

# Introduction to the Special Issue «Justice Based on Truth»

Marcel Senn <sup>†</sup>

The Faculty of Law, University of Zurich, 8006 Zürich, Switzerland; marcel.senn@rwi.uzh.ch  
<sup>†</sup> Emeritus Professor.

## 1. Why Truth and Justice Still Matter

When I received a request from MDPI in 2021, in the midst of the COVID-19 pandemic, to guest-edit a new online journal of philosophy of law and legal theory, including the history of their disciplines, it was immediately clear to me that this offer could be a great opportunity for all of us working in the field of philosophy of law or legal theory to develop an organ to exchange knowledge through this, as well as further crises. For it has always been of great importance to the people who deal with the fundamental questions of life and who are interested in these topics that they are also able to exchange their ideas, especially across dividing borders, and to discuss the essential questions of society, law, and state in a well-founded and free manner.

Therefore, we should first have to deal with the central question of the entire philosophy of law, namely, the question of the relationship between justice and truth. The development of a just legal order presupposes that we have knowledge of the foundations on which we are judging. This means that we must first acquire certainty in the process of gaining knowledge in order to be able to make a well-founded determination of the facts. We must therefore concentrate on the core methodological problem of how to obtain and establish these bases with as much certainty as possible. This insight arose not least against the background that for some years now, at least in the Western world, talk of «alternative facts» has been rampant to the point of conspiracy anecdotes, which, philosophically speaking, is a fundamental evil. For only on a clear and clean basis of conditions and knowledge can a just order of law be built that applies equally to all people. Such questions require «epistemological analyses», for we humans ourselves are always the constructors of «realities» and «truths». This, in turn, means that we have incessantly worked to remain self-reflective and self-critical.

From a political perspective, however, the question is more about the preservation of power. How much power is available to enforce a truth that serves certain interests to ensure a legal order is on this basis. This is definitely a long-term concern of society and state too because stability also means a kind of security and peace. Yet, the problem with a political perspective is always that a certain elite wishes to secure its own power through it. It is precisely this combination of personal, political, and philosophical aspects that usually leads to an «ideological» perspective, which shall be established and secured by force, whenever necessary. This is usually associated with a high degree of destruction of the order of principles and rights. Therefore, only those people should be able to rise to a position of leadership who are truly capable of advancing humanity within society. That is why philosophers do not think in terms of political programs from the outset and do not claim to be responsible for political decisions.

Today, two years later, the crisis situation has escalated beyond pandemic proportions worldwide, and we are once again faced with the situation of spreading conflicts of brutal war-like proportions, saturated with unbelievable constructs and narratives and well-fed with claims to power, although this absurd view of reality can lead us all into the abyss.

In this context, there is also the fact that a lot of mischief is often conducted politically through the use of history as a legitimisation of a state system. Therefore, it is extremely



**Citation:** Senn, Marcel. 2023. Introduction to the Special Issue «Justice Based on Truth». *Laws* 12: 43. <https://doi.org/10.3390/laws12030043>

Received: 23 April 2023  
Accepted: 23 April 2023  
Published: 28 April 2023



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important to put history itself on an analytical level, to clearly name all events, reasons, and effects of decisions and actions. Similar to philosophy, history is not a matter that politics can dispose of, which is why we as scholars must always critically question how narratives and their traditions are supported, what functions they currently fulfil and in whose favour, and who has shaped them. That is why representations of historical justifications must be carefully questioned and examined. This is the task of the conversation between philosophers and historians.

It seems to me all the more important to keep a clear and cool head and to continue to focus on what is essential, namely, that a just order of relations between people and between states must be based on the unconditional demand for true facts and knowledge. For all these reasons, the central question is why precisely true knowledge, true statements, and a just order are essential and absolutely decisive for relations between people and also states. That is why we assert here with well-considered reason that truth and justice is all-important today and will be tomorrow.<sup>1</sup>

## 2. A Word on Methodological Historical Scholarship

Since law is always a historical category, insofar as it arose under specific conditions of its time, a serious link to older models of a philosophy of law must first clarify and secure the foundations of this knowledge; only then, when we know what to compare with each other, can we refer to them from the present when it comes to the basic questions of a just legal order.

The central point of a truly historical argumentation is, in my view, that we must always also see the breaks, because it is precisely the breaks in history that show us where and why the ideological insinuations of continuities thrive because, as a rule, such continuities construct precisely those political legitimacy goals that cannot otherwise be achieved through elaborate performance. A good example of the formation of ideological continuities of a European self-development is the omission of Arab and Jewish scholars as mediators between antiquity and the Christian Middle Ages in Europe. The reason for this was and is that because factual development does not fit into the secularised self-understanding, which still defines itself from the Christian point of view alone, which also ultimately has a common cause with racial doctrines, specifically anti-Semitic and anti-Islamic views, when it fades out this crucial bridging (see [Holenstein 2004](#), pp. 84, 73).<sup>2</sup> Another example in the same context is the function of legal positivism and Prof. Hans Kelsen's jurisprudential development in the decade of the Weimar Republic in Central Europe. That positivism was supposed to protect against the mischief of utilitarian and

<sup>1</sup> With good reason, we may then believe in the youth and their ideals of serious thinking and morality, if these youth have not been indoctrinated by the old. Then this youth also has the power to free the spirits that serve ideological interests from their shackles. That is why George Santayana, a philosopher of the early 20th century, born in Madrid, died in Rome, but who also lived in North America for many years and taught as a professor, and who presented a philosophy of the rationality of society and man, should be explicitly quoted here with his wise words about a globalised humanity (1905/06, pp. 41–46): «*Young men escape as soon as they can, at least in fancy, into the wide world; all prophets are homeless and all inspired artists; philosophers think out some communism or other, and monks put it in practice. There is indeed no more irrational ground for living together than that we have sprung from the same loins. They say blood is thicker than water; yet similar forces easily compete while dissimilar forces may perhaps cooperate. It is the end that is sacred, not the beginning. A common origin unites reasonable creatures only if it involves common thoughts and purposes; and these may bind together individuals of the most remote races and ages, when once they discovered one another. It is difficulties of access, ignorance, and material confinement that shut in the heart to its narrow loyalties; and perhaps greater mobility, science, and the mingling of nations will one day reorganise the moral world. It was a pure spokesman of the spirit who said that whosoever should do the will of his Father who was in heaven, the same was his brother and sister and mother*» ([Santayana 1980](#)).

<sup>2</sup> Prof. Elmar Holenstein contextualised this chain of tradition to European philosophy as follows: *What is called European philosophy cannot be understood without including the non-European environment* ([Holenstein 2004](#), pp. 84, 73; [Holenstein 2023](#), p. 217). Without knowledge of Islamic-Arabic and Jewish authors, the cultural flowering that has taken place in Europe since the High Middle Ages could not have been in this way, or as the well-known sociologist of law and religion, Max Weber, put it: *there is absolutely nothing in the field of thinking about the meaning of the world and of life that has not already been thought in Asia in one form or another* ([Holenstein 2004](#), pp. 90–94). Elmar Holenstein, *Philosophie-Atlas, Orte und Wege des Denkens*, Zürich: Ammann-Verlag, 3. Auflage, 2004; free download: <https://doi.org/10.3929/ethz-b-000359415>, accessed on 22 April 2023.

naturalistic currents with racist and anti-Semitic views during this period, and which was the reason Kelsen lost his job as a law professor—like so many others—not only because he argued positivistically (against the political ideology of the day and in particular the NS regime), but because he himself was Jewish. Kelsen tried to ward off the fermenting and corrupting everyday influences of his time on the law through a system of norms that, if we judge this historically, should be pure or free of such value elements, which, indeed, increasingly began to threaten and undermine the stability of the rule of law in the 1930s (Senn 2017, p. 120f.). Such errors in traditional thinking are sometimes smuggled in—almost «hidden»—but this does not make them more harmless as they can favour the reversal of the roles of victim and perpetrator.

This means that we must always reflect on the peculiarities of historical developments, which have never proceeded in strict sequence, and which have always related to the events, thoughts, and conditions of their own time. Therefore, we have to work out the differences in the framework conditions between the world in which these were created and the world in which we live today and reflect on them in terms of their significance.

If we look at the development of philosophy and its history, we should see quite clearly that it is precisely through interregional and intercontinental comparison that the quality of philosophical statements increases, because a certain systematisation in the train of thought thereby takes place, as is necessary for the formation of every good science (Holenstein 2023, pp. 226–29). Additionally, this is why one cannot shape individual empirical facts into a general statement if there is not a certain qualified set of such facts that are critically evaluated beforehand. For if one works empirically, then one must also have a disclosed point of view, the tool for it (the methodology), and an implemented form of criticism to create the necessary transparency for one's own arguments. I believe that all those so-called traditions, continuities, or «eternal themes» could only be valuable if we also reflect on them permanently because without this reflection, they cannot develop further.

### 3. Dworkin as a Contemporary Reference Author

If we already have a legal philosopher of high quality, such as Ronald Dworkin as a contemporary (1931–2013) who searched for a just law in our time, then we also have a door opener with us who facilitates access to many stations in the search for a just law. This does not mean that we have to march in his footsteps, but that he is a companion with whom we can discuss and argue intellectually. So, Dworkin is our discussion partner, not a dogmatic teacher, as should be the case in philosophy.<sup>3</sup> Yet, he is also a master of his subject, a clear and critical thinker. Dworkin has written thought-provoking works, such as «Taking Rights seriously» (Dworkin 1977), and his last major work: «Justice for Hedgehogs» (Dworkin 2011). He worked in both the New and Old World of the West and therefore he knew the differences in the way law was dealt with in the West in both common and continental law.

Dworkin's core idea in the philosophy of law can be paraphrased as follows in relation to the relationship between truth and justice: Dworkin is concerned with the goal of a generally good conduct of life in a democratic constitutional state. In this way, he links the concerns of antiquity with those of modern times, and he rightly sees that this double goal cannot be helped by a simple, unreflective adherence to any premises, but that one must deal reflexively—as in a round of discussions—with the arguments of others that are put forward for or against. Only then do these form a reliable basis on which we can stand, develop intellectually, and shape our lives. If we strive for a just order, this expands our freedom as a whole because all human beings can then lead a good life. That is why I see

<sup>3</sup> «... our conclusion ought to be that no philosopher from the past or from another cultural tradition can ever be so readily adapted to needs of the present. A good philosopher's writing is meant to challenge our individual minds in reading and understanding. It is not intended to be an authority on the basis of its thoughts, which, in the end, were created under circumstances not comparable to those of the present. Therefore, we have to be well educated so as to know how to deal with a current problem critically by ourselves, without relying on the advice of opinion-leaders and lobbying intelligencia. In my opinion, this is the only intellectual way in which we can show our respect to all of these great and profound philosophers» (Senn 2014, p. 44).

in Dworkin and his work the clue of our time to discuss and develop new basic philosophical ideas.

Biographically, we have an interesting starting point with Dworkin, which made him an independent thinker, especially in the period from the mid-1960s to the edition of his philosophy of law in 2011 (before his death in 2013), since he cannot be assigned to any philosophical school or direction. However, there is no mistaking that we may always find it easier to subordinate someone to a school direction in order to understand them and their ideas at all, if we are not so good at understanding a work independently and on our own. What some may not understand or mislocate are the two facts that Dworkin was once a fellow of Lon Fuller at Harvard, and the same Dworkin was also the academic successor of the positivist philosopher Herbert Lionel Adolphus Hart at Oxford.<sup>4</sup> That is why, sometimes, such facts cause confusion or incomprehension. However, Dworkin does not belong to either of these factions. Dworkin was, however, a clear advocate of the basic principles of justice that have always governed legal theory and, in particular, the practice of law by lawyers and judges in the courts.

Thus, for Dworkin, there can be no question of an objectively given natural law, since such a concept always contains a preconceived opinion that is also subject to historical and analytical interpretation. According to his critical view of things, people who, like naturalistic scientists, claim that there is a pre-existent natural law are in this way members of a kind of priestly caste who defend something such as a divine law in the sense of a post-Scholastic perspective with a claim to validity. In any case, these people want to introduce a certain objectivism into a historical-cultural debate, but it is an inadmissible structuring element because it is like a stowaway or, as Nadja E. Nedzel puts it in her contribution, «a hidden structure». These people cannot themselves present a generally convincing argument for their own position in order to defend their point of view, they simply cling to a supposedly indisputable truth that is supposed to reveal itself. They function just like the people of that group, let us call them the everyday philosophers, who pretend to follow a purely empirical path and therefore call themselves pragmatists because they cannot see the unreflective premises on which they build their edifice of thought.

So, we have no other choice but to reflect, analyse, and critically discuss our methods and arguments, including all our thoughts and actions, without, at the same time, claiming that we are the only ones who know. Additionally, this is precisely what we must do, according to Dworkin, yet in a Socratic spirit, in order to work and progress as serious and authentic philosophers. For this reason that we must bring our full weight of argument to bear, but not with sophisticated or pharisaical skill, not with formalistic or disingenuous skill, but from a humble view of honesty and authenticity that derives from the very fact that our thoughts, our words, and our actions are aligned.

That is why philosophy always requires contribution by an individual matching his personality with his thoughts and deeds. Philosophy does not propagate freedom in the

<sup>4</sup> Lon Fuller (1902–1978), an US-American jurist, who was since 1940 Professor of Law at Harvard University, engaged in 1958 as a representative of natural law, in the famous debate with Herbert Lionel Adolphus Hart (1907–1992), the Anglo-Saxon representative of legal positivism at Oxford University, Great Britain (Senn 2017, p. 187). Hart's article in the Harvard Law Review from 1958 was entitled with "Positivism and the Separation of Law and Morals" (Hart 1958, Harvard Law Review. 71 (4): 593–629), the answer by Fuller read "Positivism and Fidelity to Law – A Reply to Professor Hart" (Fuller 1958, Harvard Law Review. 71 (4): 630–72). Hart pleaded for a separation from morality and law, Fuller argued for morality as the [authentic] source of law's binding power. In fact, this debate between the Anglo-Saxon and North American runs through the entire tradition on legal philosophy in the 20th century, especially against the backdrop of the Second World War between Americans and the Nazi Germans. The key question was: what can effectively legitimate a law, make it binding and ultimately enforce it? The famous German Kantian philosopher of law, Gustav Radbruch (1878–1949), had commented on this in his first edition of the Philosophy of Law from 1914 until the third edition in 1932 (Radbruch 2003, p. 82 original German, transl. Senn): "He who is able to enforce law proves that he is called upon to be called upon to establish law. Conversely: whoever does not have power enough to protect each of the people against the other, has not the right to command him (Kant)." Immediately after the war, Radbruch revised this position and professed his belief in natural law (Radbruch 1945, Fünf Minuten Rechtsphilosophie). It is true that he was never a legal positivist, but at the beginning a strict and then perhaps an open Kantian, who nevertheless increasingly turned to non-legitimised principles of law (Radbruch 1946, Gesetzliches Unrecht und übergesetzliches Recht), a position that a Fuller also subsequently represented to Hart.

sense of arbitrariness, it takes philosophers to task in the sense of ethical–moral responsibility to contribute to truth through their authenticity. This cannot be done in any other way than through a clear and unambiguous argumentation on the fundamental and clearly defined attitude of the philosopher as a human being. A philosopher must think clearly, argue logically, and be able to justify his claims in order to advance the cause of philosophy through better and more consistent as well as morally convincing arguments, according to Ronald Dworkin.

#### 4. The Structure of the Special Issue «Justice Based on Truth»

There are eight contributions that we have accepted for publication. I have formed three sections:

1. Dworkin’s epistemology of ethics and personal responsibility in the search for truth and justice;
2. Dworkin’s philosophy of law in comparison with historically important authors such as Thomas, Spinoza, Leibniz, and Fuller;
3. Dworkin’s theory in contemporary application and its possible development with a view to the future (Transitional Justice in Civil War and the perspective of traditional Chinese Moluë).

The first section introduces us to the specific reference of the legal philosophy of Ronald Dworkin (1931–2013). There are two reflections, one on the epistemology of the ethics of Dworkin’s philosophy (by Matthias Mahlmann, which he reconstructs precisely), and on personal responsibility in the search for truth and justice (by Samra Ibric).

In the second rubric, we present historically significant, i.e., impactful, philosophies of law by four important authors of the past and compare them with Dworkin’s theory of law. The four portraits of historical philosophers are Thomas Aquinas (by Kyle L. Smith, who connects Aquinas’ philosophy to a topical issue, the so-called «fourth revolution», and the problem of the foundations of law in the age of «surveillance capitalism»), Baruch de Spinoza (by André Kistler), Georg Wilhelm Leibniz (by Matthias Armgardt), and Lon Fuller (by Nadia E. Nedzel). What these four have in common is the reference to the natural law thinking, even if their understanding of natural law is based on different historical grounds in each case. We learn in the sense of the historical path of reflection in a step-by-step process, which is why Dworkin’s legal thinking has great relevance and justification today.

In the third rubric, we look at a possible application of Dworkin’s thinking, its relevance, and its limitations, to explain how Dworkin’s theory can also contribute to the resolution of traumatic experiences and feelings of justice among people and groups of people in situations similar to those of war and civil war (by Helen Gyr on «transitional justice») and a development of Dworkin’s Philosophy by Harro von Senger, who argues from the Chinese tradition how space for truth and justice can be found by means of stratagems, who opens our mind for another cultural mindsetting.

On closer examination, these eight excellent contributions and the recourses on Dworkin as a whole ultimately guide us to our own thinking and argumentation.

#### 5. Conclusions

Is clear thinking still assured and guaranteed in our time? Or are the sciences, especially philosophy, already so poisoned and politicised by the daily influence of programmatic assessments (e.g., via social media) that we can no longer think as independently as we would like and should clearly and logically; if we could, perhaps it is the fear of either not being strong enough or the warning against too autonomous thinking by politically authoritarian people that keeps us away from ourselves. Can we no longer perceive and feel ourselves as independent individuals? Or, in the end, do we even lack civil courage and commitment?

Since the Enlightenment, freedom of thoughts in the sense of the rational sciences with their methodological transparency and verifiability has been the basic concern of phi-

losophy. This basis must continue to exist, for a free society can only exist as long as it can rely on a scientifically sound basis of knowledge on free thought. «The crucial thing about science is not that it produces mere knowledge, but that it develops an awareness of how and under what conditions and for what purpose it produces this knowledge. [...] Today's tendency to administer knowledge by invoking an *opinio communis* is, however, reminiscent of the scholastic practice of creating a tower of knowledge order. The starting point of science, however, would be the formation of an adversarial awareness of problems on central questions of, for example, theology, ethics, law and society, for a theory never represents the whole, since reality is always more diverse than our means of access to explain it» (Senn 2022, p. 57).

However, a free society also requires an everlasting solidarity between the population groups of a state. Not only serious knowledge and the freedom of our thinking but also the social solidarity in societies is one of the fundamentals of a good society and good state. Freedom, therefore, must be institutionally secured by a strict separation of powers between the executive, judiciary, and legislature. History teaches us that these organs have to be clearly separated and their officers must therefore be rotated and replaced in civil times. Necessarily, this society and this state have to be assisted by a critical civil discussion and free investigative journalism. One who advocated a philosophy of law and society in terms of transparent discourse was Ronald Dworkin, which is why I chose him as our reference author on the common theme that justice prevails in a world and a society or a state only when and where truth, and therefore intellectual vision and consolidated knowledge, guides us.

In such a spirit, our discussion here of the successful contributions of our authors has just begun. It must continue in an unbiased and critical manner. The problems of the epistemological foundation of truth and justice according to scientific and philosophical rules of morality and ethics must consequently be considered more closely. Only in this way can this discussion, which is independent of concrete political or economic goals but scientifically based, be guaranteed. Consequently, truth and justice remain the fundamental aims of legal and social philosophy for a longer period than just ours.

**Conflicts of Interest:** The author declares no conflict of interest.

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