

# Philosophy of Law

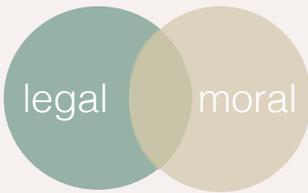
- Law is 1.** A codified set of rules, which are enforced through social institutions, to govern behavior.
- 2.** The monopolization of force (violence) by the state.
- 3.** A procedural instrument for creating justice and equality.

The rule of law is the legal principle that law should govern a nation, and not arbitrary decisions by individual government officials.

## Philosophy of Law

is a branch of philosophy which studies basic questions about law and legal systems.

## Legal versus Moral



Not everything that is legal is moral. Only in Utopia do the moral and the legal overlap completely. It is illegal and immoral to steal from your neighbor. It is illegal and immoral to harm your neighbor. However, although it is *immoral* to harm your neighbor in time (future generations), it is *legally allowed* to harm them.

## The No Harm Principle

A fundamental principle of justice  
By John Stuart Mill:



Anything goes as long as nobody is involuntarily harmed.

What is a crime?

Only if there is a victim (who is not the perpetrator).

What is the role of the state?

Protecting individuals from harm of others.

[...] the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. *On Liberty (1859)*

## Green Liberalism

From anthropocentrism  
To sentientism (*Can they suffer?* Bentham)

Extending the scope of Mill's No Harm Principle:

Anything goes as long as it does not harm other sentient beings, including nonhuman animals and future generations.

## Some Hard Cases

Individual liberty versus paternalism, tradition, custom & religion

- ☞ Censorship on the freedom of expression, including blasphemy laws
- ☞ Female Genital Mutilation (FGM), honor killings
- ☞ Religious privileges e.g. ritual slaughter, non-therapeutic circumcision of boys, religious education
- ☞ Paternalistic laws, e.g. restrictions on (soft) drugs, (public) nudity, gay marriage and even gay sex
- ☞ Euthanasia, abortion, assisted suicide

## Values & Human Rights

Are these values which human rights promote?



## Some Fundamental Questions

What is justice?

Fair treatment (Rawls); equal consideration of equal interests (Singer)

Who makes the laws?

E.g. dictator, a special class, the people

How are laws made?

Difference between wishes of the dictator or ruling class versus democratic procedures

What is the scope of law?

How much should be arranged by law? Risk of paternalism

What is the purpose of law?

A good society, protection of individuals (liberalism), stimulating capacities (Nussbaum & Sen, UDHR)

How to judge if the law is just/good/fair?

What is the criterion for judging laws? Ethical priority over law. But what ethical principle? (E.g. Mill's liberalism: no harm principle)

What is the status of rights?

Are rights natural (e.g. Locke), objective, universal, subjective, particular, social constructs?

Do animals have rights?

Regan, Francione. If nonhuman animals have the right to life, than meat is murder.

Great Ape Projects: Rights for Great Apes (some animals have more rights than others – sentientism)

Does nature have rights?

Should trees have moral standing? (Stone)

Eradicating ecocide by law (Higgins)

The Human Right to a Green Future (Hiskes)

Ecocentrism, deep ecology, Earth First!

Do future generations have rights?

7-generation test: laws should be considered for their impact on the seventh generation to come, inspired by the laws of the Iroquois

Are laws universal?

Relativism: laws are relative to time and place. Is FMG justifiable in some cultures/traditions? Non-therapeutic circumcision of boys?

Universalism: Good laws are good always and everywhere in the universe

What is permitted and what is legally forbidden?

Paternalism; non-victim crimes (e.g. drugs, pornography, homosexuality).

Liberalism: anything goes as long it does not (physically) harms or threatens others (Mill)

Should we (always) obey the law?

Civil disobedience (Ghandi, Thoreau, Animal Liberation Front). Opposition to oppression

Why do laws (fundamentally) change over time and place?

Good laws should not change. We should strive for Utopia: the complete overlap between the good and the right

What should be the relation between religion and the state?

Secularism: strong separation between religion and state (Cliteur)

What is the best political structure?

Democracy (what kind of democracy?). Monarchy versus republic

What is the nature of property?

Who can own property? What things can be owned? How can owning things be justified? (E.g., patenting DNA (biopiracy). Who own natural resources?

Who owns the commons (oceans, atmosphere, rainforests)?

Is a corporation a legal structure that has moral benefits?

Registered corporations have legal personality and are owned by shareholders whose liability is limited to their investment. Problems of externalization and personal liability. (Bakan)

## 10 Legal Principles

Beccaria, Verhofstadt, Van den Berg

1. Legality

*Nulla poena sine lege*. You cannot be punished for something not forbidden by law. However, some things might be immoral, but still be legal. Perhaps one day meat eaters will be persecuted as criminals.

2. Equity & equality

Everyone is equal for the law. 'Equal consideration of equal interests' (Singer). No one is exempted from the law, including politicians.

3. Proportionality

Punishment should be proportioned to the severity of the crime.

4. Subsidiarity

Minimal punishments for the required goal. Criminal law is not about revenge (*lex talionis*) but about securing law and e.g. order.

5. Abolition of physical punishment, capital sentence and torture

6. Rationality

There have to be rational reasons for punishment. The laws should not be guided by superstition/religion/tradition.

7. Individuality

Only punishing the perpetrator, not his/her family.

8. Secularism

Autonomous versus heteronomous justification of the law.

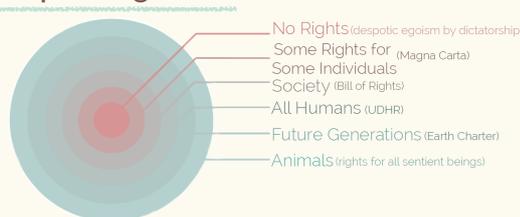
9. Publicity

Laws should be duly published and accessible to all citizens.

10. Universality

Good laws are universal in time and place, e.g. the UDHR, the Earth Charter

## Expanding Moral Circle



## Emancipation and Moral Progress through Rights

Abolition of slavery	Children's rights
Women's rights	Rights for believers in a different faith, rights of unbelievers
Workers' rights	Rights for apostates
Rights of ethnic minorities (e.g. indigenous people)	Gay Rights (LBGTQ rights)
Rights for convicts and Prisoners of War	Non-human animals (e.g. Great Ape Project)
Rights for immigrants	Protection of cultural heritage
Against racial discrimination and apartheid	Future generations

## The Expansion of the Moral Circle by Legal Documents & Books

Magna Carta (1215)

Great Charter of the Liberties of England

The first document imposed upon a King of England by a group of his subjects, the feudal barons, in an attempt to limit his powers by law and protect their rights. Beginning of constitutional law.

English Bill of Rights (1689)

Basic constitutional and civil rights. Limits the powers of the crown. (Locke)

United States Declaration of Independence (1776)

First statement of human rights: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Declaration des Droits de l'homme et du Citoyen (1789)

Declaration of the Rights of Man and of the Citizen

First universal statement of human rights. The rights of man are held to be universal: valid at all times and in every place. It became the basis for a nation of free individuals protected equally by law.

United States Bill of Rights (1789)

Collective name for the first ten amendments to the United States Constitution.

Famous First Amendment (separation of religion and state & freedom of expression): "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Charter of the United Nations (1945)

The United Nations shall promote: a) higher standards of living, full employment, and conditions of economic and social progress and development; b) solutions of international economic, social, health, and related problems; c) international cultural and educational cooperation; d) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Universal Declaration of Human Rights (1948)

First global expression of rights to which all human beings are inherently entitled, including social and cultural rights. Amnesty International is an example of an NGO which monitors human right violations and takes action.

European Convention of Human Rights (1950)

International treaty to protect human rights and fundamental freedoms in Europe.

Universal Islamic Declaration of Human Rights (1987)

Sharia law prevails; moral regression.

Earth Charter (2000)

International declaration of fundamental values and principles considered useful by its supporters for building a just, sustainable, and peaceful global society in the 21st century. Extension of the UDHR by incorporating future generations and an awareness of our dependency on ecological life support systems. The EC acknowledges the intrinsic value of living beings.

International Criminal Court (2002)

Intergovernmental organization and international tribunal that sits in The Hague in the Netherlands. It has the jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, and war crimes.

Hugo de Groot (Grotius), *Mare Liberum* (1609) *De Iure belli ac pacis* (On the Laws of War and Peace (1625): Foundation of international law

John Locke, Letters concerning toleration (1689-92):

'Father of classical liberalism', freedom of religion (but not for atheists)

Cesare Beccaria, *On Crimes and Punishments* (1764):

Humanizing and rationalizing of law, specially the penal code. Against torture and death penalty.

Thomas Paine, *Rights of Man*, (1791): Plea for universal rights.

Mary Wollstonecraft, *A Vindication of the Rights of Woman* (1792)

Immanuel Kant, *Zum ewigen Frieden* (Perpetual Peace) (1795):

On global peace (by world rule)

Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (1823): Expanding the moral circle from anthropocentrism to sentientism (*Can they suffer?*)

John Stuart Mill, *On Liberty* (1859): Plea for individual liberty

John Stuart Mill & Harriet Taylor, *On the Subjection of Women* (1869)

Henry Stephens Salt, *Animals' Rights*. Considered in Relation to Social Progress (1894): Plea for animal rights

Karl Popper, *The Open Society and Its Enemies* (1945):

Plea for constitutional liberal democracy and freedom of expression, and a plea not to tolerate intolerance.

John Rawls, *A Theory of Justice* (1971): Political philosophical justification for the welfare state and political and social rights.

Peter Singer, *Animal Liberation* (1975): 'Bible' of the animal liberation movement. Beginning of a large social movement, for example the Party for the Animals in the Netherlands established in 2002.

Ronald Dworkin, *Taking Rights Seriously* (1977): A forceful plea for non-negotiable individual rights: rights function as trumps against policy concerns.

Tom Regan, *The Case for Animal Rights* (1983): Sentient nonhuman animals should have basic rights, including the right to live, than meat is murder.

Paola Cavalleri, Peter Singer, *The Great Ape Project* (1993): Equality beyond Humanity: Recognizing moral and legal personhood of the great apes and acknowledgement of their rights.

Richard Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (2008): The rights to clean air, water, and soil should be seen as the environmental human rights of both present and future generations.

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Designed by: Loes Albert

Contact: f.vandenberge2@uu.nl

for more info: Floris van den Berg, *Philosophy for a Better World*, 2013

