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Strategies for the Justification of Law

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Abstract: We need to acknowledge that the members of most modern societes adhere to different and partially contradictory moral convictions which to overcome we yet don't have the intellectual means. Since such convictions typically include opions about which moral rules should be established as laws there will be disagreement about the correct rules of law as well. The article investigates the possibilities to find a system of laws that all can accept on the basis of such moral pluralism. It develops six steps and models for the required justification. As the final step has the form of a strategic negotiation the concluding section explores which forms of representation and which deviations from unanimity are acceptable within this procedural model of justification.

Keywords: Law, justification of law, contractualism, proceduralism, compromise, negotiation, moral pluralism, principle of unanimity, representation

1 Introduction

Every human life takes place in a dynamic field between cooperation and conflict. On the one hand, it is only in cooperation with others that people can guarantee themselves a satisfying life and develop their specific capabilities. On the other hand, there is a broad range of opinion as to what makes a life good. What pleases one person irritates another. These tensions are exacerbated by the fact that the means required by each person to actualize what he considers to be a good life must be generated out of what is always a scarce amount of resources. Those competing for resources are ultimately also involved in conflicts because in the collaboration with others, it is often unclear who should receive what share of the collectively-created goods. A time-tested means for overcoming these conflicts is morality. Moral convictions are behavioral expectations that lay claim to a general validity. Morality makes statements, among other things, as to what behavior each individual is permitted to expect from others for the attainment of his goals, and what behavior on his part he can expect others to accept. Whoever has developed a moral conviction believes the corresponding limitations to his actions to be

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justified. A morality shared by the protagonists is accordingly capable of resolving conflicts.

Conflict resolution through morality, however, remains deficient in several regards:

1. It functions only when all participants adhere to the same morality.
2. Even if all protagonists verbally adhere to the same morality, differences of opinion will occur with regard to the meaning and relative importance of the moral rules.
3. Conflicts cannot be avoided simply by depending on the motivational power of the moral convictions.

The resolution of the second problem requires an authority which is accepted by the protagonists and which clarifies and hierarchizes commonly accepted norms. The third problem can be lessened by a motivation-enhancing system for the threatening and imposing of sanctions. With these two elements, moral self-control is transformed into a limitation of behavior through law. A legal system will only be able to effectively fulfill the tasks of conflict prevention and conflict resolution, however, if it appears to be justified or legitimate from the perspective of those who are subject to its dictates. Otherwise it remains a purely coercive measure to which one submits, if at all, then only out of prudence. Hence the solution of the first problem is central to the success of a legally constituted strategy for conflict resolution. How can a legal order appear to be justified or legitimate from the perspective of all participants if they hold different moral convictions? In the following, I will investigate the question as to what arguments can be used to motivate potential adherents to a legal system to accept universally valid, legally grounded rules on the basis of their moral convictions.

2 The Methods for Generating Legitimacy

2.1 First Level: Legitimacy through Morality

The step from morality to law is in most cases already established in morality itself. Most moral systems make statements about how the norms they advocate should be backed up in society. This can involve praise and reproach, withdrawal or also sanctions through an institution set up for this purpose. The norms backed up by institutionalized sanctions are typically ones which protect extremely important goods, and for which it is true that this sort of protection can be best assured by corresponding measures. The norms strengthened in this way con-

stitute the legal framework for a community, with whose help conflicts between individuals can be avoided or settled. The legitimacy of a legal order can be defined on this basis as follows:

L-1: A legal order is legitimate for a person P if its rules should be enforced by a system of state institutions in accordance with the moral convictions of P.

An essential characteristic connected with the recognition of the legitimacy of a legal system is that such an order does not simply represent a system of coercion for this person. Someone who holds moral convictions is in most cases motivationally and emotionally connected or even identified with the corresponding norms. It is not a matter of indifference to him whether he himself or others do or do not act morally. And for such a person, the moral norms established in legal form are accordingly not only external acts of coercion that attempt to force his life in a direction that is meaningless to him. On the contrary—the fact that these legal practices exist meets with his approval, even if they both extend and limit his range of possible action and he does not always find it easy to act accordingly. As a consequence of his moral convictions, the person will feel obliged to obey the laws that meet with his approbation.

This form of acceptance and origination of legitimacy, however, is only possible as long as the members of a legal community all adhere to the same morality, or at least to such moral systems as seek to give legal form to the same norms. Most modern societies, however, are characterized by a moral pluralism. It is rare that all their members adhere to the same moral system. They have varying expectations in their dealings with each other and also advocate divergent legal norms for regulating their social intercourse. Something that seems fair and legitimate from one person's perspective is unjust and illegitimate from the standpoint of another individual. Thus the original conflict due to scarce resources is often exacerbated into a conflict about behavioral expectations which all claim universal validity. The more the proponents of a moral system are identified with it, the more it can itself become the source of new and intensive enmities. The frustration of not possessing some item or not being able to live in a particular manner is often far overshadowed by moral anger at the behavior of others and their possession of certain goods which appears to be unjustified according to one's own morality.

In part, the problem of moral pluralism consists in entirely practical terms of the thereby arising tensions. These not only have to do with the fact that the interests of one person are frustrated by the actions of others. Here it is additionally a matter of the aversions which arise out of normative heteronomy, out of the thwarting of the desire for normative autonomy. On an intellectual level, the problem is that up to now, no means and arguments have been found for convinc-

ing all people of the correctness of a specific morality. The discovery of a correct morality proves to be difficult particularly because those devoted to various moral systems cite extremely diverse sources for the claims to validity that they make. For some, the contents of morality come from divine revelation, and for others from self-determination. For some, empathy is the only pure source; for others, that origin is a treaty between rational egoists. Some believe themselves to have reason to reduce suffering wherever it occurs; others consider themselves to be lawgivers in a kingdom of ends. The favored moral principles are accordingly different. Consequentialists argue with deontologists, contractualists with egalitarians, utilitarians with prioritarians—to name just a few lines of conflict. In view of these fundamental differences, it seems a futile endeavor to summon the participants to shift to the more abstract level of a coexistence based on equal rights, and from there to seek an arrangement that is good for everyone in equal measure.[1] Because for some of those contesting the issue here, the search for what is equally good for all is again only the ideal of a certain moral tradition. And even those for whom the idea of equal rights plays a role are in disagreement about the concrete norms to which such an attitude leads. If all individuals are equally important, but here on earth even the best ethical system is incapable of making everyone completely happy, must morality consequently aim at making everyone happy to more or less the same degree, or at creating as much happiness as possible? Or is it a matter of maximizing the lowest level of happiness?

In view of these difficulties, we would do well to acknowledge that at the moment, we do not have available the intellectual means for discovering the true morality. Up to now, we have not been able to find, behind those systems of prominent moralities that have meanwhile been holistically elaborated, a deeper basis from which their falsity or validity could be recognized. Nonetheless, we have need of methods and arguments in order to mitigate the conflict not only between interests, but especially also between moralities. The question is then: How is it possible in view of normative pluralism to find legal norms which can be acknowledged to be legitimate from the perspective of all those to whom a norm is addressed?

2.2 Second Level: Legitimacy through Partial Moral Consensus

A possible procedure is the restriction to the highest common denominator. If a legal norm is legitimate for a person because it is endorsed by his morality, then a

1 As proposed by Habermas 1996, 321.

legal norm is clearly legitimate for all persons when it is endorsed by the morality of everyone. In order for something to become a legitimate law, it must be unanimously approved by everyone.

A second concept of legitimacy corresponds to this:

L-2: A legal system backed up by sanctions is legitimate if its rules are to be enforced according to the convictions of all those who are subject to them.

The strength of this strategy consists of the fact that all the supporters have convincing moral reasons for accepting the elements of the consensus. The consensus is also not the reflection of the relative strengths of the participants. Independently of the strength or weakness of the parties, it is simply the realm of unanimity. The focus of attention is on what is prohibited by the moralities. Assumed that one group in a society wishes to allow consensual sexual activity between any persons whatsoever, another only between non-minors of different sexes, and a third only between persons joined in marriage, regardless of whether they are minors or not. If normative commonality were here to consist in what everyone wants to allow, then only consensual sexual activity between married adults of different sexes would be legitimate. If, on the other hand, normative commonality is understood to be that which everyone wants to forbid, then only non-consensual sexual activity is illegitimate. The latter point of view is more plausible, because what is at stake in the search for commonalities is the effort to find common convictions as to what the state is permitted and expected to do. The activity of the state, however, consists primarily in setting up prohibitions. No state issues a list of permitted actions. Citizens proceed on the assumption that everything is permitted that is not expressly forbidden by a law.

One can imagine the determination of the area of unanimity as consisting of a first step in which the parties enter the principles and rules they advocate into a list and then examine what common elements are to be found in the various lists. In a next step, the parties can begin to argue with each other. They can try to reduce their divergences by endeavoring to show the advocates of another position that some of their rules do not logically follow from their principles, or only under quite specific circumstances; that there are contradictions, instances of imprecision, or questionable empirical assumptions in their system of belief, and so forth.

In the framework of this discourse, the parties could also discover that, over and beyond agreement with regard to a few concrete rules, they share common convictions as to what characterizes moral thinking in general. For example, they can all believe that moral thought includes such forms as reciprocity or role reversal (cf. Hare 1983, ch. 6; Forst in Brunkhorst 1999, 82). They hereby find them-

selves to be in good philosophical company, but even an agreement regarding such formal requirements of moral thought will not necessarily mean that all parties advocate the same concrete rules. Moral reflection certainly includes readiness for an elementary role reversal. One must examine whether one can accept both behaving and being treated in accordance with a particular rule, because logic already dictates that identical cases must be evaluated in the same manner. But this requirement of reciprocity is not sufficient for arriving at universally acceptable rules. There will already be dissension among various moral conceptions with regard to which cases are identical and which differences constitute relevant distinctions between them. Moreover, there will be controversy regarding the taking over of other positions, how far such role reversal must go. Is it enough, while retaining one's own preferences, to imagine oneself in another situation? Or must the individual put himself so far in the position of others that he attempts to discover what they think about a particular behavior on the basis of their preferences?[2] Nor will everyone come to the same conclusion in weighing the advantages and disadvantages which are connected to every behavioral norm. Some individuals are ready to accept risks; others seek to avoid at all costs the possibility of finding themselves in certain situations. Someone who adheres to a utilitarian morality, for example, will be able to accept being treated in certain situations in a manner that would be unbearable for a Kantian.

The parties will come to recognize that from their respective points of view, most moralities also have something to say about how their adherents should treat those who think differently. This can include a readiness to concede certain fundamental rights to the devotees of other religions even if they remain excluded from holding public office. Utilitarians can be ready, in a grand calculation of utility, to take at least as preferences the ill-conceived moral convictions of egalitarians into account. Others will be less tolerant and will allow dissenters solely freedom of speech; their ideals will not be taken into consideration and deviating behavior will be strictly punished.

In all these discourses, the parties can approach a consensus or discover that their divergences are more extensive or deeper than originally thought. On the basis of everything that we know, these discourses will not lead to a discovery by the parties that in fact everyone holds the same thing to be right. There will continue to be significant differences between their normative convictions. And in order to assure protection from normative heteronomy, the concept of a normative agreement formulated at L-2 will remain attractive.

2 Cf. in this regard Mackie's differentiation between three levels of universalization, Mackie 1981, ch. 4.

Connected with this notion of legitimacy, however, is a far-reaching change. The acceptance of the normative structure now has a hybrid form. The individual norms still have a moral underpinning; but in addition, there is now a readiness to assure that the norms also conform to the moral convictions of all other parties. What makes a legal norm legitimate is no longer simply the moral reasons for accepting it, but also the fact that all parties assent to the norm.

This second notion of legitimacy accordingly stands in partial contradiction to the first. This becomes clear when one asks what reasons the adherents of various moralities could have to orient their behavior towards the second notion of legitimacy and hence to attribute a normative significance to this concept of legitimacy. If single individuals or entire groups of persons find themselves to be confronted with the phenomenon of moral pluralism and agree to establish as laws only those norms which all parties consider to be moral, then these persons have not suddenly taken on, in addition to their hitherto existing morality, the new moral conviction that one can only compel others to such modes of behavior as are morally correct from their perspective. That kind of change would mean that they had ceased to be advocates of their previous moral principles. But they are not given a reason to do so by the mere fact that others consider other moral systems to be true. The parties will instead adhere to their original moral concepts and the concomitant expectations regarding others and only refrain from their legal implementation in order to reduce the conflicts between the adherents of diverse moralities and to strengthen the stability of their community. The practical orientation towards this notion of legitimacy, i.e. the limitation of demands made on others to the norms accepted by everyone, accordingly has a pragmatic-prudential character, even though all such legitimatized norms also meet with the moral approbation of all participants.

This characterization of their attitude as prudential allows an appropriate description of what will occur further after citizens have reached an agreement concerning a common core of conviction: They will continue afterwards to morally criticize the behavior of others at various points, even if this behavior is legally permitted through the restriction to the common normative core.

The consequence of the prudential character of an orientation towards this form of legitimacy is that this orientation will not exist where there is a dominant group in a society. The members of such a group—e.g., those who stick to deontic rules—will initially have no moral problem with imposing their notions of morality and law on a dissident minority: e.g. on the advocates of the Baal religion or of utilitarianism. In particular, they do not believe that persons have a right to live only under such legal norms as they have themselves agreed to. They consider the others to have been led astray and can only hope that constant instruction will return them to the path of reason, morality and law. In the meantime, the power

of the law will be used to prevent them from doing pernicious things. And if the group of dissidents is small enough, then their suppression can be achieved at an acceptable cost. So in this constellation, the deontologists have neither a moral nor a stability-oriented reason for becoming involved with the concept of moral consensus. They would have a reason to do so if it were true that a legal system based on the assent of all is always more stable than one which simply imposes certain rules on a group in an inferior position. But that is certainly not the case in all constellations.

There is most likely to be a reason for assenting to this concept where no dominant group exists and the tensions between the proponents of various moral persuasions become apparent and lead to undesired costs for everyone. Even if in this situation a group should manage to make its normative ideals compulsory for one and all, there will be many individuals whose sole reason for adhering to some of the norms imposed upon them is to avoid the sanctions that are linked to a violation of those norms. In this sense, the devotees of Baal might have good reasons for conforming to the norms imposed on them; but they have no reason to wish that they exist or to seek to assure their continuation.[3] In such a situation, a legal system based on general consensus will lead to greater stability.

Its pragmatic-prudential character notwithstanding, the L-2 legitimacy must be placed over that of L-1. The factors speaking in favor of a legal system in conformance with L-2 are admittedly second-rate from a moral perspective, but they demand the cultivation of a new virtue—that of tolerance. Most participants must now acquiesce to patterns of behavior which, on the basis of their moral system, would have to be prohibited but, according to the opinion of others, should be permitted. In terms of L-2, a person is tolerant when she does not attempt to impose on others legal norms which are not assented to by all those whom they affect. In return, L-2 offers an important protection. No one must fear any longer that he will be compelled to adopt a specific behavior merely by legal force. Most persons doubtlessly consider many other rules to be correct, but that does not yet turn a life spent in adherence to consensus-capable rules into mere submission to coercion. No one who violates one of these rules and thereby becomes subject to sanctions can claim that he is simply the victim of violence.[4]

3 They would have such a reason only then if they had to fear that otherwise they would have to live under even more disagreeable laws.

4 Cf. Buchanan 2002, 698: "The virtue of consent is that it takes the sting out of coercion." In spite of this virtue, Buchanan then attempts to show that the consensus theory of legitimacy is doomed to failure.

The consensus model of legitimacy is confronted with *four problems*:

1. The realm of law is contingent and fluctuating. What can become law remains dependent upon what normative convictions are actually represented in society. If the proponents of certain convictions die out or change their opinion, there must be a reexamination of what norms are still capable of universal approval under the changed circumstances.[5]
2. With regard to many issues, it is not clear how there can be any common denominator at all. Even if one concentrates on prohibitions, there are many areas where it is not evident of what a shared normative basis could consist. This is especially true for questions of distributive justice. Thus with regard to property rights and forms, some will be egalitarians and others prioritarians or utilitarians. Still others will consider specific forms of property to be impermissible: for example, private ownership of the means of production. Regardless of these differences, the parties could agree that everyone should at least have access to the basic goods required for life. But even this commonality proves upon closer scrutiny to be insufficient. First of all, it is unclear what role personal responsibility plays in this claim to the bare minimum required for life. Can an individual also assert this claim if he stubbornly refuses to work to support himself? Moreover, for someone suffering from cancer, for example, an effective therapy is of crucial importance. But whether or not that therapy is available in a society can depend on what forms of property and thus what forms of economic inequality exist therein. Thus it could be true that societies which allow private ownership of the means of production are more innovative and thereby achieve a higher level of medical care. An egalitarian might in some cases be inclined to content himself with a meager degree of medical care if better care could only be reached by a higher degree of inequality. A prioritarian will give exactly the opposite weight to the advantages and disadvantages.
3. The concentration on what is forbidden, together with the contingent character of the consensus, will most likely cause the adherents of the various moral-

5 Overlapping consensus is also fundamentally important for Rawls concept of political justice. For that reason, according to him, the sought-after concept cannot be formulated in terms of a comprehensive doctrine. Consensus should instead become possible through recourse to the underlying intuitive thoughts that are latently present in a democratic culture (Rawls 1994, 302). This is a much narrower formulation of the problem than here, where it is a matter of a zone of consensual overlap among quite heterogeneous moralities. These include the black virtue-ethical and theocratic models, which have no particular sympathy for democratic culture. The area of agreement will naturally be much smaller among these. But regarding the issue of the legitimacy of domination, it is essential to confront the heterogeneity of the moral convictions that are present.

ities to be differently handled by the consensus. If something can only attain legal validity when all those subject to its dictates are in favor of a corresponding law, then the proponents of a demanding morality will be structurally disadvantaged. They will have to renounce many elements that are important to them; the advocates of a minimalist morality, on the other hand, will find most of the contents of their convictions to be preserved in the consensus. In particular, the adherents of many religious moralities will feel themselves to be disadvantaged because such moralities frequently include more areas of life in that which is supposed to be regulated in moral terms (clothing, art, sexuality, food, working times, etc.).

4. A fundamental problem of all normative theories based on consensus is that under real conditions, there will scarcely ever be agreement among all parties regarding a set of norms. Thus the concept of a legitimacy on the basis of a moral consensus threatens to become a utopia in a negative sense: "Some citizens, for good reasons or bad, will not consent even if presented with the possibility of doing so."[6] This problem is doubtlessly serious, but it is important to first examine what forms of non-approval can count as a challenge to legitimacy. For this purpose, it is necessary to distinguish the forms of and reasons for non-approval.
   4.1 Non-approval as the consequence of a readiness to dominate.
   What is at stake here is the fact that although it is possible to identify norms which everyone espouse as legal regulations, some are nonetheless not ready to limit their legally codified expectations regarding others to these norms, because they expect more from also subjecting others to those of their norms to which they do not assent. A dominant group can have good reasons for such conduct, as has already been made clear above. This is not to say, however, that the concept of legitimacy through consensus is too ambitious and in a negative sense utopian (Buchanan, 2002, 699); it says only that this form of legitimacy will not be interesting for everyone in all historical situations. In most modern societies, however, it will be interesting, because they do not have any clearly and permanently dominant groups.
   4.2 Non-approval as a consequence of cognitive deficits.
   This form is to be found with small children and mentally confused persons, who are incapable of understanding what the question involves. Where this capability is not present, the lack of approval presents no

6 Buchanan 2002, 700. This fear motivated Buchanan to abandon the consensus model which he as well had previously advocated (cf. Buchanan 1975, ch. 4).

problem for the legitimacy of a regulatory system. The lack of approval is then an indication that the person infringing upon these rules should be treated with more forbearance than those who have agreed to the system of rules and subsequently violated it.

4.3 Non-approval as a consequence of skepticism regarding institutionalized threats of sanctions.

A further group of dissidents could consist of individuals who have moral convictions shared by others, but who do not believe that it makes sense to use institutions to strengthen a part of the norms which they advocate. This anarchic skepticism can have two types of reasons:

- The skeptics can believe that this sort of strengthening has no effect. This is scarcely plausible as an empirical thesis. Even where there are shared moral convictions, not everyone will be sufficiently motivated to act in accordance with such tenets. Cases will doubtlessly occur in which the fear of sanctions contributes to avoiding bad conduct. Moreover, even with shared normative convictions, there is frequently controversy concerning the correct application of the corresponding norms. As Buchanan has persuasively shown (Buchanan 1975, 3–6), there is then need for an institution which can resolve such issues and impose a solution.
- Secondly, the skeptics can concede that this sort of strengthening could reduce the number of morally reprehensible actions but not consider this to be normatively desirable. Their concern would be solely with the voluntary exercise of reciprocal considerateness. These skeptics believe that where such considerateness fails to occur, it is still morally better for the bad conduct to take place than for an attempt to be made to prevent it through the threat of sanctions by the state. This is a contradictory attitude. Because if the fundamental evil consists of preventing people through violence or the threat of violence from actions which they would otherwise be inclined to perform, then here as well the victims of violence and the threat thereof by citizens among each other must be given consideration. And if it is true that state sanctions can reduce the occurrence of such events, then the existence of state structures of sanctions means that all in all, changes in behavior resulting from threats occur in fewer persons than without such structures, because in most cases persons inclined to violence—whether through a single action or a sequence of actions—bring several other persons into the normatively undesired situations.

4.4 Non-approval as a consequence of deficient moral theories.
The question here is whether there are moral convictions which cause their proponents to refrain from espousing norms, but which are simultaneously deficient inasmuch as this non-approval cannot count as an argument against the legitimacy of the norms under consideration. What normative significance does it have, for example, when a norm is not espoused by racists or members of a group deeming itself to be the chosen and anointed?

a) With regard to racist theories, the following argument can be made: A racist theory normally consists of two elements. An empirical element which says that the members of a certain group do or do not have certain characteristics. And a normative element which says that it is justified to treat persons of this nature in a certain way. Thus someone could hold the opinion that the members of a group lack certain capabilities and therefore should not be considered as candidates to fill certain positions.
If such theories are to be taken into account, two requirements of rationality must be fulfilled:
   - If the reason for discriminating against or favoring a person lies in certain characteristics, then it is a matter of the characteristics and not of membership in a racist defined group. In this way, racist theories become unavoidably porous. In the case that there is someone from the group being discriminated against who possesses the necessary capability, from the standpoint of the theory there is not any longer anything speaking in favor of his exclusion from the positions under consideration. Racist theories thereby evolve into theories of capability and must be formulated as such in order to be worthy of consideration.[7]
   - The occurrence of the negative consequences asserted by such a theory must be empirically plausible. It must be true that a person must possess the indicated characteristics in order to fill the position under consideration.
   The non-approval of persons who propound theories which are deficient in these respects is just as inconsequential as the non-approval of children.

7 It is typical of racists, on the other hand, that they are not willing to give consideration to the concrete characteristics of a person but cling to sweeping, judgmental generalizations. But precisely that is itself irrational according to the standards of their theory and therefore not worthy of consideration.

b) These requirements of rationality can be applied to religious or quasi-religious systems of belief only to a limited degree. This is because most of the time, religious convictions cannot be empirically examined. That a God exists and has issued commands intended for human beings can be neither proven nor shown to be false. Also convictions regarding the occurrence of certain events such as the Resurrection or the Last Judgment remain purely a matter of belief. All this can be considered to be improbable or superfluous with regard to understanding the world; but it is also not irrational to make such assumptions. Thus it is not possible to characterize as irrational and neglect as legitimatorily irrelevant the non-approval of all persons whose normative convictions are based on such transcendent assumptions. This would not only be inappropriate; it would also be ineffective, because a transcendent normative theory can always be divided into two elements: both normative convictions and the transcendent contents which are cited for their justification. The advocates of such theories can accordingly detach their normative convictions from the transcendent grounds and reformulate them as an intuitive grasping of values. Where it was previously asserted that God condemns homosexuality, there would now stand the intuition that such activity is undignified or a bad thing. Such intuitions are, of course, not claims which can be empirically validated, but they share this characteristic with many non-transcendent normative theories. For religiously oriented persons, there is even a rational reason to make use of intuitive evidence. This reason consists of the fact that it is scarcely convincing to argue that certain norms are correct and can lay claim to validity because a God proclaimed them. It is far more plausible to assume, as Socrates already emphasized, that God proclaimed the norms because they are right (Platon, Euthyphro 10a–d). So the adherents to a religion can very well hold to their convictions; they must acknowledge, however, that they cannot dismiss doubt as to their correctness with the simple indication that these are the very norms proclaimed by God. Instead they must endeavor to make clear to themselves and to others the cognitive process which led to a recognition of the correctness of these convictions.

If the discussed forms of non-approval are incapable of calling into question the legitimacy of a legal system, then quite a few objections to the usefulness of the theory of consent thereby become obsolete. After excluding such objections, there will be in every society a set of norms which, maintained in a general form, are

accepted by all as the legal standard. Most capable of achieving general consensus will be a group of fundamental negative rights and duties: for example, the right to physical integrity as well as prohibitions of fraud and bribery. These rights will be advocated by almost everyone, because with them interests are protected which most people have or for conceptual reasons must have if they pursue any interests at all. Who seeks to realize any goal at all must have an interest in assuring that he cannot, at any time and for no foreseeable reason, be harmed in his ability to perform action. A part of these prohibitions, moreover, already results from that which belongs to the ongoing existence of a legal system. If in pursuit of their goals citizens can at any time threaten or even kill each other, it cannot be ascertained to what degree it is still possible to speak at all of a rule of law.

But also there where all parties recognize the same rights, it remains unclear what significance and what status these rights have.

- With regard to the significance of a right, it is extremely important to clarify the concepts formulated in the legal system. Even if all agree that it is always wrong to threaten or kill an innocent person, this says only little. There must be clarity as to how someone can lose the status of being innocent. Can this occur only if he threatens the life of someone else or also if he performs an abortion, insults me, or blasphemes the God I revere?
- With regard to status, it is a question of whether the sufficiently specified rights are to be taken as absolute rights or as prima-facie rights which, in the daily life of society, are supposed to engender a certain reliability but which, if serious problems arise, may be modified or annulled. And if the answer is yes, then what counts as a serious problem?

  The actual problem of the theory of consent is thus not that no norms capable of engendering consensus can be found, but that the extent of the consensus is too narrow or the meaning of the norms is too indefinite. This should not cause those who are confronted with the problem of moral pluralism to abandon the search for a consensus, but instead animate them to search for methods of expanding and clarifying the realm of consensus capability.

2.3 Third Level: Legitimacy through Moral Compromise

In response to these problems, those who are interested in expanding and clarifying the acceptance of legal regulations past the area of moral consensus must necessarily be ready to take a step past their own morality. This step means that the parties now no longer search for commonalities in their moral convictions. They now use this store of shared beliefs as a point of departure and, in view of their

ongoing differences and indeterminacies, to arrive at further agreements which are deemed by all parties to be desirable.

Further agreements will be desired by most parties because they realize that a restriction to directly shared norms does not constitute an optimal moral state for the participants. All parties are motivated by a wish to usher into social reality as many as possible of the norms which they advocate. And a non-violent method for approaching this goal as closely as possible consists in the initiation of negotiations aiming at an extension of the zone of consensus through moral compromises. The parties further endeavor to achieve general recognition of the norms that are important to them inasmuch as in return, they declare themselves ready to recognize some of the norms of other parties. Let us assume that in a state, neither abortion nor alcohol are prohibited because there is no general assent to such prohibitions. Then a party interested in a prohibition of abortion could succeed in coming to an understanding with proponents of forbidding alcohol that in their society, abortions would only be allowed in certain cases and the consumption of alcohol only at certain places. The acceptance of such a compromise is then rational for all sides if, from the perspective of all participants, the extension of the normatively regulated area represents a situation which is morally better than the retention of legal minimalism. In such negotiations, the parties renounce part of their moral demands in exchange for moral concessions by other parties. They thereby require a second-order moral theory which tells them which impairments of their moral ideals are less bad then other possible deviations. It is a matter here of a process of working towards moral compromise (cf. McCarthy 1993, 325f.).

A further notion of legitimacy corresponds to this:

L-3: A sanction-strengthened legal system is legitimate if its rules are accepted by all those who are subject to them—whether as an element in their morality or as the result of a moral compromise.

But even if through compromises, the parties have come somewhat closer to what they envision as a morally optimal world, they continue to have moral reservations with regard to this situation. They still do not believe that only those norms are legitimate to which all have given their assent. They have only granted their assent to the model of moral compromise because it promises stability and a closer approximation to their moral ideal. And they have even paid a high price for this gain. Because part of the rules which they have now consented to can even directly contradict the original morality of the subjects. For example, they may have renounced the absolute prohibition of abortion which they consider to be correct only in order to be able to achieve consent to a limited prohibition of abortion. Thus the acceptance of a partial allowance of abortion as well as the readiness to

adhere to the agreed-upon rules is only a temporal-conditional attitude. The negotiated rules are accepted because all in all, they are morally better and because under the given circumstances, a state of compromise is in any case better than the effort to compel others to follow one's own canon of rules. Therefore one can also not proceed from the assumption that the parties consider each other to be on an equal moral footing. The proponents of a Marxist-inspired ethic will doubtlessly consider the adherents to Catholicism to have been led astray. The advocates of a virtue-ethic will continue to espouse the idea that influence in society should be distributed in accordance with virtue. They do not fundamentally object to social hierarchies. Therefore they also have no reason to avoid relationships of social superiority.[8]

This model of the extension of law through moral compromise will only work where each of the parties wins more than it loses through the extension. It will accordingly not function at all where a party seeks to prohibit only a few actions and these prohibitions were already all realized because they are contained within the range of normative agreement (L-2). The advocates of further prohibitions would have nothing to offer such a party which, from its point of view, would constitute a moral improvement. The proponents of a minimal morality can exercise a sort of veto here.

2.4 Fourth Level: Strategic Legalism

The proponents of more demanding moralities will accordingly be frustrated. Moreover, inasmuch as they do not believe that legitimacy is fundamentally linked to the consent of all those subject to rules and are only participating in the search for agreement in order to realize to the greatest extent possible their favored morality, they will now ask themselves what speaks in favor of contenting oneself with a normative system which corresponds to L-3. If the proponents of minimal morality constitute a minority, the proponents of more extensive moral systems will for their part come to the conclusion that for them, success is promised and moral behavior is assured by imposing their norms on the minority. The permissible forms of coercion will then arise only out of the principles which the morality of the majority makes available for dealing with dissidents.

Only if this form of imposing norms proves to be unstable and expensive is it rational for all participants to take a further step. This means that the parties enter

8 Cf. in contrast Kolodny 2014, 299f. He argues that we have reason to avoid such social superiority because such a stance considers the recognition of others as moral equals to be inappropriate. But against the background of moral pluralism, this recognition is no longer self-evident.

into strategic negotiations on the basis of the norms deemed legitimate according to L-2 or L-3. The strategic character of these negotiations lies in the fact that the parties are no longer seeking moral agreements or compromises. After the moral potential has been exhausted, the parties can now attempt to further realize their moral ideals by activating their social threat potential to the extent that this is allowed by their respective moralities. Here the parties cannot threaten each other with violence, because they all acknowledge the premise that domination of the other parties is either impossible or incurs excessively high costs. If forcing others to submit through the use of actually physical or legally formulated violence has proven to be suboptimal, all that remains is the indication of a weaker threat potential. This can include a withdrawal from the already established forms of cooperation, or the cessation of certain activities along with a reference to concomitant losses for those who are affected. Since all parties attempt to make the best use of their specific capabilities, threat potentials and alternative options, the rules rationally acceptable to all will be marked by the relative strengths of the parties and can accordingly have an inegalitarian character (cf. Stemmer 2000, 199, 222, 247; Buchanan 1975, 60). Such a broader set of rules can claim universal validity only if all parties win and can simultaneously recognize that a further concession by other parties would no longer be rational from their perspective. It is difficult here to estimate how extensive the inequality connected with this model will be in the order that is ultimately espoused by all. It is clear that this is crucially dependent on the initial parameters—which parties are present with which interests, ideals and capacities—and the real alternatives of the parties. If a qualified minority in a society holds to libertarian convictions and simultaneously has a simple possibility of emigrating from its socialist society, then the majority will be able to induce it to stay through violence and physical barriers, or with significant normative and material concessions. Because without concessions or sanctions for attempted emigration, it would be irrational for the libertarians not to emigrate or to separate themselves from the given society through secession. If, on the other hand, almost all citizens are convinced by the socialist ideal, one can allow the dissidents to leave without a problem and thereby adhere to the egalitarian order.

In spite of its strategic crudity, a compromise negotiated in this way still represents an alternative to mere coercion and leads to a new concept of legitimacy:[9]

9 With justification, McCarthy has already refuted Habermas, whose disjunction between a merely strategically motivated compromise and a consensus reached through argumentation he has demonstrated to be incomplete. He argues that a consent motivated by compromises and concessions is still rational and constitutes a moral and political alternative to coercion (McCarthy 1993, 326).

L-4: A legal system strengthened by sanctions is legitimate if its rules are endorsed by all those who are subject to them—whether as an element of their morality, as an element of a moral compromise, or as the result of a process of strategic negotiation.

The assessments which must be made by the negotiating parties will have to become much more complex at this point. Whereas up to now it was a matter of weighing the elements of the parties' respective moral ideals, the focus is now on determining the relative importance of the moral ideals in comparison to entirely ordinary interests. This becomes clear in the example of negotiations between libertarians and egalitarians. If the libertarians simultaneously possess many key qualifications and resources and can threaten to withdraw from an existing collaboration, then such a withdrawal would mean that the egalitarians become better able to realize their ideals, but must simultaneously reckon with genuine forfeits with regard to the satisfaction of their interests. For them, the question will arise as to how extensive a reduction in their quality of life their moral ideal is worth to them. For their part, the libertarians will be compelled to make a similar assessment, inasmuch as the withdrawal from a community will be linked with transitory costs for them.

This bargaining process is in a certain sense a second-level contractualism. Here it is not a matter, as is the case in normal contractualism, of arriving—out of a state of nature previous to the contract and on the basis of interests—at rules which are acceptable to all, then strengthening these rules with threats of sanctions and, through pedagogical measures, of transforming them into a moral disposition. Here instead, the point of departure means that the participants are already engaged in genuine cooperation, already have moral convictions and dispositions, and now are searching for generally acceptable rules which realize as far as possible both the normative ideals and the interests of the participating parties.

The motivation and readiness to also adhere to the agreed-upon rules accordingly has a different character than the motivational appraisal of the moral attitudes which the individuals bring to the negotiating process. Many are motivationally connected to the morality serving as their point of departure by the fact that they identify themselves with the accompanying values or the underlying notions of humanity. The adherent to a religiously supported morality understands himself to be the child of a God in whose love and commandments he has faith. A Kantian sees himself as an autonomous member of a kingdom of ends, or at least believes that without a moral orientation, he would lose his personal identity (cf. Korsgaard 1996, 101). Finally, a consequentialist in most cases carries the conviction that he has reasons to combat pain as such, wherever it appears (cf. Nagel 1992, 270f; Fehige 2004, 38). In all these moralities, their proponents will be in-

clined to consider that behavior which is deemed correct and is demanded from them to be their duty. The sense of having a duty means that as someone subject to obligation, one has (or believes oneself to have) reasons to do or not to do something, regardless of whether such behavior is or is not subject to sanctions.

With the rules negotiated here, such a motivation exists directly only with regard to that part of the rules which is identical with the moral convictions of the respective contractual partners. There are several plausible attitudes towards the rules which deviate from this core:

- Someone can think that the simple fact that he assented to an agreement constitutes a reason for him to follow all the rules. This sort of reason will arise especially for persons whose morality includes the institution of making a promise, and who understand the assent to an agreement to be a sort of promise which engenders duties.
- An obligation to adhere also to rules of which one disapproves could also arise for some persons out of the fact that they assented to the agreement and in some sense have benefited from the thereby-established community of cooperation.[10]
- How far this extension of the original motivational status reaches through this sort of agreement or the receipt of advantages, however, will again depend on the original morality of the subject. For the acceptance of an obligation to follow all the rules, the degree to which what is prohibited contradicts one's own morality will doubtlessly be important. A person who, in the context of a bargaining process and against the dictates of his conscience, has agreed to the prohibition of abortion in order to avert further losses will not necessarily believe that he is now subject to a duty to refrain from performing abortions. He could also believe that his consent is only related to the establishment of a system of sanctions one of whose rules forbids abortions. He consented to the system of sanctions because overall he considers its existence to be advantageous, but he obeys some of its rules only because those violating them are subject to sanctions. When such a person can perform an abortion without having to expect the imposition of sanctions, there is most of the time no more reason for him to refrain from doing so. Only in rare cases when one's violation of a rule could threaten the existence of the entire system does this person have a stronger reason for not violating the rule than the avoidance of sanctions—because he as well wishes for the negotiated system of rules to continue to function and not be replaced by the unregulated exercise of violence.

10 Thus argues Simmons 1999, 753.

Here as well, the parties will voice moral criticism of others' behavior in certain regards, even if this behavior is legally allowed by the agreement that was reached. Nonetheless, the contents of this agreement determine the extent of both the legal violence recognized as justified by all parties and the tolerance called for by them all: Regardless of the moral criticism, they will attempt to compel each other by legal means only to the extent that this is covered by the agreement.[11] In this self-restraint, the parties must of course not have constant recourse to strategic reasons. In some cases, the self-restraint required of them will also be demanded by the morality to which they adhere. The legitimacy linked to this form of consent is—with the exception of those who, as Locke, understand legitimacy in a strategic sense from the very beginning—merely a second-best form for the participants. The legitimacy which arises from the moral rightness of rules remains the primary form for them.

At this point, however, a problem of circularity emerges. In the strategic negotiations, the parties can make use of threat potentials which arise out of their property and their capabilities. The existence and size of these factors, however, are dependent for their part on already existing social practices and norms. Whoever has access to material resources with whose withdrawal he can threaten in the negotiations must somehow have come to possess these resources. They must be considered to be his and thus presuppose an acknowledged practice of appropriation. Whoever has special capabilities was only able to develop them so far because there were social institutions which allowed or even supported this refinement: for example, the right of parents to educate their children, or access to educational institutions. But it is precisely these social rules and norms that are judged to be false by the proponents of certain moralities.

Thus socialists will consider it to be absurd that only a few individuals own the means of production and can threaten to no longer make them available, even though according to socialist morality there should be no private ownership of the means of production. In order for the strategic negotiations to have a legitimizing effect, it seems necessary to cleanse the negotiating positions of all elements which can only exist as the effects of already controversial norms. Otherwise the model of legitimization remains circular in the sense that it is based on circumstances which for their part must still be legitimized. Through this questioning of heretofore accepted initial positions, the demand for consensus is radicalized and the process of justification acquires a hypothetical character specifically because one can no longer argue on the basis of the actually existing position. A new type of legitimization presents itself.

11 P. Königs has described this attitude towards the law as political tolerance (2013, 488f).

2.5 Fifth Level: Hypothetical Contractualism

The exclusion of the morally controversial factors gives rise to this concept of legitimacy:

L-5: A legal system reinforced by sanctions is legitimate when its rules are approved of by all those subject to them as the result of a negotiating process which has been radicalized within the limits of their morality.

The phrases "within the limits of their morality" indicate that also in radical negotiations, the subjects are guided and restrained by the morality to which they originally adhere. For example, someone who believes that special talents are God-given blessings which the recipient should use for the good of his fellow men will not threaten, even in strategic negotiations, to exclude his fellow citizens from benefiting from these talents. On the other hand, someone who believes that his personality with all its elements is one coherent entity which is not open to redistributive enterprises will feel less inhibitions in this regard.[12]

The concept of radical negotiation, however, proves upon closer inspection to be incapable of realization. The fundamental problem is that there are no clear preconditions for such negotiations. Which arguments can the parties make to each other under the now-required restrictions? These limitations do not put the parties in a situation which is equivalent to the original position conceived of by Rawls (cf. Rawls 1979, 27–29). Here the issue is not that parties—in a pre-moral state and only on the basis of their declared interests and in ignorance of their personal circumstances—search for rules for their coexistence which are rationally acceptable to all. Instead the parties are already in the possession of formulated moral convictions and ask themselves how they should handle their moral differences. When, after the phase of achieving moral compromises, no party is any longer permitted to have recourse to its real threat potential during bargaining about further rules, the rug has basically been pulled out from under the strategic negotiations. The parties can only continue to threaten each other with ending cooperation with the other side. But precisely because the parties adhere to divergent moral ideals, it can no longer be predicted what such a withdrawal would mean for all participants, because it is no longer clear what they would concede to each other as that to which they all can lay claim in the process of departure or of collective separation. For example, are the wealthy and well-educated allowed to abandon cooperation while preserving their material and mental properties, or

12 This is the argument, for example, of Wolfgang Kersting in Kersting 2000, 228.

do they owe compensation to those who remain? Must those who are leaving carry the long-term costs of decisions which they always considered to be false and because of which they now wish to withdraw from the cooperation? According to what principle are natural resources such as water or minerals to be distributed, if at all, in a collective separation? In order to clarify such issues, the parties must share a common separation ethic; in view of their moral differences, this is highly unlikely.[13]

One could suspect that one benefit of radicalized justification lies in the fact that the parties are compelled to a form of impartiality. But the recourse to impartiality will not create unanimity. Because in the moral convictions of the parties, the argumentative patterns of impartiality have already played a role many times. Someone who propounds a libertarian morality does not generally adhere to it because he is wealthy or highly talented and therefore benefits from it. Instead he will cite neutral reasons and claim that he would also hold his morality to be correct if he were poor and untalented. Thus radicalization leads back to the dissension with regard to the various moralities based on some concept of impartiality. This involves again issues of the ranking of goods and the favored level of social security. Even behind a veil of ignorance, it is e.g. not rationally imperative to come to an agreement along the principles defended by Rawls.[14] Instead on the basis of varying degrees of readiness to take risks, various levels of social security will be advocated. The call for a radical justification accordingly has at this point no effect on the level of normative convictions. It only shows that, according to this concept of legitimacy, none of the parties in this strategic struggle to realize their own ideals and interests can expect that the property heretofore recognized as belonging to them will now be acknowledged as their own, or that the talents developed by a person will be seen as something that can justify the making of claims. As long as there is no agreement in this regard, it is not clear what costs an end to cooperation will have for everyone. And as long as that is not clear, there is no basis for conducting the radicalized negotiations. Under the

13 Frank Dietrich has investigated the problems of such an ethic for the case of secession. He concedes that in many cases, the principles cited by him for solving the problems will remain controversial; for such cases, he favors the subjection of the parties to an impartial court of arbitration (2010, 284–87). That doubtlessly makes sense in pragmatic terms. It would then be necessary to show how an unbiased standpoint is possible in normative conflicts.

14 Rawls has acknowledged that the choice of the principles which he favors is dependent on a strong aversion to risk on the part of those making the choice; therefore he has attempted to show that such an aversion is rational in their situation (1979, 179). But for its part, rationality depends on convictions that are not inherently evident with regard to the unacceptability of certain consequences (ibid. 181).

initial conditions which apply here, the concept of hypothetical contractualism proves to be incapable of realization. Even if the parties recognize that the initial state of the strategic negotiations is simply a matter of historically contingent conditions, they nonetheless have no common normative basis that would allow them to transcend these contingencies and establish a basis for negotiations that is morally acceptable to them all. They will accordingly have to communicate with each other on the basis of their real conditions.

3 The Framework Conditions and Problems of Strategic Negotiations

The results of the strategic negotiations depend on the historical circumstances, on which parties are in fact present and how their actual gain- and loss-options look. But with reference to discriminatory or repressive societies, there is already a significant emancipatory potential in the requirement of participation in the negotiations. If all must be asked whether they agree to certain rules, this gives a voice to those who are condemned in such societies to a lack of influence.[15] Due to historical contingencies, no general conclusions regarding the rational results of such negotiations can be made in the armchair discussions of philosophy. But thought can be given to which problems typically arise in such negotiations and with which methods they can be resolved or at least reduced.

One fundamental problem is certainly that of size. Consent to the results of negotiations is easiest to achieve if the number of addressees isn't too large and they have all been directly involved in the negotiations. Obviously, the procedure of direct negotiation cannot be carried out in all modern societies because of their size and complexity. Neither can everyone participate in the necessary negotiations, nor is everyone willing and able to take a clear look at the problems of certain areas of activity. Therefore the participants must come up with an acceptable system of representation.

Moreover, with growing complexity and the formation of different normative convictions, it becomes increasingly unlikely that there will be unanimous approval of a proposed solution. So if the parties wish to establish legitimacy through voting in favor of the results of the negotiations, then they must give

15 Thus in Switzerland in 1971, women's suffrage was introduced through a vote among the men who alone were allowed to vote. But another electoral result would not have been able to legitimize the continued exclusion of women from voting. If legitimacy is to be established at the ballot box, then all those must be included who are capable of voting.

thought to acceptable forms of representation and non-universal approval. There is a danger here that the project of a consensus model of legitimacy could fundamentally fail. Because a logically consistent solution of the problem now being addressed implies a primary act in which all unanimously approve a form of representation and a certain reduction of the unanimity requirement. With this decision as well, there will never be unanimity in real situations, because all solutions which are possible here bring advantages and disadvantages which will be assessed differently by the participants. Hence it is easy to criticize unanimity as a criterion of legitimacy and to reject it as unsuitable.[16] But the unattainability of an ideal does not necessarily discredit it as an ideal. And no ideal of justice will ever be completely realized without thereby already giving up its normative power. This is the case with requiring unanimous approval for legitimacy. In the strictest sense, none of the existing states is legitimate, because none has met with the approval of all those subject to its laws.[17] The non-fulfillable nature of the demand, however, should be understood as a call to lessen the divergences from the ideal as much as possible on all levels. Even if every actually existing form of government is illegitimate because it does not conform to the ideal of universal approval, it nevertheless makes no sense to regress and once again connect legitimacy to substantial moral criteria: for example, to a robust natural duty of justice.[18] Because we are not in the possession of moral criteria which persuade everyone and simultaneously are sufficiently explicit to be able to derive from them a sufficiently concrete system of legal regulations. Instead we should hold that an institutional and legal order can all the more lay claim to legitimacy through the degree to which its constituent nature conforms to the requirement of consent.[19] It remains to be examined which deviations from the ideal of direct, unanimous consent are most likely to be acceptable to the parties.

Here it is first necessary to distinguish between two phases of self-determination in negotiations. The first phase consists of a decision regarding the procedures for generating rules. Here it must be determined in a constitution-engendering act which form of representation and which deviations from the principle of unanimity should be permanently included in the process of collective self-government. These determinations then define the conditions for the second phase of the

16 This is the argument of Buchanan 2002, 699–702.

17 Simmons makes the argument in connection with Locke 1999, 769f.

18 Cf., on the other hand, Buchanan 2002, 703.

19 Frank Dietrich as well comes to the conclusion that the arguments Hume makes against Locke's consensus concept of legitimacy simply show that the universal consensus required by Locke is not easily attained. But they do not prove that consensus cannot serve as a criterion for assessing the legitimacy of states.

ongoing negotiations and the proclamation of the concrete, universally binding rules of communal life.

In the first phase, the problem of representation can still be excluded. Various groups of citizens could develop different proposals and present them for approval or rejection. An initial and avoidable deficit regarding the legitimacy of most states comes to light here. In most cases, their constitutions were drawn up by only one group and then presented to the citizens in a referendum. The citizens did not have a choice among various constitutions, but only the choice between acceptance and a rejection with uncertain consequences.

The problem of unanimity cannot be excluded even in this phase. Because if none of the proposed constitutions encounters unanimous approval, there must be a stipulation of how high the degree of approval regarding one of the constitutions must be so that it can be seen as obligatory for everyone. Is a relative or absolute majority sufficient, or is there need of a somehow higher one? It would be ideal if at least this issue could be decided unanimously. But here as well, there is no guarantee. What majority is sufficient at this point? Here there is apparently the threat of an infinite regression which in actual practice can only be interrupted by the exclusion of protests, by a "silent consensus".

If the citizens have determined the degree of approval necessary for a constitution to be valid, they must then make a selection from among the proposed constitutional forms. This confronts them with the *following problems*:

1. What is the best form of representation?
   Here there are above all two questions to be answered:
   a) Who can claim to represent whom? Every representation presupposes the construction of a group which is then represented by one person. But according to which criteria should the groups be set up? Must all cities of a district be represented in the assembly of the residents of that district—or should it be all tribes, religions or professions? The answer is clear in the framework of the problem formulated here: Above all, the actually-present normative ideals must be represented. Norm addressees are called upon to organize themselves and to form associations whose ideals and interests are then represented by a few persons. Even if only fifty citizens set up a party, the declared goals of the party will not be able to contain everything that is important to every member. It is for this reason that there is vociferous debate about party programs. They always represent a compromise, often formulated in vague terms, between the convictions and interests of the various members.
   This leads to a new problem: When can someone legitimately claim that he is not sufficiently represented in a representative body? Who, for example, represents the specific interests and ideals of homosexual, rural

residents of the Jewish faith? Whether or not these rural residents are represented in the assembly depends upon how many members it has and how many such rural residents there are. If it is only a few, they will only be able to receive consideration as members of a larger association. They will find it accordingly difficult to gain attention for their interests and ideals. The fact that their group is small is initially only a form of bad luck. A fate which they share with many others. So many will be interested in reducing the disadvantages that can arise from this form of bad luck. A normative system will accordingly be able to claim all the more legitimacy the more it contributes to reducing the negative consequences of this form of misfortune.

b) The ideal of as universal a consent as possible must be made compatible with the existence of representation. That can occur in two ways: Those who are represented can specify that, right from the start, they understand the decisions of their representatives to be equivalent to their own expression of approval. Or they can consider the representatives to simply be negotiators whose results can only become legitimate norms when all those represented have subsequently consented to them.

Ideally, there would also have to be a unanimous decision about which function the representatives should have. But this as well is unlikely, because all models have advantages and disadvantages which can be assessed differently by the participants. Thus with regard to the function of the representatives, in the first solution it is more likely that the comparatively small group of representatives will be able to agree to norms; but those who are represented run the risk of becoming subject to a regulation which they did not directly consent to. And this risk is not particularly small, because already in coming up with a common program, most of them will have had to renounce part of their goals. This danger is eliminated by the second procedure; but this makes it highly probable that there will be someone who will subsequently not support the agreement that was reached. Protection against heteronomy conflicts here with an interest in facilitating the establishment of farther-reaching, universal norms.

A possible way out involves retaining the requirement of unanimity and seeking a compromise among the representational models which is in fact supported by everyone. Such a compromise, for example, could separate areas in which the decision of the representatives is binding from those in which the subsequent approval of all individuals is required. Moreover, there could be several representative organs which are consti-

tuted according to different criteria (assemblies of cities, confessions or professions) and provided with specific competences.

2. Which Deviations from the Requirement of Unanimity are Acceptable?
It is extremely unlikely that so complex a form of representation can be found which would be supported by one and all. And it is also improbable that the representatives could then in an appropriate amount of time find norms they could all agree to. On all levels, the requirement of unanimity is a serious obstacle to finding solutions. The parties are caught in a dilemma here. On the one hand, everyone wants to avoid having to live within institutional forms and under norms that he does not agree to—whether for moral or strategic reasons. On the other hand, the parties see that it is absolutely essential for the functioning of a complex society that solutions be found for problems which lie outside the area of consensus. The parties must accordingly consider the question of in which issues or areas of life it is acceptable for them that a decision is no longer reached through unanimity but through some sort of majority.[20]
Regarding the establishment of concrete legal norms, the most radical and simple method of drawing a line between the area of unanimity and that of majority decision lies in declaring the norms within the area of moral consensus (L-2) to be inviolable, and in entrusting everything else to the decisions of majorities which must be more specifically defined. Another possibility is to include in the area of inviolable norms also those norms which were agreed to through moral compromise (L-3), and to have recourse to majority decisions only beyond this extended area. This second possibility, however, is always threatened by strategic considerations. If all parties know that in order to regulate their communal life they will at some point have to turn to majority decisions, then a party which sees that it has significant opportunities to realize many of its ideals along the pathway of majority decisions will no longer have reason to accept the procedure of moral compromise at all. The set of norms accepted by reaching moral compromises will remain empty. The area of original moral consensus will thereby define the majority-immune core beyond which legitimate rights can be established through majority decisions. A reason for expanding this majority-immune core that is convincing from a strategic perspective can only consist in the insufficient stability of such an order. If many citizens would feel excessively alienated in their moral outlook

20 Stemmer as well emphasizes that what is at stake here is a relative assessment of protection against heteronomy and the interest in coming up with rules that protect elementary interests (Stemmer 2013, 85).

by the majority decisions which are possible therein, the majority as well will recognize a reason to give stronger consideration to possible moral compromises.

In the framework of a consensus-based, representative constitutional system, this gives rise to a further form of legitimacy:

L-6: A sanction-strengthened legal system is legitimate if its rules are approved by a constitutional majority of the representatives of norm addressees in negotiations and do not violate the moral norms shared by all parties at the time the system was set up.

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