protect fundamental rights, important ones of which are understood and applied as true human rights, which means their subject is any human being, not just the citizens of the respective state. The same is true for supranational organizations like the EU. Here too, fundamental rights are protected beyond the citizens of the member states. Many of the rights of the European Charter of Fundamental Rights are therefore consciously drafted as human rights, despite some exceptions that may be open for critique.²

On the international level the human rights culture is embodied in the international bill of rights formed by the Universal Declaration of Human Rights, the mayor covenants and respective customary law, some forming *ius cogens*. These rights are protected by various mechanisms, many not particularly effective, some even counterproductive. Other institutions like the European Court of Human Rights have comparatively helpful effects, despite the strain put on them due to an excessive workload, among other things. The rights of individuals are thus a material yardstick of public international law, increasingly

² Matthias Mahlmann, *1798 Renewed? Prospects of the Protection of Human Rights in Europe*, 11 CARDOZO J. INT'L & COMP. L. 903 (2004).

taken to limit state sovereignty, and thus challenging the building block of the Westphalian System. In addition, human concerns are not only central to the material content of objective law, but individuals are emancipating themselves from their role as objects of legal norms, as they have become increasingly legal subjects of public international law.

The grown human rights culture is not only embodied in public law, especially constitutional law or public international law; private law has a very important human rights dimension one should not forget. Private autonomy, that is the freely exercisable legal ability to determine one's own legal bounds, is undoubtedly a very important human right. As this is true for any individual, not only liberties have to be established and protected by private law, but their fair limits have to be drawn as well. Private law is the attempt to create a civilized constitution of private autonomy that guarantees such freedoms justly distributed among the subjects of the legal order. There are various recent developments that are directed at re-calibrating the human rights content of private law. Because of its contentious nature, anti-discrimination law is a good example. In Europe in the last few years, a wide-ranging regime of protection against discrimination has been established beyond the classical spheres of protection against discrimination on the ground of nationality and sex or gender, increasingly permeating important parts of European private law.³ The explicit aim of this legal regime is to bolster important human rights standards. Among them are the protection of equality and the necessary respect to which individuals are entitled. Anti-discrimination law has a central *liberal* point, too: it extends freedoms to those who do not benefit from legally guaranteed liberties because of some characteristic they possess, for example because they cannot rent a flat due to a certain unwelcome skin color or religious affiliation.

The criminal law is another important example. A civilized criminal law system is in many ways related to human rights. It is not only limited by fundamental rights, but should protect these standards by its architecture and normative content. There are many examples where progress has been made in this respect, though not self-evident given the many incidents where criminal law was and is used for other purposes, such as the protection of power or the suppression of alternative ways of life.

These developments are, however, only part of the picture. The human rights law in the books is not the human rights law in action. There are many shortcomings in the system as it stands, some of which, like the problem of enforcement, have previously been mentioned. In addition, even this less than perfect law has not reached every corner of the world. There are enough regimes where human rights are, at best, elements of politically helpful rhetoric and tools of managing ideological resources to manufacture facades of legitimacy. In addition, there is no guarantee and not even a very well founded

³ See Matthias Mahlmann, *Gleichheitsschutz im Europäischen Rechtskreis*, in *GLEICHBEHANDLUNGSRECHT* 87 (Beate Rudolf & Matthias Mahlmann eds., 2007).

hope that things will get better. The conviction of inevitable progress, if it ever was entertained, has disappeared with the downfall of teleological historicism. The more modest hopes of progress have been shattered through recent developments like the erosion of most fundamental human rights like *habeas corpus* or fair trial guarantees in the so called war against terror.

Nevertheless the human rights culture, how fragmented and endangered it may be, still forms a remarkable property of the epoch, the midwives of which were the death and destruction of World War II and the crimes committed in its wake.

B. Reconciliation of Pluralism

The universalistic stance is in consequence real enough. It is more than the illusory dream of confused moralists. It is a hard fact of contemporary life. On the other hand, the plurality of legal conceptions is equally real. In this respect, the most important gulfs are not necessarily between different traditions but within what is commonly called legal cultures. Examples like abortion illustrate this quite well.

This does not necessarily form a problem for the universalistic stance, as factual plurality of norms can be reconciled with a universalistic theory of legitimacy. There are three important ways to do that.

The first one understands the existing plurality of normative orientations as a step in a sometimes long process toward a convincing conceptualization of a particular right or value. The reluctance of the Swiss to extend the suffrage to women is an example for this. To deny the vote to women on the federal level until 1971 can hardly be taken as something other than a transient phase in the arduous process of not only understanding what human equality is about, but of acting on the foundations of some basic insights in this respect.

The second way of reconciliation of variety and universalism understands normative plurality as the necessary consequence of fallible human insight. This is a basic demand of epistemological modesty. The epistemological claim that there are universally legitimate norms does not entail that they have been finally ascertained by anyone or any culture, let alone by a single author. Universalism is about an epistemological possibility, not about the reality of a table of norms beyond serious, legitimate and indispensable doubt. It is therefore a question that has to be asked constantly: whether the norms, which claim universal legitimacy, are doing so with some justification.

The political mirror image of this epistemological modesty is tolerance of other normative visions until there are very clear signs that they are on the wrong track, such as the perception of the impossibility of women as political agents. What the standards may be

and what their origin could be, that establish the lack of plausibility of such norms is sketched below.

The third way to reconcile variety and universalism also has to do with tolerance, though not derived from epistemological grounds, but directly from a normative source. If one takes the autonomy of individuals seriously, they have a *prima facie* right to have space to do what they want, including creating normative orders of their liking. This freedom, if taken seriously, should be not censored before hand, especially by limiting it to certain exercises of human liberty, such as those that foster human autonomy as proposed in some parts of today's theories of liberty. Liberty with an attractive sting is the liberty to decide for oneself for what it is best used. Only when certain limits are transgressed, for example denying political autonomy to some, these choices can be legitimately limited by law, based on a process of new democratic cultural orientation.

C. Universalism and the Irony of Modern Theory

There is, however, another more fundamental challenge to the universalistic stance. There is the widespread impression that there is no theoretically sound foundation for universalism. On the contrary, the universalistic stance appears as outdated rhetoric, as clumsy persuasive definitions, a piece of sticky sentimentalism, a last chapter of metaphysics of those theoretical know-nothings who have not yet understood the liberating message of the philosophical ironists borne from the consciousness of the contingency of human intellectual worlds and final languages.⁴

The background of this perception is another mark of the epoch. Classical sources of normative standards, like the teleology of history, authoritative traditions, a substantial conception of human nature or of an individual practical reason, have ceased to be springs of renewed moral and legal orientation.⁵ Crucial is the disenchantment with reason. As far as *practical* reason is concerned the critique of what one might call the project of *Socratic Intellectualism* is most important. Normative issues have ceased to appear as the possible object of true insight, be it a mystical daimonion (δαίμόνιον)⁶ or a practical reason.⁷ This is necessarily so, because moral judgment has no cognitive content. Consequently, for many there is no rational argument possible based on universal standards of right and wrong, which are more than the contingent, ephemeral, fleeting products of social and cultural formations that wrongly and conceitedly interpret themselves as universally valid.⁸

⁴ See, e.g., RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989).

⁵ See JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG* 17 (1992).

⁶ PLATO, *APOLOGY*, 31 d, 41 d.

⁷ IMMANUEL KANT, *5 CRITIQUE OF PRACTICAL REASON* (1788).

⁸ JEAN-FRANÇOIS LYOTARD, *LE DIFFÉREND* 208 (1983).

In moral discourse, as in other intellectual endeavors, there are no *vindictory* statements, just the reshaping of emotions and language games through time.⁹

From this starting point, different theoretical projects are pursued. One example is the theoretical reconstruction of legal systems and its internal legitimacy claims as part of the functional reproduction of autopoietic systems.¹⁰ Another is the understanding of law as a system of normatively organized allocation of goods according to criteria of efficiency. This is the idea behind classical law and economics.¹¹ Behavioral law and economics in contrast is interested in empirical findings about the psychological patterns of decision making and their impact on the law, for example, through—perhaps helpful, perhaps misleading—cognitive heuristics.¹²

Another option is to embark on the project of theoretical deconstruction. The relativity of foundational narratives is demystified, revealing how law is created through varieties of force, thus tearing away the masks from the hidden face of power.¹³ This course of argument is supplemented with some variation of an ethics of the Other, inspired by Levinas's thought,¹⁴ or drawing from different sources, like Rorty's sentimentalism, who is hoping to curb cruelty through the educational effect of literature based not on the development of ethical standards, which is the flawed metaphysical project, but based on the perception of suffering.¹⁵

A last example is the reformulation of universalism as discursive proceduralism. This position accepts the death of the idea of practical reason in the traditional sense but

⁹ See Bernard Williams, *Philosophy as a Humanistic Discipline*, 75 PHIL. 487 (2000) (discussing the notion of vindictory statements and their impossibility).

¹⁰ NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* (1995).

¹¹ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, (7th ed. 2007).

¹² See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioural Approach to Law and Economics*, in *BEHAVIORAL LAW AND ECONOMICS* 14 (Cass R. Sunstein ed., 2000) ("The task of behavioural law and economics, simply stated, is to explore the implications of actual (not hypothesized) human behavior for the law. How do 'real people' differ from *homo economicus*?"). For the role of heuristics, see the exchange in: Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531 (2005), and John Mikhail, *Moral Heuristics or Moral Competence? Reflections on Sunstein*, 28 BEHAV. & BRAIN SCI. 557 (2005).

¹³ Jacques Derrida, *Force of Law: The 'Mystical Foundation of Authority,'* in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3 (Drucilla Cornell, Michael Rosenfeld, & David Gray Carlson eds., 1992). For more comments, see Matthias Mahlmann, *Law and Force: 20th Century Radical Legal Philosophy, Post-Modernism and the Foundations of Law*, 9 RES PUBLICA 19 (2003).

¹⁴ EMMANUEL LEVINAS, *TOTALITÉ ET INFINI* 173 (1961).

¹⁵ RORTY, *supra* note 4. Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 111 (Stephen Shute & Susan Hurley eds., 1993).

names a legitimate heir: communicative reason, embodied in language and the structures of understanding of the *Lebenswelt*, the life world, that is *unhintergebar*, that cannot be transcended, though of course destroyed, by social agents. This is so, because this *Lebenswelt* embodies the objective spirit that is the precondition for forming personhood and individuality through reciprocal communicative interaction in the first place. What is left from universalism, and this is for some a lot, are inclusive procedures of determining the content of norms, be it in morality or in law. These procedures and the social structure they yield are the true utopia, the space of human interaction and personhood without estrangement.¹⁶ From this starting point the analysis of law is unfolded, for example, through a system of rights in which private and public autonomy are co-original (*gleichursprünglich*).¹⁷

D. The Limits of a Consensus

I. The Predicament

The resulting predicament is interesting: On one hand there is a concrete, though limited and fragmented, normative reality. This is especially but not exclusively embodied in human rights, which is clearly based on the universalistic stance. On the other hand, there is a widespread and influential theoretical reflection that in one way or other declares that this reality is built on sand and rests on nothing more than a couple of influential, but in principle easily discernible epistemological fallacies.

One way to deal with this situation is foundational agnosticism. This attitude can be found in some parts of the modern human rights culture. For some, not the least within the legal sphere, it is enough that there are positive human rights catalogues that are not seriously politically endangered (who wants to get rid of the US-American Bill of Rights or the European Convention on Human Rights?) and on this basis to embark on the admittedly difficult and time consuming constructive business of unfolding the given positive law. The foundational question appears as something that may not have an answer which is, however, not particularly troublesome, as no such answer is needed in the practice of real legal work, which is happily saved from foundational scruples by the steadfast security of positive law.

There are at least two reasons why such foundational agnosticism is not the best way ahead. The first is one of legal hermeneutics. There are good arguments to be made that, due to their abstractness, though not solely because of this property, human rights cannot

¹⁶ JÜRGEN Habermas, 1 THEORIE DES KOMMUNIKATIVEN HANDELNS 533, ("Die utopische Perspektive von Versöhnung und Freiheit ist in den Bedingungen einer kommunikativen Vergesellschaftung der Individuen angelegt, sie ist in den sprachlichen Reproduktionsmechanismen der Gattung schon eingebaut".)

¹⁷ HABERMAS, *supra* note 5, at 154.

convincingly be interpreted without an encompassing conception of what human rights are in fact about, both in general and regarding concrete norms of liberty, equality and dignity. Such encompassing account is a theory of fundamental rights.¹⁸ Such a theory cannot be formulated without recourse to sources of legitimacy, more precisely moral legitimacy. In consequence, the apparent solution of the foundational problem, the safe haven of positive law, drives legal thought by hermeneutical necessity back to the foundational questions it wanted to escape.

The second reason is one of sober social, historical and political observation. If the gruesome 20th century teaches anything, it is that agnosticism about the basis of central norms is no longer an option. This option has vanished in the horrors of the battlefields and concentration camps. Human beings have to take a stand as to the norms they want to defend, and the reasons why this is so, if these norms are to survive. It should be noted that this is not an elitist project of some intellectual groups. Were that the case, hope for the preservation of the human rights culture would be small, given the well-illustrated possibility of moral corruption of such groups in both the past and present. Defending fundamental norms is a common human project, improbable on all accounts, but a surprisingly real possibility as indicated by the practical universalism of the more hopeful aspects of recent history.

II. The Way Ahead

Consequently, there seems no way around directly addressing the foundational problem. The first step in doing so is the following observation: the theoretical challenge to the universalistic stance faces more difficulties than is often assumed. A central problem seems to be that its main premise, shared across the frontiers of various theoretical camps, that the idea of practical reason, or (historically less suspiciously formulated) of a useful human faculty of moral judgment, can no longer be seriously entertained is less convincing than its status in many contemporary discourses suggests. There are various reasons for that. Some of the more important are the following:

The first is that in their arguments, the critics of the universalistic stance often rely on normative propositions, the legitimacy of which they deny, or for which they do not provide a convincing explanation. Many of the challenging theories are self-contradictory or incomplete. Again, some examples: Luhmann's treatment of human rights is marked by the tacit acceptance of the legitimacy of human rights.¹⁹ Though certainly plausible, this position is inconsistent with the tenets of system theory and its radical constructivism. A

¹⁸ See MATTHIAS MAHLMANN, *ELEMENTE EINER ETHISCHEN GRUNDRECHTSTHEORIE* (2008).

¹⁹ LUHMANN, *supra* note 10, at 576 - 579. For a background understanding of human rights, see NIKLAS LUHMANN, *GRUNDRECHTE ALS INSTITUTION: EIN BEITRAG ZUR POLITISCHEN SOZIOLOGIE* (1965), and NIKLAS LUHMANN, *DIE GESELLSCHAFT DER GESELLSCHAFT* 1075 (1997).

consistent analysis of human right in terms of systems theory would be unable to explain the main point of human rights, namely, the drawing of a line to the functional instrumentalisation of human beings by social forces. The functional analysis of systems theory deriving the yardstick for functionality from the needs of mechanisms of autopoietic reproduction cannot explain a phenomenon that transcends the imperatives of these mechanisms.

Another example is the economic analysis of law, which has provided many insights. There are, however, limits to the extent to which the content of law can be explained with reference to efficiency. Again, human rights are a prime example for this. As untradeable goods, they cannot be conceptualized in the framework of a theory that bases efficiency on hypothetical exchange relations.²⁰ Insofar as the economic analysis of law acknowledges this, it poses questions beyond the borders of its own theoretical enterprise.

Varieties of deconstructivist theories provide another example. Here, the implicit reference to ethical norms, the deconstruction of which is the surface language of these pursuits, is surprisingly manifold. For example, the theory of liberal irony argues against the relevance of ethical principles. But are such principles not necessarily implied if cruelty is criticized?²¹ Is such a position really consistently tenable without a norm that postulates respect for the integrity of human beings? Why is cruelty a problem for those who do not suffer if no such norm exists? Additionally, what about the respect for the Other, which is often impressively and credibly stated? Is it really possible without some kind of account for the origin of the value of human beings? The epiphany of the *visage*, the realization of the Other in its Otherness is not enough in this respect. It leaves the question open, why the Other, in all its fully realized Otherness, *should* not be mistreated and abused.

In a final example, discourse theory faces the question whether it can really provide sufficient reasons for the normative foundations of the proceduralism it develops. It is argued that human equality is a necessary presupposition of the universal pragmatics of practices of understanding. One cannot engage in them without accepting it. There is some truth in this. There is something subversively egalitarian in unfettered intellectual exchange between human beings. The question is, however, why one should engage in these practices in the first place. Selective communicative exclusion is not the end of the human form of life. Quite impressive achievements can be made within such structures that exclude for example women or people with a certain skin color or religion. The modern natural sciences excluded women from their enterprise for a very long time and nevertheless came to some rather impressive results, though we do not know how things

²⁰ This concept was formulated in the Coase-Theorem. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1961).

²¹ See, e.g., the passages and the tacitly implied ethical norms in RORTY, *supra* note 4, at 84, 88, 91, though Rorty denies this. *Id.* at 88.

would stand if the sources of female creativity had been tapped. The main normative reasons that speak against communicative exclusion as against other forms of exclusion, are consequently not just demands of linguistic pragmatics. Rather, the question is why one should not exclude human beings in general from the many benefits of human life, including but not remotely limited to matters of communication. There are non-procedural preconditions to proceduralism that cannot be the outcome of discourses, as they are the precondition that they are established in the first place, most importantly human equality and its further ethical foundations.

The second reason is that a closer analysis of moral judgments shows that it cannot be understood without a cognitive element.²² Certainly no normative position will be formed without understanding the emotional impact of an action on others. This is a truism embodied in such primordial norms as the Golden Rule, the point of which is to make agents take the perspective of others who are affected by the actions of the agents. Emotive sentimentalism alone, perhaps in the form of general appeals to understand cruelty, however, will certainly not do, as they lack standards for the evaluation of sentiment. The cruelty done to a criminal by sending her to prison is not a final reason not to do it. In these and other cases, intricate moral principles, justice for example, are applied involving the establishment of relations of proportional equality between a treatment, the cause of the treatment and of persons which form a non-emotional cognitive component of moral judgment, among others. A moral judgment predicating a moral property to some object of evaluation, say a human action, certainly differs from a descriptive or explanatory statements about facts. An action is not in the same sense just as water is composed of hydrogen and oxygen. As the before mentioned elements of moral judgment illustrate, this does not, however, mean that moral judgments do not have a cognitive component. It is important to notice that these observations do not commit oneself to an ontology of metaphysical moral entities. The cognitive component of moral judgment can be reconstructed without recourse to such an ontology, understanding it as part of the internal resources of the human mind.

This leads to the third reason why the thesis of the death of practical reason may be more doubtful than it seems. There may be promising and yet widely unexplored ways to reconstruct the idea of practical reason, or less historically loaded, the human conscience, in a manner that avoids the various, not only metaphysical pitfalls of the past.

An interesting possibility in this respect is provided by the modern theory of the human mind. In this framework the human conscience, the ability of moral judgment, can be understood as *generative human moral faculty*, constituting a central element of the human cognition, governed by principles that form something that can be metaphorically

²² For more detail on the phenomenology of morality, see Mattias Mahlmann, *Ethics, Law, and the Challenge of Cognitive Science*, 8 GERMAN LAW JOURNAL 577, 580 (2007).

termed a *universal moral grammar*.²³ Among these principles are principles of altruism and egalitarian justice that yield *Grundurteile*, or foundational judgments, that are the building blocks of human moral systems. There is a long way from these *Grundurteile* to a differentiated, mildly plausible ethical code, say perhaps a liberal, egalitarian, rights based humanism. These *Grundurteile* are, however, the precondition of the cognitive reality of morality, as for example the cognitive architecture of visual perception is the precondition of the visual representation of the outside world, or as the language faculty forms the constitutive enabling condition for the many uses of language.

The law is a culturally and historically highly determined artifact. Its foundations, its cognitive possibility, may, however, turn out to be unexplainable without recourse to such a moral faculty. This may be true as well for structural components like rules or subjective rights.²⁴ In addition, the specified principles of altruism and justice form not the whole, but indispensable building blocks of theories of material legitimacy. On this basis, a refreshed understanding of the foundation of human rights and the theoretical possibility of a universalism is possible, one that is epistemologically neither naïve nor lacking sufficient epistemological modesty.²⁵

E. Conclusion

In sum, it seems that the universalistic stance, embodied in the modern culture of human rights, is a mayor step forward. This achievement is, however, fragile, and in many ways limited and threatened by powerful forces in the world. Given the course of human history, it is an improbable achievement.

The reality of normative pluralism is reconcilable with universalism in three respects: First, pluralism is a necessary part of historical processes of normative improvement. Second, pluralism is a necessary concomitant of the epistemological fallibility of human beings. Thirdly, pluralism can be reconciled with universalism because of its implied respect for the autonomy of others.

There are influential theories that deny the theoretical possibility of the universalistic stance, creating a predicament. The practice of universal norms, not the least human rights, is confronted with the theoretical denial of its legitimacy. In this situation, foundational agnosticism will not help. This is so, because the hermeneutics of human

²³ See, e.g., NOAM CHOMSKY, LANGUAGE AND PROBLEMS OF KNOWLEDGE: THE MANAGUA LECTURES 152 (1988); Mählmann, *supra* note 22, at 577; MATTHIAS MAHLMANN, RATIONALISMUS IN DER PRAKTISCHEN THEORIE (2nd ed., 2009); JOHN MIKHAIL, ELEMENTS OF MORAL COGNITION (2009). MARC D. HAUSER, MORAL MINDS: HOW NATURE DESIGNED OUR SENSE OF RIGHT AND WRONG (2006) closely follows in constitutive parts Mikhail's previous work.

²⁴ For examples of rules, see MAHLMANN, *supra* note 23, and on rights, see MAHLMANN, *supra* note 18.

²⁵ See MAHLMANN, *supra* note 18, at 487.

rights demand an account of legitimacy. Additionally, positive catalogues of human rights are only as stable as the cultural perception of their well-groundedness.

Interestingly, it turns out that from a theoretical point of view, the universalistic stance is more convincing than it may seem from some influential corners of contemporary theoretical discourse. To account for its foundations, a promising way ahead is a mentalist theory of ethics and law, embedding important parts of practical, moral and legal philosophy in the theory of the human mind.