A MATTER OF CONTEXT

A LAW CONCEPTION OF ETHICS AND AN ETHICAL CONCEPTION OF LAW

Kaj-Henrik Impola

In her articles *The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship* and *Equity, Conscience and the Art of Judgement as Ius Aequi et Boni*, Maria Drakopoulou investigates the connections between law and ethics from a point of view, which I shall refer to in the following essay as 'an ethical conception of law'. Firstly, I shall describe what Drakopoulou means by 'an ethical conception of law,' and, secondly, chart its relations with some recent developments in ethical theory. In the latter respect I shall discuss ethical particularism and virtue ethics in general, and Margaret Anscombe's critique of modern moral philosophy in particular. I believe that Anscombe's critical views on what she calls 'a law conception of ethics,' which have been very influential for modern virtue ethics, also bear some significance for the understanding of law, although the significance of her views has been largely overlooked by legal theorists and legal philosophers. However, my intention here is not to argue for any one conception of ethics (based on virtues or anything else) as such; I rather seek to illustrate the relations between law and morals from a point of view which has been inspired by the work of Maria Drakopoulou. One interesting aspect of this approach is that it calls for a critical evaluation of H.L.A. Hart's views on the relations between law and morals. Therefore, I shall attempt to examine briefly this aspect at the end of this paper.

One interesting feature of Drakopoulou's ethical conception is its interconnectedness with humanism and the humanities. Thus, the approach on law and morals discussed in this paper can very well be subsumed under a humanistic perspective. This is also substantiated by Drakopoulou's discussion of 'a humanist project in law' in contrast to 'a feminist project in law' in *The Ethic of Care*. I shall begin by considering the role of ethics in law emerging from the tension between them, as this tension reveals somenthing about the humanist project itself.

1. Towards a humanistic perspective

In *The Ethic of Care*, Drakopoulou investigates the role of ethical theory for feminist legal theory. The ethic of care, which has been coined by Carol Gilligan, is based on the idea of differences between feminine and masculine moral reasoning. It claims that women emphasize concrete relationships, whereas men focus on the application of abstract moral rules. According to Drakopoulou (Drakopoulou 2000a, 210-221), the ethic of care has played a role in resolving issues pertaining to the 'crisis of subjectivity' in feminist legal theory. From the construction of a gendered legal subject to the renounciation of all legal subjectivity, the different phases of the evolution and dissolution of subjectivity are all related to the care perspective.

I am here mainly interested in the last phase identified by Drakopoulou as that in which 'the face of the subject before the law had virtually faded away' (Drakopoulou 2000a, 215) and in which the ethic of care 'was now understood as a special kind of normative practice providing standards by which other practices are judged' (Drakopoulou 2000a, 215). The dissolution of the legal subject together with a reinterpretation of the ethic of care has paved the way for a new relational understanding of law. According to this approach relationships, negotiation, co-operation, responsibility and concrete situations are valued, and the assessment of needs and the identification of the ways of meeting these needs are established as the basis of a situated legal judgement (Drakopoulou 2000a, 215-216). Drakopoulou describes this approach as a humanist project in law (Drakopoulou 2000a, 220-221). Its adoption would mean renouncing at least a part of the heritage handed down by feminist legal scholarship, most notably the reinterpretation of the notion of legal subjectivity. However, Drakopoulou points out that maintaining legal subjectivity is necessary for the feminist project in law as long as the political validity and ethical legitimacy of the project are intertwined with securing the normative interests of women.

Drakopoulou bases the humanistic project in law upon the ethic of care and relational jurisprudence. However, if one wishes to speak in terms of a wider humanist conception of law, one needs to address the question of what other issues, in addition to the role of ethics in law, a humanist conception of law would have to embrace. When it comes to legal theory, the matter of the applicability of the methods of the humanities is one such issue, and I believe that there is enough proof to support this argument. Linguistics and philosophy of language, rhetoric and literary criticism, not to mention several other humanist approaches in philosophy, have all found their way to the study of law; they have been successfully applied to legal history, legal hermeneutics, and law

and literature. In fact, the work of Maria Drakopoulou is a case in point of such a methodological approach.

Another question related to the recent success of the methods of the humanities is whether this success has contributed to the adoption of what would be considered to be a wider humanistic world-view in legal theory. Now, this question postulates a connection between method and world-view. Admittedly, in this respect, the relation between a humanistic world view and law would be somewhat analogous to the scientific world view in law propagated, for instance, by legal realism, sociologically rooted legal theory or a law and society approach. However, a truly humanistic conception of law is comprised of different meanings and approaches to the term 'humanism,' only some of which being directly related to methodological choices. In other respects, humanism is more akin to an attitude, an outlook or even a way of life. The core question, then, is whether legal theory can impose on its subject matter this kind of humanistic world-view. The scientific conception of law, although it was and still is influencial, never quite became a successful explanatory model, because its language is incompatible[1] with the language of the law and, therefore, with the self-understanding of law (i.e. the legal community). However, if the humanistic conception of law fails, it will not fail because of differences in language and semantics (the existing methodological connections between law and humanities demonstrate this), but because of differences in logic. Drakopoulou's examination of the ethical discourses in *Equity, Conscience and the Art of Judgement as Ius Aequi et Boni* only clearly shows those differences regarding logic, but also offers hope for overcoming them.

2. The ethical conception of law

The ethical conception of law is also the main theme of Drakopoulou's article *Equity, Conscience and the Art of Judgement as Ius Aequi et Boni*. In that article, Drakopoulou makes a genealogical investigation of the English law of equity, which was originally a system of adjudication that relied on conscience and prudence as the basis of good and just law. She traces the conceptual roots of this system in medieval theological and ethical discourses, the most notable representative of which was Thomas Aquinas. In that tradition, and in the original law of equity, the Greek notion of *synderesis* ('conscience') was understood as the innate knowledge of the precepts of divine natural law and as an ethical 'potentiality' of the soul (Drakopoulou 2000b,

[1] My analysis is based on the general idea presented in Nelken 1996, 112-113.

351). According to the Thomistic mode of ethical reasoning, a conclusion was drawn from *synderesis* and from a factual situation calling for a judgement. Unlike *synderesis*, the conclusion, which was identified with the Latin term for conscience, '*conscientia*,' was considered to be fallible as a result of the operation of free will. As a result of this fallibility, the deduction from synderesis was not a true syllogism: the conclusion (*conscientia*) did not follow *necessarily* from the premises (*synderesis* and the factual situation). Because the application of the precepts of natural law was not strictly speaking a logical deduction, a specific ability, identified with the virtue of *prudentia* ('prudence'), was needed to reach a correct conclusion and good conscience. (Drakopoulou 2000b, 352-353.) According to Drakopoulou, prudence 'transformed the nature and the rationale of right judgement and introduced an understanding of the fulfilment of law which was predicated neither upon a mere application of rules, nor upon restraint, fear and punishment' (Drakopoulou 2000b, 353). Instead, prudence was applied to ordinary situations with the particularity of the situation in mind. It could therefore provide perceptual acuteness and sensitivity of judgement (Drakopoulou 2000b, 352-353). *Prudentia*, proceeding from precepts of natural law and the particular circumstances of the case to correct conscience is a mode of legal reasoning. It corresponds to the logic of the particularist ethical discourse that shall be discussed in the next section.

In *Equity, Conscience and the Art of Judgement as Ius Aequi et Boni*, Drakopoulou also describes the process of change, as a result of which Thomistic ethical discourse and the original idea of equity were to give way to another mode of reasoning (Drakopoulou 2000b, 354-355). A more rigid logical deduction replaced prudence in the system of equity (Drakopoulou 2000b, 358-359). According to Drakopoulou, the process of change was ushered in with the nominalism of William Ockham and was consummated with the new idea of man presented by Reformation theologists. As a result of this process, man, whose true nature was now conceived as corrupt and sinful, was only deemed capable of sharing in the knowledge of God as a result of His grace. Natural law was from now on understood as an expression of the will of divine authority which corresponded to the total submission of man to this authority. In this context, the concept of *synderesis* as an innate knowledge of the precepts of eternal law could not survive. Thomistic ethical discourse was consequently replaced by a new discourse, in which 'conscience came no more to be derived from reason and virtue but an unquestionable obedience to a single, authoritative moral code guided by faith and faith alone' (Drakopoulou 2000b, 356). The idea of conscience as a matter of human activity was replaced by the idea of faith as total surrender to the will of God.

The notion of *synderesis* emphasizes the idea of conscience as a human and social activity that relates to other persons and to social relations.[2] This appears to be the core of the ethical conception of law discussed in Drakopoulou's articles. Emphasis on relations would then also be the core area of any conception of law that claims to be humanistic. The establishment of a more secluded relationship to God, on the other hand, does not only mean that conscience, so to speak, loses its connection to other human beings and that our understanding of what correct conscience is no longer results from situations involving other people. It also means that relationships with others are replaced by an inward relationship to one's own self, as one cannot have the same kind of attitude to God as one has to one's fellows. As a result of this kind of change in relations and attitudes, the understanding of a precept of law has also undergone a conceptual change. In all these respects the effects of Reformation theology on ethics have according to some philosophers also created severe and continuous problems for moral philosophy. I shall return to these problems in more detail in Section IV.

3. Ethical particularism and virtue-ethics

So far, I have discussed some of the elements of the ethical conception of law presented by Drakopoulou. Next, I shall attempt to relate at least some of these elements to the debate that has dominated moral philosophy in the latter part of the 20th century. The debate has been going on at different theoretical levels. At the level of the theory of moral agency and right action, virtue-ethicists have criticized ethical deontologists and utilitarians. At the metaethical level a corresponding debate has been going on between moral particularists and universalists. I believe that both discussions are illustrative of exactly the kind of questions that Drakopoulou brings up in her articles *The Ethic of Care* and *Equity, Conscience and the Art of Judgement as Ius Aequi et Boni*. To be more precise, Drakopoulou's views coincide with virtue-ethicists and ethical particularists.

Virtue-ethics and ethical particularism are in fact two sides of the same coin. Virtue-ethics is a substantive ethical theory and particularism is a theory of the logic of ethical discourse (i.e. a metaethical theory). Particularism criticizes other metaethical theories, e.g. universalism, pluralism and monism, on the grounds that they operate with abstract moral principles and logically deduce the correctness of moral beliefs from

[2] See e.g. Drakopoulou 200b, 349, where she points out that the literal meaning of both the greek '*syneidisis*' and the latin '*conscientia*' is 'to know together with'.

these principles (Timmons 1998 chs. 4-6). Particularism makes three claims about correct or at least justified moral beliefs, which are of interest for us here. Firstly, particularism rejects the universality of the reasons thesis: what counts as a reason in a particular case and how it counts depends on the particular situation at hand (Timmons 1998 ch. 6 para. 1). Secondly, particularism claims that moral reasoning and argumentation proceed by examining the details of the particular case and making judgments based on one's moral discernment about the case at hand (Timmons 1998 ch. 6 para. 3). Thirdly, particularism relies on trained moral perception in discerning the morally relevant features in a particular case (Timmons 1998 ch.6 para. 3). All three features show an affinity to the Thomistic conception of conscience and the ethic of care and, consequently, to Drakopoulou's ethical conception of law. To discuss one example: what else is prudence than trained moral perception? Underlying the affinity of virtue ethics and Thomism is the fact that modern virtue ethics is very much influenced by classical moral philosophy. There is also a very close connection between virtue-ethics and the ethic of care, a connection that is so close that both of these approaches have been regarded as two versions of the same ethical theory (Crisp 1998/2004 ch. 6 para. 2; Statman 1997, 17).[3] Therefore, the ethical conception of law envisaged by Drakopoulou corresponds to the position of ethical particularism and virtue-ethics. Likewise, 'the need, indeed longing, for an ethics in law' (Drakopoulou 2000b, 366) unveiled by the genealogical investigation in *Equity, Conscience and the Art of Judgement as Ius Aequi et Boni* is a longing for particularistic ethics.

However, neither particularism nor virtue ethics has escaped criticism. Even proponents of virtue ethics have pointed to shortcomings in virtue theory. According to David Statman (Statman 1997, 19-20), one of the most difficult questions involved is the justification of virtues. The matter of justification is related to the familiar problems concerning the conception of the good. One possible solution is the attachment of virtue ethics to a wider theoretical perspective. For instance, as we have seen, the ethic of care relies on the feminist theory of moral reasoning. The corresponding conceptions of virtue and good are defined by this theoretical outlook. Now, what would comprise a wider theoretical perspective for a humanist conception of law? In our world the return to the theoretical background of Thomistic ethical discourse and to its conception of the good does not seem a feasible alternative. We live with institutions and practices that make it possible for us to coordinate our different

[3] Statman points out that '[t]he exact relation between [virtue-ethics] and relational ethics is a project which is worth exploring for the benefit of both views.' He also believes that the two will in the future integrate into one theory.

conceptions and even make decisions on how to act collectively in a given situation, despite our different ideas of what is good and what is not. Furthermore, a generally accepted assumption seems to be that what is considered good or virtuous is a private, individual matter. However, not only this assumption nor any other ideas about the divide between private and public are characteristics of our conceptions of good, virtuous etc. They are merely different characteristics of the framework or context in which these and other similar concepts are used meaningfully. Therefore, an ethical conception of law would not need a theory that could settle once and for all what is 'good' or 'virtuous'. As has been said earlier, particularistic ethical reasoning proceeds from the details of the situation or case at hand with the help of trained moral perception. It does not rely on abstract moral principles, although it may use them paradigmatically as examples. This also applies to virtues: good reasoning and right action is what a virtuous person would do in a given situation, not something guided by a predetermined and mutually shared conception of good or anything else. (Statman 1997, 10.)

Instead of finding a justification of virtue or a conception of the good, I shall concentrate on the framework in which the concepts in question are used meaningfully. When it comes to an ethical conception of law, an important question is whether the logic of ethical discourse described above as 'ethical particularism' is at all compatible with law.

4. The law conception of ethics

Gertrude Anscombe's article *Modern Moral Philosophy*, published in 1958, was decisive for the development of modern virtue-ethics. Anscombe criticizes modern moral philosophy in general, and deontology (e.g. Kantianism) and utilitarianism in particular. She presents, among other things, the following radical claim: such concepts as 'moral obligation,' 'moral duty,' 'morally right' and 'morally wrong' should not be used in philosophy, because they belong to an earlier conception of ethics, which is no longer extant (Anscombe 1981, 26). She identifies this earlier conception with Christianity and with what she calls its *law conception of ethics* (Anscombe 1981, 30). Anscombe claims that the notion of 'obligation' and the word 'ought,' when they are said to be invested with a peculiar moral force, are remnants of an era in which the belief in divine law had not yet been abandoned (Anscombe 1981, 30-31). This abandonment took place, according to Anscombe, during the Reformation (Anscombe 1981, 31 n. 2). She makes a trenchant remark in this respect: 'They [i.e. the

Protestants] did not deny the existence of divine law; but their most characteristic doctrine was that it was given, not to be obeyed, but to show man's incapacity to obey it, even by grace' (Anscombe 1981, 31 n. 2).

For Anscombe, having a law conception of ethics requires belief in God as a law-giver (Anscombe 1981, 30-31). Consequently, in the present-day situation, 'in which the belief in divine law had long since been abandoned' (Anscombe 1981, 31), the concepts of 'obligation' and 'ought' are used outside the context in which they originally belong. Anscombe speaks in this regard about 'the survival of a concept outside the framework of thought that made it a really intelligible one' (Anscombe 1981, 31). The point is, then, that the words in question have no meaning at all when used outside the context they belong to.

The same evolution that led to the disappearance of the concept of '*synderesis*' also led to the meaninglessness of 'obligation' and 'ought' in the language of morals. The longing for ethics in law (Drakopoulou 2000b, 366) corresponds to a similar, or maybe even greater, longing in moral philosophy. It seems at least possible that the need for ethics in law, discovered by Drakopoulou, could be somehow related to the justificatory emptiness of some of the core concepts of modern moral philosophy. This makes drafting the humanistic project in law somewhat easier. In spite of their apparent differences, Anscombe being concerned with moral philosophy and Drakopoulou mainly with law, both suggest a return to a particularistic ethical discourse, and, it seems, for similar reasons. I believe that these standpoints, and the concerns they address, are, in fact, a token of exactly the kind of humanistic world-view that I have tried to define above. This being said, there are also differences between Anscombe's and Drakopoulou's views of medieval ethical discourse. This is especially the case with Anscombe's notion of the law conception of ethics, which does not appear to be congruent with Drakopoulou's more subtle view on *synderesis*. This raises, for example, the question of how, if at all, the notion of *synderesis* is related to the concepts of 'obligation' and 'duty'. These are interesting questions, which I cannot discuss in more detail here.

One can conclude that certain concepts of moral philosophy are empty in the sense that they are used outside the context that originally made them intelligible. Anscombe, on one hand, suggests not to use words such as 'obligation' and 'ought' in their moral sense as this sense has become empty. The question that inevitably arises is whether this has any consequences for law and legal theory. It could mean, for instance, that the legal-theoretical use of these words cannot be justified by philosophical conceptions that operate with empty concepts. This problem relates, for instance, to legal theories based on Kantianism or utilitarianism. However, it would

appear to be necessary to establish whether legal language employs concepts of 'obligation,' 'ought' etc. all of which are as empty as their equivalents in the language of moral philosophy, or whether they belong genuinely to legal language and are therefore necessary to the self-understanding of law. Drakopoulou, on the other hand, reminds us of an ethical discourse in law, different from today's empty law conception of ethics. With this discourse as a model, one can foresee an ethical conception of law and a humanist project in law. This would mean, even for law, not a return to an old context, but the emergence of a new one. The question that remains open is how the legal conceptions of obligation and 'ought' fit into this context. Although the question of the relations between law and morals is too wide to be elaborated upon here, I shall briefly touch upon it in the following short discussion of the connections between law and morality in H.L.A. Hart.

5. The moral theory of H.L.A. Hart

The works of H.L.A. Hart can be subsumed under moral theory as easily as legal theory (See e.g. Hart 1963, 1-3, Hart 1997, 155-212, 268-272). This is obviously due to his view that there is a close connection between law and morals and that this connection should form the basis of a theoretical investigation of law. An important part of this investigation is how legal and moral obligation differ and yet how they are also related (Hart 1997, 13). Hart's answer is that fundamentally the concept of obligation is the same in morals and in law. There is one feature above others that connects law with morals, and this he argues is the essence of the nature of their rules: both moral rules and primary legal rules are rules of obligation (Hart 1997, 168, 170-172).[4] The moral rules based on obligation and duty belong to what Hart calls the 'accepted morality' or 'conventional morality' of a social group (Hart 1997, 169). They are, according to him, 'the bedrock of social morality' (Hart 1997, 180). There are, however, other types of morals. On one hand, Hart distinguishes conventional morality from those general moral principles used in the criticism of actual social institutions,

---

[4] The following citation is illustrative of Hart's thinking in this regard: 'In all communities, there is a partial overlap in content between legal and moral obligation; though the requirements of legal rules are more specific and are hedged round with more detailed exceptions than their moral counterparts. [----] What such rules require are either forbearances, or actions which are simple in the sense that no special skill or intellect is required for their performance. Moral obligations, like legal obligations, are within the capacity of any normal adult.' (Hart 1997, 171.)

including conventional morality itself (Hart 1963, 20).[5] In fact, critical morality is exactly what Hart himself treats in his *Law, Liberty and Morality*.[6] On the other hand, Hart distinguishes 'moral ideals' or 'virtues,' which, unlike duty, require special effort and deserve special praise.[7] These, again, are the kind of normative practices which moral particularists are interested in and which form the basis of virtue-ethics. However, in Hart both of these types of morals are firmly anchored to the notions of obligation and duty (Hart 1997, 182-183).

Hart's point is, thus, that the notions of obligation and duty are the bedrock of both morals and law. It should be obvious, on one hand, that Hart's conception of conventional morals is very much a *law* conception, and, on the other hand, that Hart, when describing conventional morals, is not involved in moral philosophy, but in descriptive moral theory. Is his description of moral practices, then, accurate? Let me give a practical example.

> Imagine that you are thanking a friend for visiting you in hospital. She replies, 'Oh, it was nothing. It was obvious that morality required me to come' (Crisp 1998/2004 ch. 4 para. 1.)[8]

The point of criticism in the example above is directed towards both deontological and utilitarian ethical theories. The example shows how flawed a description based on the notions of obligation and duty is to actual situations in need of moral assessment and to our self-understanding of what it means to do the morally right thing. This is also the problem with Hart's description of conventional morals.

However, this does not necessarily mean that Hart's conception of legal rules and legal obligation is defective. For instance, ethical particularism and virtue ethics state only that ethics is not law, and that neither the logic nor the vocabulary of law should interfere with ethics. One could argue, for example, that the practice of ethics is different from the practice of law in these two respects, the former being particular and the latter making claims for generality. Does that make them irreconcilable? Drakopoulou's investigations show that these practices are not sufficiently asymmetrical, to prevent them from being integrated. In a way, also the multiple

---

[5] This idea of 'positive morality' and 'critical morality' goes back to utilitarianism.

[6] See Hart1963, 81-83, especially his 'method of argument' on, 81-82.

[7] Hart does not take into account the possibility that virtues may have a paradigmatic or exemplary function (See Statman 1997, 10).

[8] The example comes originally from Michael Stockers influencal article *The Schizophrenia of Modern Ethical Theory*, published in Journal of Philosophy in 1976.

relations between law and morals described by Hart – especially his views on moral ideals and critical morality – point in the same direction.

To conclude, Drakopoulou's investigations of the ethical conception of law and Anscombe's criticism of the law conception of ethics both relate to important as well as persistent legal-theoretical questions. These questions, e.g. to what extent law is based on the application of rules and to what extent the legal concepts of 'obligation,' 'duty' and 'ought' possess normative force other than moral force, have yielded different answers in the history of legal theory. Even if the difference between law and ethics were a matter of logic and context, it does not mean that these questions could not be investigated theoretically with regard to both law and ethics. Quite the contrary, because of the close connections between the two disciplines, these questions would merit such investigations. Such investigations, I believe, would be a manifestation of a humanistic conception of law.

Bibliography

Anscombe, G.E.M.: Modern Moral Philosophy. In *G.E.M. Anscombe: The Collected Philosophical Papers of G.E.M. Anscombe. Volume Three: Ethics Religion and Politics*. 1981, 26-42.

Crisp, Roger: Moral Particularism. In E. Craig (Ed.), *Routledge Encyclopedia of Philosophy*. Routledge 1998. http://www.rep.routledge.com/article/L131

Crisp, Roger: Virtue Ethics. In E. Craig (Ed.), *Routledge Encyclopedia of Philosophy*. Routledge 1998/2004. http://www.rep.routledge.com/article/L111

Drakopoulou, Maria: The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship. *8 Feminist Legal Studies* (2000a), 199-226.

Drakopoulou, Maria: Equity, Conscience and the Art of Judgement as Ius Aequi et Boni.In *Law Text Culture, Vol 5(1)* (2000b), 345-375.

Hart, H.L.A.: Law, Liberty and Morality. Stanford University Press 1963.

Hart, H.L.A.: The Concept of Law. Second Edition. With a Postscript edited by Penelope A. Bulloch and Joseph Raz. Clarendon Press 1997.

Nelken, David: Can there be a Sociology of Legal Meaning? In David Nelken (ed.): Law as Communication. Darthmouth Publishing Company 1996, 107-128.

Statman, Daniel: Introduction to Virtue Ethics. In Daniel Statman (ed.): *Virtue Ethics. A critical reader.* Edinburgh University Press 1997, 1-41.

Timmons, Mark: Logic of Ethical Discourse. In E. Craig (Ed.), *Routledge Encyclopedia of Philosophy*. Routledge 1998. http://www.rep.routledge.com/article/L045