

Spatial Aspects of Moral Judgements in Lawyers' Heaven, Peoples' Earth and Malefactors' Hell: Leibniz, the Austro-Marxists and Durkheim's Alleged 'Disintegration' Thesis

Mate Paksy¹
(mpaksy@ulg.ac.be)

Recibido: 26/10/2017

Aceptado: 13/12/2017

DOI: 10.5281/zenodo.1133709

Abstract:

Ever since antiquity, lawyers and philosophers have essentially been divided over whether they should keep law, morality and politics separate, or whether the need for their unity is more compelling. In the wake of countless bloody conflicts worldwide, the durability and resilience of this discourse on laws and morals is at once both impressive and sad. The aim of this paper is to show that individual moral deliberation is essentially local and cannot be dissociated from the spatial-communitarian context – neither by describing society as if it were the City of God (Leibniz), nor by demanding that collective spatial contexts should be deliberately ignored in favour of de-territorialized minority rights (Renner and Bauer), nor by criticizing the 'disintegration' thesis which seeks to justify a rights-based Republican vision of society (Hart). It probably goes without saying that recognizing the relevance and importance of the spatial character of our individual normative (legal, moral, religious) judgements in no way implies that legal, moral or political theory-based suggestions, explanations and statements about our societies are either impossible or wrong. The argument tries rather to show that outcome of moral judgments is influenced by the context, therefore a good theory of moral judgement should refer to the spatial contexts as well.

Keywords: Spatiality – Leibniz - Austro-Marxism – Multiculturalism – Deterritorialisation - Disintegration thesis

¹ Lawyer and legal philosopher. Postdoctoral researcher, University of Liege.

Introduction

Immanuel Kant and John Rawls seemingly decontextualized the moral judgements with great success, taking a critical and *sub specie aeternitatis* point of view. This paper is not about these decontextualized moral judgements themselves, but about those moral and political theories that treat the context of judging individually in moral cases. These contexts are spatial, in the sense that no community has ever lived in the world without having a well determined space. Instead of formulating critical assessments of their contributions, here I focus rather on other theories, which nevertheless maintain certain links to Kantian moral and political philosophy.

At the initial stage of our argumentation some remarks are made on the legal and moral philosophy and theology of the most significant pre-Kantian legal philosopher, Gottfried Wilhelm Leibniz. The general idea behind this choice can be summarized as follows. In Leibniz, quite uniquely in my view, the ‘community’ is essentially the community composed of each and every individual (he calls them *vir bonus*) plus God (defined as supreme architect, judge or king). In this pre-Kantian philosophical oeuvre, since jurisprudence forms the foundation for both practical philosophy and theology, so law, morality, politics and theology become organically interrelated areas. This is the most obvious reason why the City of God serves as the spatial context for practical judgements and this moral philosophy should indeed be blind to cultural differences, at least in the Christian culture.

In the second stage of the analysis, we turn our attention to those Neo-Kantian philosophers who felt it necessary to develop a voluntarist theory of community and wished to opt for a materialist and anti-metaphysical premise as a basis for this judicial-political theory. Here the goal is not directly an elaboration of contexts for moral judgements; but if those scholars were right, and minority rights are susceptible to de-territorialization, then the moral judgements of individuals belonging to ethnic or national minority groups would be deprived of the unique features of their particular practical judgements vis-à-vis judgements of the majority members. It will be argued that Will Kymlicka’s critical observations are correct: no political community can exist without efforts toward nation-building. This means that moral judgements in the case of members belonging to

multicultural political communities are spatially determined, and for this reason cannot be deracinated from their spatial-social context, as Rawls' ideal theory seems to suggest.

In the last stage of the analysis, we investigate the limit of paternalist legislation. Treating this question in a traditionally post-WWII academic British way is a sort of trademark of the Hart-Devlin debate on the enforceability of morals through legislation. Whereas their point of departure is essentially the fair use of John Stuart Mill's harm principle, their references to Emile Durkheim, who was one of the Neo-Kantian fathers of sociology, reveal again the hidden Kantian aspect. In this third part of the study, it will be argued not only that Hart provided a bad account on Durkheim's social theory – and particularly on his alleged 'disintegration' thesis – but also that the French scholar's social theory offers an operational frame for the spatialization of moral judgements.

The three stages of the argument treating directly or indirectly the links between law, morals and religious belief follow the typical tripartite theological spatialization, putting Leibniz in Heaven, treating Renner, Bauer and Kymlicka on Earth, and questioning whether the State has the right to judge morally the conduct of malefactors who are supposed to be consigned to Hell.

I. Moral Judgements in Heaven: Leibniz

The first stage of the argument is an ideal place for all of us: Heaven. Here I rely exclusively on Leibniz, but the use of his texts will be pragmatic and goal oriented. He will be presented as a legal scholar who tends nevertheless to preserve practical moral judgements in their organic ties with law and theology (claiming that 'it is necessary to join to metaphysics moral considerations')² and, at the same time, personal commitments to the community as an idealized Republic of individuals where God acts as monarch of the divine city of spirits.

Armed with some sense of practicality, Leibniz sometimes claims that philosophical reflections as foundations are useless for lawyers, who are supposed to be judging usually

² Leibniz, Gottfried Wilhelm. 'Discourse on Metaphysics', XXXV in *Leibniz. Selection.* ed. by Philip P Wiener, New York: Charles Scribner's Son 1951. p. 340.

ordinary cases. He claims that ‘[Y]et as the geometer does not need to encumber his mind with famous puzzle of the composition of the continuum, and as no moralist, and still less a jurist or a statesman has need to trouble himself with the great difficulties arise in conciliating free will with the providential activity of God, (since the geometer is able to make all his demonstrations and the statesman can complete all his deliberations without entering into these discussions which are so necessary and important in Philosophy and Theology)...’³ This statement nevertheless should not be taken literally, as a sort of legal realist credo: rather it is an empirically justified observation on the fact that there are plenty of everyday moral judgements to be taken regularly without a clear concept of free will.

In a sweeping attack on Cartesian thinking – particularly on Descartes himself and Blaise Pascal – Leibniz appears to claim that our moral judgements are overwhelmingly not purely axiomatic. Thus, Chaim Perelman presents Leibniz’s account on legal treatment of proof (*prevue*) and evidence (*evidence*), demonstrating that proof should not be reduced to evidence, given the anti-Cartesian claim of Leibniz that even evidence should be proved. And herein lies the overlapping area of rhetoric and the logic of demonstration: as axioms should be proved by evidence, in argumentation even something that appears evident, or that is *de facto* evident, should be proved. This argument seems totally wrong – not only in moral reasoning, where some concepts, theses or principles should be interpreted as self-evident, but also in everyday judicial practice, where the shortage of time means that self-evident facts need not be proved.

Legal conundrums may emerge not only in everyday life, but on the final day of humankind when the Last Judgement occurs. God, the supreme judge, is finally situated above the everyday human users of legal techniques, such as the fiction:

‘One could invent the fiction, not much in accord with the truth but at least possible, that a man on the day of judgement believed himself to have been wicked and that this also appeared true to all other created spirits who were in a position to offer a judgement on the matter, even though it was not the truth. Dare one say that the supreme and just Judge, who alone knew differently, could damn this person and judge contrary to his knowledge? Yet this seems to follow from the notion of »moral person« which you offer. It may be said that if God judges contrary to appearances, he will not be sufficiently glorified ... but it can be

³ *ibid.* p. 303.

replied that he is himself his own unique and supreme law, and that in this case the others should conclude that they were mistaken.’⁴

Note that in this situation the community of others is there – not just the individual alone who stands in front of the Judge; but this community manifestly is composed of similar persons who share the same error as the individual in question. Indeed, the community of individuals in Leibniz seems to be perfectly homogeneous. This description of society corresponds to the ontology of legal rules in Leibniz. Indeed, after having moved to France in 1672, Leibniz published an excellent critical account of Pufendorf’s legal philosophy. This work can be construed as an indirect critique of Thomas Hobbes’ voluntarist jurisprudence. Leibniz continued to claim that ‘[n]either the norm of conduct itself, nor the essence of the just, depends on [God’s] free decision, but rather on eternal truths, objects of the divine intellect, which constitute, so to speak, the essence of divinity itself’.⁵ This means that legal rules are as rational as God, and their rationality can be discovered by each rule-following individual.

Apparently, by the way, Leibniz’s account is similar to Ronald M. Dworkin’s legal philosophy, who, as is fairly well known, on the basis of this antivoluntarist legal ontology argues that a ‘hard case’ in law should be resolved by finding the ‘one right answer’ to the foundational legal question. The most embarrassing logical puzzles (*casus perplexus*) were already discovered by the Ancient Greeks, and therefore, some three centuries before Dworkin, Leibniz simply ‘refilled’ the powder keg of the Protagoras v. Eulus case.⁶ Let me sum up the case in a nutshell. According to an agreement reached between a law professor and his student, the student should pay his tuition fees only if he wins his first case. Suppose the student is sued by the professor, seeking to enforce the promise: if the student wins against the professor, he will not pay; if he loses, he is not obliged to pay either, because he has not won his first case.⁷ Leibniz does not leave this case undecided. He

⁴ Leibniz, Gottfried Wilhelm. *New Essay on Human Understanding*, para. 22. trans. Peter Remnant, Jonathan Bennett, Cambridge: Cambridge University Press 1996. p. 244.

⁵ Antognazza, Maria Rosa. *Leibniz. An Intellectual Biography*. Cambridge: Cambridge University Press 2009. p. 474.

⁶ Alberto Artosi, Bernardo Pieri, Giovanni Sartor (eds). *Leibniz: Logico-Philosophical Puzzles in the Law. Philosophical Questions and Perplexing Cases in the Law*. Heidelberg, New York, etc.: Springer-Dordrecht 2013. pp. 76-78; pp. 87-89.

⁷ *ibid.* pp. xxi–xxii, 76.

claims *ex mero jure*⁸ that it is fair if the first case is won by the student, and thereafter the fairness should not be applied to subsequent cases in which the former student is involved, now as a practising lawyer.

While Leibniz refers, therefore, to fairness (contrary to the previous case, where God appears to be judging by juggling a rather far-fetched legal concept of fiction), Dworkin refers to the political morality of the community; and here lies one of the evident limitations on the comparison: while Leibniz is an emblematic figure of natural law thinking, Dworkin was reluctant to accept this label and would reject not only the theological foundation of legal theory, but even the notion that moral and legal judgements overlap in every legal case.⁹ It remains nevertheless true that both philosophers flirted with a ‘light’ utilitarian moral theory: Dworkin wholeheartedly denies the reason for the strong form of this approach,¹⁰ and Leibniz agreed neither with Hobbes nor with Locke. And finally, even though both thinkers desire to conceive of law as a system without any gap structured by norms and principles, they do so for diametrically opposed reasons. According to Leibniz, if the sources of law have been reduced to the Code, the judges should henceforth be replaced by a simple judging-machine. Dworkin’s unattainable ideal is first of all counterfactual. Viewed from this perspective, his Herculean judge’s goal is rather to make real the idea of the morally enriched Rule of Law. It is quite obvious that Dworkin’s final intentions are far from the Leibnizian enterprise, and – probably more important in our case – that he has never tried to reformulate his theory in terms of deontic logic, as Leibniz did. From legal philosophy’s cognate areas, it was rather ‘law and literature’ and political theory that affected his legal philosophy.¹¹

Marcello Dascal, in his *G.W. Leibniz: The Art of Controversies*, claims that it is the concept of ‘controversy’ which links Leibniz’s different areas of interest; he holds that he

⁸ ‘On grounds of mere law’ *ibid.* p. xxii.

⁹ See e.g. Dworkin, Ronald. “‘Natural’ Law Revisited’ *University of Florida Law Review* 34:2 (1982), pp. 165-188.

¹⁰ In Leibniz scholarship consensus appears around the fact that he rejected utilitarianism. Martine de Gaudemar in his ‘Leibniz and the Moral Rationality’ in Dascal, Marcelo (ed) *Leibniz: What Kind of Rationalist?* Dordrecht: Springer 2008. at p. 343 states that ‘there is no reason in Leibniz to oppose a moral rationality coming from an Aristotelian influence to a calculating or utilitarian rationality, for the notional distinction between them is not a conflictive opposition.’

¹¹ See e.g. Dworkin, Ronald. ‘Law as Interpretation’ *Texas Law Review* 60:3 (1982), pp. 527-550.

‘dealt with controversies, both theoretically and practically’ throughout his life.¹² The Leibnizian ‘art of controversy’ comprises not only the *ars disputandi*, but also the *ars vivendi* and *ars judicandi*. This interpretation is new, since formerly this practical-dialectical part of the *oeuvre* was ‘systematically neglected’.¹³ Dascal goes so far as to claim that ‘it is rather the juridical model that should serve as a paradigm for science’.¹⁴ (By way of example, the legal presumption was a model for Leibniz’s theory of mathematical probability,¹⁵ not vice versa.) If Dascal is right,¹⁵ it is not the philosopher Leibniz who gradually left behind his legal thinking. On the contrary: it was Leibniz as a lawyer, who introduced the ‘new (legal) logic’ into the domains of metaphysics and theology.

But let us return to Heaven, where the best possible law and morality can be found! Here, in the ideal society, men appear like angels:

‘This is why all spirits, whether of men or of genii, entering by virtue of reason and eternal truths into a sort of society with God, are members of the City of God, that is to say, of the most perfect state, formed and governed by the greatest and best of monarchs; where there is no crime without punishment; no good actions without proportionate recompense; and, finally, as much virtue and happiness as is possible; and this is not by a derangement of nature, as if what God prepares for souls disturbed by the laws of bodies, but by the very order of natural things, in virtue of the harmony pre-established for all time between the realms of nature and of grace, between God as Architect and God as Monarch; so that nature itself leads to grace, and grace, in making use of nature, perfects it.’¹⁶

Strangely enough in the City of God – or, to put it in more ordinary terms, in Heaven – people are therefore capable of acting in an immoral way, since the thesis of perfectly just punishment implies that these citizens are capable of doing wrong. It should be added that God, as Monarch, is apparently a perfectionist legislator, creating ‘as much happiness as possible’ for the citizens. This time perfectionism should be taken seriously, given that theology and jurisprudence are scholarly enterprises of the same genre, precisely because both deal with happiness:

¹² Dascal, Marcelo. G. W. *Leibniz. The Art of Controversies*. Dordrecht: Springer 2006. p. xx.

¹³ *ibid.* p. xxi.

¹⁴ *ibid.* p. xxxiv.

¹⁵ *ibid.* p. xxxv.

¹⁶ Leibniz, Gottfried Wilhelm. ‘The Principle of Nature and Grace, Based on Reason (1714)’ in *Leibniz. Selection* (supra n 1). p. 531.

'Theology treats of eternal happiness, and of everything that bears upon that in so far as it depends upon the soul and the conscience. It is a sort of jurisprudence which has to do with the matters which are said to concern the 'inner tribunal', and which brings in invisible substances and minds. Jurisprudence is concerned with government and with laws, whose goal is the happiness of men in so far as it can be furthered by what is outer and sensible. Its chief concern, though, is only with matters that depend on the nature of the mind, and it does not go far into detail of corporeal things, taking their nature for granted in order to use them as means.'¹⁷

While it is clear from the *Monadology* that the political system in Heaven encompasses a perfect Rule of Law where 'God as architect fully satisfies God as lawgiver',¹⁸ it is quite another matter what the advice would be for the human legislator in terms of a pattern for the just redistribution of goods among subjects. Jon Elster invites us to give a new interpretation of Leibniz's metaphor describing the political community as if it were ruled by the Lex Rhodea.¹⁹ This piece of Roman legislation suggested that the value of any cargo saved from a storm-wrecked ship should be redistributed among all the merchants who had had cargo on the ship. The very idea of describing a political community as a risk community with a limited freedom of contract, with similar assurance, is in reality a profound contradiction of the original idea of distributing happiness equally among individuals, as if every society was similar to the one in Heaven.

II. Moral Judgements on Earth: the Austro-Marxists.

Now let us return to Earth and travel back only a century, to the final disintegration of the Austro-Hungarian Empire. The state-formation existed as a multi-ethnic and paternalistic state, where the local constitutional tradition created a serious obstacle to an exclusively rights-based liberal political philosophy. On a territory where basically only ethnic minorities exist, it is patently obvious that any attempt to maintain multi-national unity was essentially a lost cause: nationalities driven by the nationalist spirit were in a certain manner compelled to demand their 'own' territories, 'own' languages and 'own' constitutions.

¹⁷ Leibniz, Gottfried Wilhelm. *New Essay on Human Understanding* (supra n 3). p. 522.

¹⁸ Leibniz, Gottfried Wilhelm. 'Monadology' in *Leibniz. Selection* (supra n 1). pp. 89, 293.

¹⁹ Elster, Jon. *Leibniz et la formation de l'esprit capitaliste*, Paris: Aubier Montaigne 1975. pp. 138 f.

Some two decades before the final disintegration of the empire, a vanguard of this Neo-Kantian scholarly movement, the philosopher and positivist lawyer Georg Jellinek (from Austria and Germany), famously defined the state in this political-cultural context as having three necessary elements: territory, population and authority. This definition is particularly important and is widely used. Though there was strong distrust of natural lawyers' reasoning (stemming from a certain reading of Hobbes' minimalist moral philosophy), Jellinek thinks that there is a necessary connection between law morality, to the extent that law is an 'ethical minimum'.²⁰ Jellinek himself, as a legal scholar, subordinated the (strictly speaking) legal judgements to the domain of domestic law, but he does not seem to show reluctance to engage in a universalism if individual rights are in question. On the contrary: Jellinek, in his debate with the Frenchman Emile Boutmy, endorsed the idea that so-called 'universal' rights were in fact Teutonic in origin, since that the religious liberty demanded by the German Reformation could be conceived as the original source of Human Rights. For his part, Emile Boutmy tried to promote the necessary link between Jean-Jacques Rousseau and the French Revolution as the start of this idea.²¹

Now let us take a look at Jellinek's general theory of the state (*Allgemeine Staatslehre*). Thanks to him, a clear methodology was introduced to positivistic legal scholarship, marked by a powerful Kantian accent on the distinction between 'is' and 'ought'. Conceived in the most abstract form possible, the State has two faces: a legal-normative one and a sociological-factual one. It would come as no surprise to learn that territory is under scrutiny in both the factual and the normative parts of Jellinek's magnum opus. At the very beginning of his volume, demonstrating the factual environment of statehood, Jellinek interprets the territory as a sociological fact, and in Chapter 13, it is construed as part of the judicial definition of the state.²²

²⁰ 'Law is nothing other than the *ethical minimum* ... it supplies the conditions for the preservation of society; that is, the minimum ethical norms for [social] existence.' See Jellinek's *Die socialethische Bedeutung von Recht* Vienna: 1878. p. 42. as well as Peter Ghosh. 'Max Weber and Georg Jellinek: Two Divergent Conceptions of Law' *Saeculum* 59:2 (2009), pp. 299-347.

²¹ See Kelly, Duncan. 'Revisiting the Rights of the Man. Georg Jellinek on Rights and the State.' *Law and History Review* 22:3 (2004), pp. 493-529.

²² Jellinek, Georg. *Allgemeine Staatslehre* [1900]. Berlin: Springer 1922. 3rd ed. I. 4. pp. 75-80; II. 6. II. A. 1. pp. 140-142.; III. 13. 1. pp. 394-40.

According to Jellinek, ‘territory’ as such is a relatively new phenomenon. As a sort of terminus ad quem, he refers to an article by a certain Klüber (1817), who defined the state *mit einem bestimmten Landbezirk* (with a determined territory). Before that, even a ‘state-emigration from one territory to another’ was conceptually feasible.²³ By virtue of territoriality, the sovereign power can forbid other sovereigns to have control of this territory. This is the negative side of territoriality. The positive side implies that anyone who is found on the territory is subject to the sovereign power. Jellinek remarks that territoriality makes a conceptual difference between states and churches, since the latter are not territorial corporations, if territoriality means that aliens who are on a given territory should be subject to sovereign power merely by virtue of the fact that they are there. Without any prioritization of the normative or factual side, Jellinek seems to be reluctant to decide whether this or that aspect of territory should prevail. The territory of the state (*Staatsgebiet*) remains a polysemantic concept, and this nature of the concept encourages definition of the claims of national minorities with the help of territoriality.

Now let us turn our attention to those political theories that take it for granted that states like Germany in its modern formation, or the Austro-Hungarian Empire, are multicultural societies composed of national minorities. Not surprisingly, the usual definition of national minority follows the definition of the state and has indeed an explicit or implicit reference to the territory being homogeneous groups of people. All this seems to mean that one cannot really argue for the de-territorialization of the concept of the national minority, because in fact it is a nation-state in embryonic form. According to many scholars, the federalization of the state is the penultimate step before secession. In order to keep the geopolitical balance of power unchanged, they prefer to promote ‘non-territorial’ or cultural autonomy.

The debate is still open as to whether drafts and plans of non-territorial cultural autonomy, as elaborated by Karl Renner (before Jellinek) and Otto Bauer (after Jellinek) in Austria, really count as paradigm shifts in the field of the protection of national minorities vis-à-vis the federalist theories on the one hand and the liberal-individualistic theories on the other. Nevertheless, many contemporary political theorists – driven by a desire to

²³ *ibid.* pp. 395f.

promote stability and eternal peace in international relations – suggest that ‘de-territorialized’ theory based on cultural autonomy should be considered a panacea for the whole Eastern and Central European misère.²⁴

Renner’s ‘State and Nation’²⁵ should be construed as a political pamphlet, rather than as an academic study. Despite its political character, it contains the intellectual and political seeds of a modern theory of state as cultivated in German and Austrian universities. This pamphlet-study was first published in 1899, only a year before Jellinek’s grand synthesis, in which he elaborated the above-quoted three-component definition of the state. Renner, one the great framers of the Austrian constitution (enacted on 1 October 1920), tried to distance himself from politics, just as Hans Kelsen did. Both were under the influence of Neo-Kantian philosophy and the dominant positivism. Renner provides the following manifesto: ‘The jurist is as such not a politician. It is his task to clothe given political postulates in a juridical form, to strip the slogans appealing to the emotions of their mystificatory quality and to translate them into bare relations of will ... We believe that we have now honestly attempted to solve the task of the theoretician with reference to jurisprudence. And the theoretician cannot aim for or achieve anything more than the delineation of the constitutional legal principles according to which a solution is conceivable.’²⁶

This manifesto as such does not sound scandalous, though it is obvious that its author is trying to hide the ideological content using judicial phraseology. As for the community of the persons to be protected, the national minority is defined in a legalistic way as a ‘factual personal association’ which has its own ‘rights-holder legal personality’.²⁷ With this, Renner, the legal scholar, elaborates a legal analogy to compare declaration of membership of a national minority with declaration of paternity. The second analogy that

²⁴ See for instance Quer, Giovanni M. ‘De-Territorializing Minority Rights in Europe: A Look Eastward’ *Journal on Ethnopolitics and Minority Issues in Europe* 12:1 (2013), pp. 76-98 or Smith, David J. ‘Non-Territorial Autonomy and Political Community in Contemporary Central and Eastern Europe’ *Journal on Ethnopolitics and Minority Issues in Europe* 12.1 (2013), pp. 27-55.

²⁵ Original title: *Staat und Nation. Zur österreichischen Nationalitätenfrage* [State and nation. To the Austrian nationality question] Wien: 1899. The study was undersigned as Synopticus. Here I am using this English translation: Renner, Karl. ‘State and Nation’ [1899] in Ephraim Nimni (ed.) *National Cultural Autonomy and its Contemporary Critics*. London: Routledge 2005. pp. 15-47.

²⁶ *ibid.* pp. 36, 45.

²⁷ *ibid.* p. 27.

he uses is the organization of a Christian church. If one takes this doctrinal study seriously, one can easily detect the faults of the *per analogiam* arguments. First of all, in most legal systems the declaration of paternity is only a subsidiary possibility in establishing the status of a child, since if conception took place after marriage (or within a certain well-defined period of time prior to marriage), there is an assumption of fatherhood. The unilateral declaration of membership of a national minority group cannot be compared to an act of marriage, which presupposes two parties; indeed, neither the presumption of paternity nor the declaration works as an analogy in the field of determination of membership. The second counter-argument is that it is sporadic for fatherhood to be declared without the consent of the mother, simply because the mother should be aware of someone declaring his paternity. Since the national community's consent cannot be required for a personal declaration of membership, this analogy does not work either. Furthermore, one should be mindful that a declaration of fatherhood is not always a voluntary act, in the sense that it is done on the father's initiative. In many cases, the child's mother requests it, in order to enforce a set of obligations, for example child support. This set of obligations exists independently of the father's rights. Hence, for instance, a father cannot enforce his right of access to his child in return for the payment of the support, while the mother is not allowed to refuse to allow her child to see the father if he has not paid the support and the arrears. In case of a national minority group, there is only a very weak obligation (if any) of simple loyalty to the group, and if minority rights exist at all, their function is to protect the group externally from intervention by the majority, rather than to enforce specific rights inside the group. As for the analogy between a national minority and a Church, that works only if we agree with Jellinek and Renner that the origin of individual liberty is the Protestant vision of religious freedom and tolerance. Unreformed Christian churches – for instance the Russian Orthodox Church or the Roman Catholic Church – do not necessitate a personal declaration for the baptism of newborn children or infants who are unable to declare personally their adherence to the Church.

Compared to Renner, the more radically Austro-Marxist Otto Bauer, in his magnum opus, provides a clearly political theory that gives priority to economic considerations over

legal and constitutional aspects of the protection of national minorities.²⁸ Nevertheless, at one important point at the very beginning of his book, he almost immediately enters the field of legal scholarship. He analyses how Carl Friedrich von Savigny's 'national spiritualism'²⁹ refers to the 'spirit of the people' as a driver of national action. Using Kant's transcendental philosophy, Bauer claims that this is a 'substantialist' vision of the nation, which attempts to get us to believe that the nation really thinks and acts according to its 'spirit'. Such a vision is contrary to materialistic-individualist premises. Savigny and his historical school promoted the organic development of society and made efforts to immunize the political community against fighting and conflict. He famously painted the romantic picture of socio-legal development as comparable to the silent evolution of language. In contrast to this romantic-conservative worldview, Bauer – in conjunction with Karl Marx and Rudolf von Jhering – conceptualized the problem of national sovereignty and minority issues in terms of fight and conflict. Bauer seems to feel frightened that 'national self-determination on the basis of the territorial principle would simply provoke renewed struggles'.³⁰ He defines the nation as 'a relative community of character'; and being 'relative', the way of organization of the peculiar unity should be variable. He claims that a national minority should be organized as an association of persons,³¹ and not as a territorial corporation. The conflict situation between minority and majority is not uniquely German or Austro-Hungarian; hence, it can be generalized to 'all nations'.³²

Austrian and German theories of state – being genuinely general theories – were exported worldwide, despite the fact that their authors originally tried to contribute to German unification and to avoid the disintegration of the Austro-Hungarian monarchy. Neither Renner nor Bauer was successful in healing the nationalist illnesses and the monarchy disappeared from the political map. Despite this failure, their theories have had an impact on nation-building strategies in Central European countries. In addition, these theories have witnessed a renaissance in recent debates surrounding federalism, unionism,

²⁸ Originally: Otto Bauer: *Die Nationalitätenfrage und die Sozialdemokratie*. Vienna: Verlag der Wiener Volksbuchhandlung Ignaz Brand 1907. Here I am using this English translation: Bauer, Otto. *The Question of Nationalities and Social Democracy* [1907] ed. Ephraim J. Nimni, trans. Joseph O'Donnell. London: University of Minnesota Press 2000.

²⁹ *ibid.* p. 23.

³⁰ *ibid.* p. 271.

³¹ *ibid.* p. 281.

³² *ibid.* p. 266.

linguistic and other group rights, legal pluralism, secessionist movements and minority nationalism. The legislation of countries like Latvia, Hungary, Russia, Lebanon, Iraq and Israel have been biased more or less by their ‘territory-blind’ theory of cultural autonomy. The different networks of the so-called cultural councils are probably the most palpable proof of their intellectual influence.

The distinguished Canadian scholar, Will Kymlicka, armed with critical spirit and on the basis of a slightly modified theory of John Rawls, rejected the principle of cultural autonomy as a solution for the difficulties in the Central European countries in general, and the application of Renner’s and Bauer’s theories in particular. Contrary to other post-Rawlsian liberal individualist political philosophers, he reintroduced the cultural approach to normative political philosophy. His concept of ‘societal culture’, which is to be conceived of as a context for the individual choice of the good life, is a ‘territorially concentrated culture’. Kymlicka argues that new liberal democracies are ‘nation-building’ states, and if they are multi-ethnic, then their nation-building component can promote more than one societal culture. This is the case, according to Kymlicka, in Canada, Switzerland, Belgium and Spain.³³

Within this framework, the question of doing justice can play a central role. In a well-established liberal and multi-ethnic democracy, the question is whether it is possible to avoid a situation whereby the majority’s nation-building project harms vulnerable groups, which would constitute an obvious injustice (and if it is possible, how). The Eastern and Central European form of the same question is whether a widely recognized past injustice against a minority (or indeed a majority) can be rectified in this normative way, or whether only a sort of factual Realpolitik can guarantee national unity sustaining the current status quo in terms of the relationship between majority and minority. Kymlicka criticizes the radical contrast between the theory of justice and the effective ethnic risk management that has been undertaken by so many Western scholars. He thinks that such a strategy overemphasizes the question of security at the expense of justice. Vulnerable groups, including national minorities, have a right even in Central Europe to a framework within

³³ Kymlicka, Will. *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*. Oxford: Oxford University Press 2001. pp. 26-27.

which to practise their group-differentiated rights, other than non-territorial cultural autonomy.

The way in which Kymlicka uses the term ‘national minority’ corresponds to the use of classical ‘nation-state-based’ political theories (including those of Jellinek and Renner): ‘Groups formed complete and functioning societies in the historic homeland prior to being incorporated into a larger state.’³⁴ Further to this definition, he splits the category of national minority into two subcategories: ‘substate nations’ and indigenous people. He defines the first subcategory as follows: ‘nations which do not currently have a state in which they are a majority ...’³⁵

As a first step toward his theory construction, Kymlicka appears fairly plausible in rejecting the choice between collective and individual rights, because much of what is called ‘minority rights’, ‘based upon the idea of justice between groups requires that the members of the different groups be accorded different rights’.³⁶ With the use of the ‘multicultural’ adjective, and treating the problem of the self and identity, Kymlicka has arrived at almost the same way of thinking as Bauer and goes beyond the liberal principle of toleration, claiming that even if this principle goes hand in hand with a justification of individual liberties, it provides less protection to national minorities than do group rights.³⁷ The Canadian scholar thinks that a national minority, as defined above, has a legitimate expectation of realizing its own nation-building project. Given that territory is an essential and cultural element of the state (and by implication of the substate), it is difficult to imagine how a nation-building project might be realized in a de-territorialized way. The ‘culture’ is a set of social practices which are intrinsically linked to the nation, even in a multi-nation state.³⁸ According to him, there is no moral reason to support the realization of the theory of non-territorial cultural autonomy in this region of Europe, instead of further

³⁴ Kymlicka, Will. ‘Reply and Conclusion’ in Kymlicka, Will and Opalski, Magda (eds.) *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe*. Oxford: OUP 2001. p. 349.

³⁵ *Ibid.*

³⁶ Kymlicka, Will. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Oxford University Press 1995. p. 47.

³⁷ *ibid.* Ch. 3.

³⁸ *ibid.* Ch. 5.

federalization of the states.³⁹ Furthermore, he is critical of Renner's plan, which took it for granted that the Austro-Hungarian Empire would be divided between Magyars and Austrians; against this background, he advanced a plan for 'non-territorial autonomy': [T]he main point is that the model of the national-cultural autonomy presupposes that we have already determined the territorial units. ... The »personality principle« operates within the pre-existing territorial boundaries and administrative structures.⁴⁰ If the context is a multi-nation society, then, as part of the nation-building project, one of the conditions for a good moral or legal decision is a well-established spatial context and essentially uncontested borders. Indeed, if there is wider consensus on these spatial contexts, these judgements become more reflective and wiser at the individual level.

7III. On the Road to Hell: Durkheim's Alleged Disintegration Thesis.

Finally, we arrive at the lowest level in the vertically divided theological space: Hell – according to the Christian worldview, the final destination for the spirit of immoral dead people.

The medieval worldview, backed by scholarly philosophy, required the rigorous control of the human body on Earth by means of natural and positive laws, in order to save the spirit for Heaven. One way or another, but obviously in a less cruel manner, this type of paternalist legislation lingers on in our 'decent' societies. Thus, the enforcement of public morality through legislation has not yet disappeared from political agendas, and legislators apparently still feel the need to save spirits from the eternal Hellfire by punishing immoral behaviour (such as forbidding prostitution, to give just a classic example). Interestingly enough, while the scope of our well-considered moral judgements is obviously much wider

³⁹ Kymlicka, Will. 'Renner and the Accommodation of Sub-state Nationalisms' in Ephraim Nimni (ed.) *National Cultural Autonomy and its Contemporary Critics*. London: Routledge, 2005. pp. 137-49., pp. 138-139.: 'Experience to date suggests that most viable democratic settlement for such sizable potentially secessionist national groups involves territorial self-government. I believe that this is a clear lesson from the accommodation of sub-state nationalism in the Western democracies, and I see no reason to think that the lesson does not apply to Central and Eastern Europe, or elsewhere around the world. ... It is almost certain that several of the Western countries that have adopted territorial autonomy would have faced much greater threats of violence if they had not accommodated the desire for the territorial autonomy.'

⁴⁰ *ibid.* pp.141-142.

than the question of the morally right and wrong use of the body for reproductive activity, the controversy between Herbert Hart and Lord Patrick Devlin focused essentially on sexual immorality, and the latter supports the view that (British) society, being Christian, has a right to enforce morality based on the commonly shared values. Unless this particular society wants to change, then Christian institutions, such as monogamous marriage, need to be protected through the enforcement of morals shared by a majority of citizens. While government does not refer directly to Hellfire in relation to individuals' earthly immoral behaviour, its regulatory action in the field of sexual conduct is necessary, as the relevant norms belong to the sphere of public morality. Under these circumstances, Lord Devlin claims that if a certain immoral private behaviour of an individual is categorized as harmful to society, then it should be punished. The test of 'harmfulness' is a reasonable person's individual judgement. Hart disagrees with Lord Devlin in many respects, but he admits finally that law and morality do have some overlapping areas – or in other words, they are necessarily connected.⁴¹

Note that this debate assumes the social homogeneity of British society and revolves around unusual sexual habits, regardless of the ethnic background of 'offenders'; the same debate would certainly happen in a different way in the context of a multi-national society in relation to special customs that are manifestly incompatible with basic liberal principles such as equal respect for women and men. Moreover, the 'reasonable man' whose job it is to test the harmfulness of a given activity in Lord Devlin is essentially different from Leibniz's *vir bonus*, or God, who would obviously judge as immoral any conduct that does not imply happiness. The homogeneity of the society provided as a context for the individual moral judgement can indeed be defined as a halfway house between Leibniz's Heaven and the Austro-Marxists' consent-based voluntarist, multicultural communities.

For our purposes, one particular reference is important in the Devlin/Hart debate: the French social theorist, Emile Durkheim. At first glance, what Hart calls the 'disintegration' thesis, developed by Lord Devlin with reference to him, appears to endorse not only a slightly weaker version of the Leibnizian unity of law, morality and politics, but a defence of national unity in a Republican political community such as the Third French

⁴¹ Lord Devlin, Patrick. *The Enforcement of Morals*. Oxford: Oxford University Press 1965.; Hart, Herbert. *Law, Liberty and Morality*. Oxford: Oxford University Press 1963.

Republic through the penal law. Meanwhile the idea of describing society in a limited secular moral account as a ‘community of shared values’ – a description provided by Lord Devlin – would patently not impress Leibniz’s theology.

As to the origins of Durkheim’s individualist, Republican political-philosophical ideas, we again find Kant’s moral philosophy. Lukes and Scull grasp the concept of ‘disinterestedness’ in order to show the Kantian aspect of his social theory. Without any doubt, this is a key concept when judging Durkheim and makes him closer to Hart than Leibniz, who conceptually links happiness and morality. Remarkably enough, this disinterested morality is complemented by an extreme individualism, making Durkheim’s social theory quite different from the Austro-Marxist Neo-Kantianism of Renner and Bauer. Moreover, apparently ‘society’ in Durkheim is the French Republican society of his time, which promotes its own moral view.⁴²

One of the most important critical remarks made by Lukes of Herbert Hart’s thesis on the legal enforcement of morality is that in Durkheim there is more than one form of social control (i.e. penal law); he also affirms social morality as ‘cement’ in the societal structure:

‘Durkheim is not a disintegrationist in the Hartian sense, in the first place, because he does not claim that a disintegration of society simply follows if legal regulations enforced by punishment are removed. He does maintain that social integration is, in part, sustained by a kind of moral cement and that the latter is, in part, created and maintained by the enforcement of the law. But, taking his various writings together, there are a range of factors contributing to social integration of which legal regulation (through punishment) is but one of the means of rendering that regulation effective. The framework of *Suicide*, for example, rests on the multiple layers of integration and regulation of a person within society (religious, occupational, familial, and political). The weakening of any (or some) of these layers of protection would not by themselves cause a disintegration of society. *Suicide* can be viewed as a work that demonstrates empirically that in many circumstances disorder does not accompany the weakening of regulative norms and integrative institutions. After all, because of the multiple layers of integration, even when several changes take place, suicide still remains a deviant act. Anomie and egoism are entirely compatible with, even essential accompaniments of, the social order in modern industrial societies.’⁴³

Interestingly enough, French social theorists show considerable reluctance to use the concept of social integration as developed by Durkheim. Their main worry is that

⁴² Lukes, Steven and Scull, Andrew. *Durkheim and the Law*. London: Palgrave Macmillan 2nd ed. 2013. pp. 1-40., at pp. 22-23.

⁴³ *ibid.*

integration if it is spatial can be equivalent to segregation or the *communitarianisation* of minority groups, where the majority's moral judgements are imposed on these alienated individuals.

On the one hand, albeit Hart's *Concept of Law* was described by the author as 'descriptive sociology'⁴⁴, it is widely considered that he himself has an ambiguous relation to any social theory, including sociology or anthropology.⁴⁵ On the other hand, probably because of the partial receptiveness to Weber's and Marx's thinking in France, this reduced concept of law still has a strong influence on lawyers' thinking.⁴⁶ French legal sociology under Durkheim's influence did not turn in the direction of the 'interpretive' methodology à la Weber, as Hart did. French professors of law under Durkheim's direct influence, like Duguit, argued indeed like Scandinavian realists that legal concepts were meaningless. This means that legal and moral argumentation cannot be used as a means of persuasion. By implication, it would follow that Hart's critical morality cannot be introduced. Interestingly, neither Durkheim nor Duguit denies the impossibility of an individual act of judgement.

Both Lukes and Roger Cotterrell⁴⁷ place a strong emphasis on Durkheim's individualism as the theoretical basis for defending the individual as a fundamental right-holder. When Hart analytically separates 'positive' morality (accepted by a social group or society) from 'critical' morality (general principles for evaluating social morality, including positive morality) and questions conservative thinkers, including allegedly Durkheim, he overlooks the fact that individual moral judgement, reflecting the moral practice of society, is perfectly feasible. Meanwhile Hart, though the author of 'descriptive sociology', feels no need to justify empirically the existence of a 'critical morality'. Rules of positive morality can and should be criticized through moral judgements. If they cannot be, then the law, without critical moral and intrinsic normativity, is reduced to an empty means in the service of brute power and illegitimate domination. Duguit would defend Durkheim's position, even though he was of the opinion that only individual will can be considered empirical

⁴⁴ Hart, Herbert. *The Concept of Law*, Oxford: Clarendon Press 1961. p. v.

⁴⁵ Lacey, Nicola. 'Analytical Jurisprudence Versus Descriptive Sociology Revisited' *Texas Law Review* 84 (2006), pp. 945-982.

⁴⁶ See among others Arnaud, André-Jean. *Critique de la raison juridique. 1. Où va la Sociologie du droit?* Paris: L.G.D.J. 1981.; Morin, Edgar. *Sociologie* Paris: Fayard 1984.

⁴⁷ Cotterrell, Roger. 'Justice, Dignity, Torture, Headscarves: Can Durkheim's Sociology Clarify Legal Values?' *Social & Legal Studies* 20(1) (2011), pp. 3-20.

fact, and there is no such thing as collective conscience. Solidarity is a social fact to the extent that each and every individual has a sense of justice. One can actually reformulate it as a sum of the individual sentiment.⁴⁸

The analysis provided by Lukes and Cotterrell shows that Hart's use of Durkheim's alleged disintegration thesis cannot be allowed to pass without criticism, and the whole of his contribution to French sociology should also be taken into account. Their interpretation may imply as well that Durkheim's vision of society should be construed rather as one backed by a rights-based Republican idea, where individuals are integrated into political society through multiple means of social control. The law is only one of the social controls, and even the location of the citizen – a rural area vs a cosmopolitan town, outskirts vs city centres – is a significant determinant in the process of integration. Further to this matter, it can be said that the importance attributed to solidarity by Durkheim and Duguit should be construed as an idea to unite people on the basis of shared values, which implies that, at the individual level, moral judgement cannot be separated from public morality.

Conclusion

Ever since antiquity, lawyers and philosophers have essentially been divided over whether they should keep law, morality and politics separate, or whether the need for their unity is more compelling. In the wake of countless bloody conflicts worldwide, the durability and resilience of this discourse on laws and morals is at once both impressive and sad. The aim of this paper has been to show that individual moral deliberation cannot be dissociated from the spatial-communitarian context – neither by describing society as if it were the City of God (Leibniz), nor by demanding that collective spatial contexts should be deliberately ignored in favour of de-territorialized minority rights (Renner and Bauer), nor by criticizing the 'disintegration' thesis which seeks to justify a rights-based Republican vision of society (Hart). It probably goes without saying that recognizing the relevance and importance of the spatial character of our individual normative (legal, moral, religious)

⁴⁸ See e.g., Duguit, Léon: *L'État: le droit objectif et la loi positive* [1901]. Paris: Dalloz 2003.

judgements in no way implies that legal, moral or political theory-based suggestions, explanations and statements about our societies are either impossible or wrong.

References

- Antognazza, Maria Rosa. *Leibniz. An Intellectual Biography*. Cambridge: Cambridge University Press 2009.
- Arnaud, André-Jean. *Critique de la raison juridique. 1. Où va la Sociologie du droit?* Paris: L.G.D.J. 1981.
- Artosi, Alberto, Pieri, Bernardo & Sartor, Giovanni (eds). *Leibniz: Logico-Philosophical Puzzles in the Law. Philosophical Questions and Perplexing Cases in the Law*. Heidelberg, New York, etc.: Springer-Dordrecht 2013.
- Bauer, Otto. *The Question of Nationalities and Social Democracy* [1907] ed. Ephraim J. Nimni, trans. Joseph O'Donnell. London: University of Minnesota Press 2000.
- Dascal, Marcelo. *G. W. Leibniz. The Art of Controversies*. Dordrecht: Springer 2006.
- de Gaudemar, Martine. 'Leibniz and the Moral Rationality' in Dascal, Marcelo (ed) *Leibniz: What Kind of Rationalist?* Dordrecht: Springer 2008. pp. 343-354.
- Duguit, Léon: *L'État: le droit objectif et la loi positive* [1901]. Paris: Dalloz 2003.
- Dworkin, Ronald. "'Natural' Law Revisited' *University of Florida Law Review* 34:2 (1982), pp. 165-188.
- Dworkin, Ronald. 'Law as Interpretation' *Texas Law Review* 60:3 (1982), pp. 527-550.
- Elster, Jon. *Leibniz et la formation de l'esprit capitaliste*, Paris: Aubier Montaigne 1975.
- Ghosch, Peter. 'Max Weber and Georg Jellinek: Two Divergent Conceptions of Law' *Saeculum* 59:2 (2009), pp. 299-347.
- Hart, Herbert. *Law, Liberty and Morality*. Oxford: Oxford University Press 1963.
- Hart, Herbert. *The Concept of Law*, Oxford: Clarendon Press 1961.
- Jellinek, Georg. *Die socialethische Bedeutung von Recht* Vienna: 1878.
- Jellinek, Georg. *Allgemeine Staatslehre* [1900]. Berlin: Springer 1922. 3rd ed.
- Kelly, Duncan. 'Revisiting the Rights of the Man. Georg Jellinek on Rights and the State.' *Law and History Review* 22:3 (2004), pp. 493-529.
- Kymlicka, Will. *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Oxford University Press 1995.
- Kymlicka, Will. *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*. Oxford: Oxford University Press 2001.
- Kymlicka, Will and Opalski, Magda (eds.) *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe*. Oxford: OUP 2001.
- Kymlicka, Will. 'Renner and the Accommodation of Sub-state Nationalisms' in Ephraim Nimni (ed.) *National Cultural Autonomy and its Contemporary Critics*. London: Routledge, 2005. pp. 137-49.
- Leibniz, Gottfried Wilhelm. *New Essay on Human Understanding*. trans. Peter Remnant, Jonathan Bennett, Cambridge: Cambridge University Press 1996.

- Lord Devlin, Patrick. *The Enforcement of Morals*. Oxford: Oxford University Press 1965.
- Lukes, Steven and Scull, Andrew. *Durkheim and the Law*. London: Palgrave Macmillan 2nd ed. 2013.
- Morin, Edgar. *Sociologie* Paris: Fayard 1984.
- Nicola Lacey. 'Analytical Jurisprudence Versus Descriptive Sociology Revisited' *Texas Law Review* 84 (2006), pp. 945-982.
- [Quer, Giovanni M.](#) 'De-Territorializing Minority Rights in Europe: A Look Eastward' *Journal on Ethnopolitics and Minority Issues in Europe* 12:1 (2013) pp. 76-98.
- Renner, Karl. 'State and Nation' [1899] in Ephraim Nimni (ed.) *National Cultural Autonomy and its Contemporary Critics*. London: Routledge 2005. pp. 15-47.
- Roger Cotterrell. 'Justice, Dignity, Torture, Headscarves: Can Durkheim's Sociology Clarify Legal Values?' *Social & Legal Studies* 20:1 (2006), pp. 3-20.
- [Smith, David J.](#) 'Non-Territorial Autonomy and Political Community in Contemporary Central and Eastern Europe' *Journal on Ethnopolitics and Minority Issues in Europe* 12:1 (2013) pp. 27-55.
- Wiener, Philip P. *Leibniz. Selection*. New York: Charles Scribner's Son 1951.