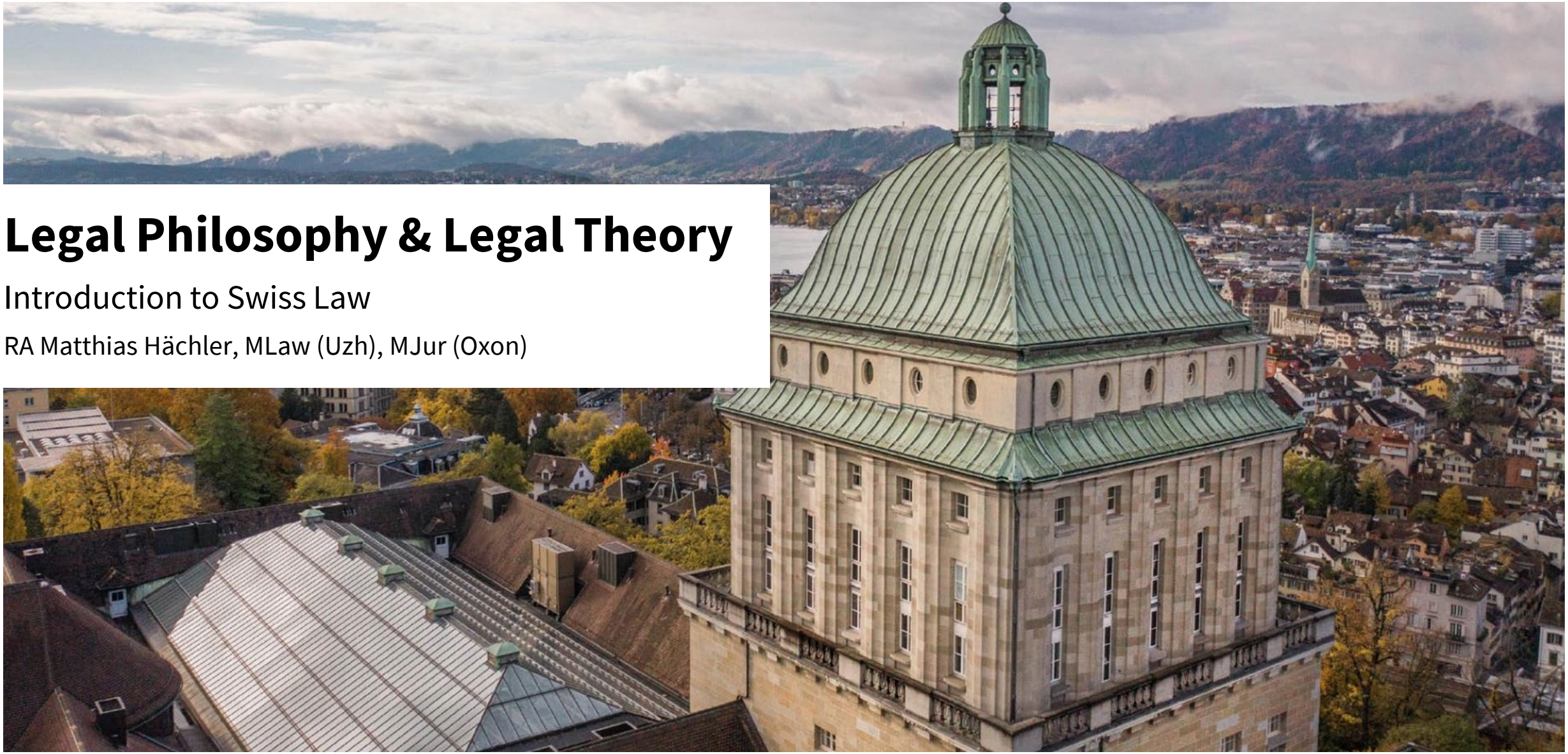
Universität Zürich[UZH]

Rechtswissenschaftliche Fakultät



Legal Philosophy & Legal Theory

Introduction to Swiss Law

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Overview

- Introductory example
- Types of theories of normative phenomena
- Normative truths and universal insights in the normative sphere
- Law and morality
- Theories of justice
- Human rights

Introductory example

Imagine that you are in a shop and that it is pouring outside. You don‘t have brought an umbrella with you because you have thought that the weather will turn out nice. You are anxious because you have your camera equipment with you since it is your best friend‘s wedding and you are responsible for taking the photographs. You fear that the rain might damage the camera. However, you see that people leave their umbrellas at the entrance of the store. You could take an umbrella as nobody seems to pay attention to the entrance at the moment but you know that taking one of the umbrellas is theft.

Should you take one of the umbrellas? What speaks against taking an umbrella?

Why obeying the law?

You steal an umbrella but get caught. As a result of the ensuing legal proceedings, you get a fine. Are you *obliged* to pay the fine?

- Reasons for the validity of the law, e.g.
  - Set in the right procedure (H.L.A. Hart) or link to a foundational norm (Kelsen: Grundnorm)
  - Product of general consent in hypothetical contract (Hobbes, Rousseau, Locke, Rawls)
  - Highest amount of happiness (Bentham, Mill)
  - Outcome of a fair and free discourse in which the best argument wins (Habermas)
  - Realisation of certain moral values
- Infinite regress of justification leading to pure subjectivism and relativism?
  - Formulating working hypotheses
  - Self-evident truths
    - Starting point of analysis (e.g. certain pyschological phenomena)
    - Also in the law: „We hold these truths to be self-evident, that all men are created equal…" (Declaration of Independence, 1776)

What is „Legal Philosophy and Legal Theory“?

- Systematic theoretical engagement with normative phenomena, law and justice
  - critical reflection of the content of law and justice, the relation between law and morality, the criteria for identifying law, validity of legal norms, elements of normative evaluation, sense of justice etc.
  - Critical evaluation of concrete legal practices (distribution of voting rights, protection of privacy in the internet, burqa ban etc.)
  - Distinction: legal sociology, legal history, practical law, legal methodology etc.

- What legal philosophy is *not*
  - Mere exchange of subjective opinions
  - Uncritical reading and adoption of authoritative texts and outlooks
  - Intellectual ornament of speeches or rhetorical devices

- Why legal philosophy?
  - Identifying „background values“ and interpreting law
  - The legitimation of law and the justification of legal coercion
  - Decision-making and responsibility
  - Legal philosophy is interesting: The law and human life: engaging with ourselves

Typology of theories

- Explanatory theories
  - Formulation of hypothesis about causal connection between a result and the causal factor (e.g. natural sciences)
  - Content and mechanisms of the law with regard to certain (e.g. social) factors

- Analytical theories
  - Analysis of the elements and phenomena that make up the law (e.g. «What is a right?» or «Do rights correspond with duties?»)
  - Conceptual clarity and precision of the conceptions used
  - Conditions for the validity of a norm

- Normative theories
  - Goals of human actions and lives: «What should I do?»
  - Norms, rules, imperatives, values, principles etc.

Examples

- „The social classes in possession of the means of production use the law to oppress the working class. The law is just the superstructure of the economy.”
- “Men should live so as to please their maker. Humans should live as the holy scripture has told. In God’s kingdom, He rules over everything, thus one king should rule over all on earth as well. Thus monarchy, being the image of heavenly order, is the right form of government.”
- “It is functional for a society to be organised by way of law. Societies organised in this way are more efficient in using their scarce resources. Thus, they prevail over other, less efficient societies. Those other societies perish, or the society organised by law comes to dominate them, or they adopt this mode of organisation.”
- “To my duty to pay a fine corresponds a right on the part of the state to claim payment of my fine. The statement ‘It is prohibited to park here’ means the same as ‘It is obligatory not to park here.” And both are true under the same conditions as the statement “It is not allowed to park here.’”
- “Every person has certain rights. Respecting these rights requires giving them a say in all matters which concern them, which shape their lives. Everyone has the same basic rights. Thus they should all have an equal say on their common affairs, and the same opportunities to get into leadership positions in their respective society. A democratic system with equal and universal franchise and fair equality of opportunity respects these basic rights. Hence it is a just system of government. “

Normative truths

- Epistemology
  - Preconditions for experiencing the physical world and possibility and limits of knowledge
  - Objective truth through „truth-makers“
    - Ontology and existence of entities in the world
    - Correspondence theory: statement about the world is true if it corresponds with a fact in the world
    - Ex.: „This bottle is green“ is true if the bottle in front of us is green

- Normative truths?
  - Can norms or principles be true/false (ex. „It is wrong to steal umbrellas“)? If yes, how do we justify this conclusion?
  - Moral ontolgy
    - moral realism?
    - mental realism

Universalism and relativism

- Relativism
  - Epistemic challenge and skeptic arguments
  - Socialisation
  - Cultural relativism, especially with regard to human rights and eurocentrism
- The case for universalism
  - Limits of epistemic relativism and socialisation
  - Blind spots of relativism
    - Danger of petrifying established regimes
    - Danger of fragmentation
    - Genesis ≠ validity
  - Universal experiences and self-evident insights
  - Refined theory, e.g. mentalist approach: objectivity through inborn principles

The connection of law and morality

- Terminology
  - Law: assessing external normative order/behaviour and enforced through instituionalised mechanisms of sanctions
  - Morality: psychological («inner») normative sphere, assessment of people's behaviour *and* motivation, no external sanction necessary
- Interaction between law and morality
  - Tradition of natural law beyond positive law (e.g. Stoa, Thomas Aquinas, Thomasius)
  - Modern approaches of integration thesis (e.g. Alexy, Dworkin)
  - Separation thesis (e.g. Kelsen, H.L.A. Hart)
- Relevance:
  - Unjust law →
  - Interpretation of law

cf Gustav Radbruch:

(1) Positive law has to be respected unless it stands in unbearable contrast to justice
(2) Norms without the ambition of realising justice are no law

Theories of justice: Introduction

- History of tradition and traditions of theories of Justice
  - Presocratic thinkers to modern authors, including the „lost voices“ and the ones that were never raised
  - Not only the „West”, but also other traditions
  - History of ideas, e.g. arguments stemming from Augustine to Moses Mendelssohn and Pierre Bayle to thinkers of today concerning religious toleration based on the impossibility to coerce religious worldview
- Open questions, e.g.
  - „What should we do?“
  - „Why should we respect each others and treat us as equals?“
  - „What kind of obligations do we have with regard to each other?“
  - „What kind of goods are central to us?“
- Features and characteristics of theories of justice
  - Empirical and anthropological base-line assumptions
  - Formal aspects (relation of rights and duties, concept of obligation etc.)
  - Principles of justice, primary goods, and values etc.
  - Application in concrete cases: Testing the theory

Theories of justice: Antiquity

- Socratic search for definitions and generally valid terminology
  - Understanding of morality as a discipline of insight
  - The wise is also just due to the ability to weigh good and bad consequences
  - Responsibility: “it is better to suffer wrong-doing instead of committing wrong-doing”
- Plato’s idealism
  - The search for unconditioned truth: metaphysical world of ideas
  - The ideal state: tripartite soul and society, functional equality and the philosopher king
- Aristotle’s ethics
  - Attack on the metaphysical realm of ideas and theory of four causes (material cause, formal cause, efficient cause and final cause)
  - Distributive and restitutive justice
  - Treating equal thing equally and unequal things unequally

Important insights from these theories

- Universal insights? Why/why not? In moral sphere?
- Distributing goods based on which criteria?
- Equality and justice: Why should we respect the others?

Theories of justice: Modern approaches

- Modern approach: John Rawls, *A Theory of Justice* (1971)
  - Conextualisation: contract theories and procedural approaches
  - „Original position“ and veil of ignorance as a thought experiment
  - 2 principles of justice
    - “Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.”
    - “Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”

Six principles of justice

(1) Equal standards applied to different agents

(2) Equal application of the standards in concrete circumstances

(3) Equal distribution of goods as the default option

(4) Distribution relies on the reasonable determination of the criteria for the distribution of goods

(5) Restorative justice is linked with the ambition of keeping a just distribution

(6) Foundation of equality: human dignity

Founding fundamental rights

- The roots, structure and limits of rights
  - Kant‘s categorical imperative
    - „Act only in accordance with that maxim through which you can at the same time will that it become a universal law“
    - „So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.“
  - Introduction into the concept of rights:
    - „Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with the universal Law of freedom“
    - „Freedom (independence from beeing constrained by another‘s choice), insofar as it can coexist with the freedom of any other in accordance with the universal law, is the only original right belonging to every human being by virtue of his humanity“
- Upshots
  - The moral ambition and character of law
  - Ultimate end of individual action and social order is human dignity
  - Substantial equality as the baseline of social interaction and distribution of goods
  - Freedom and rights are no unbound spheres of liberty, but linked with self-limitation with regard to others

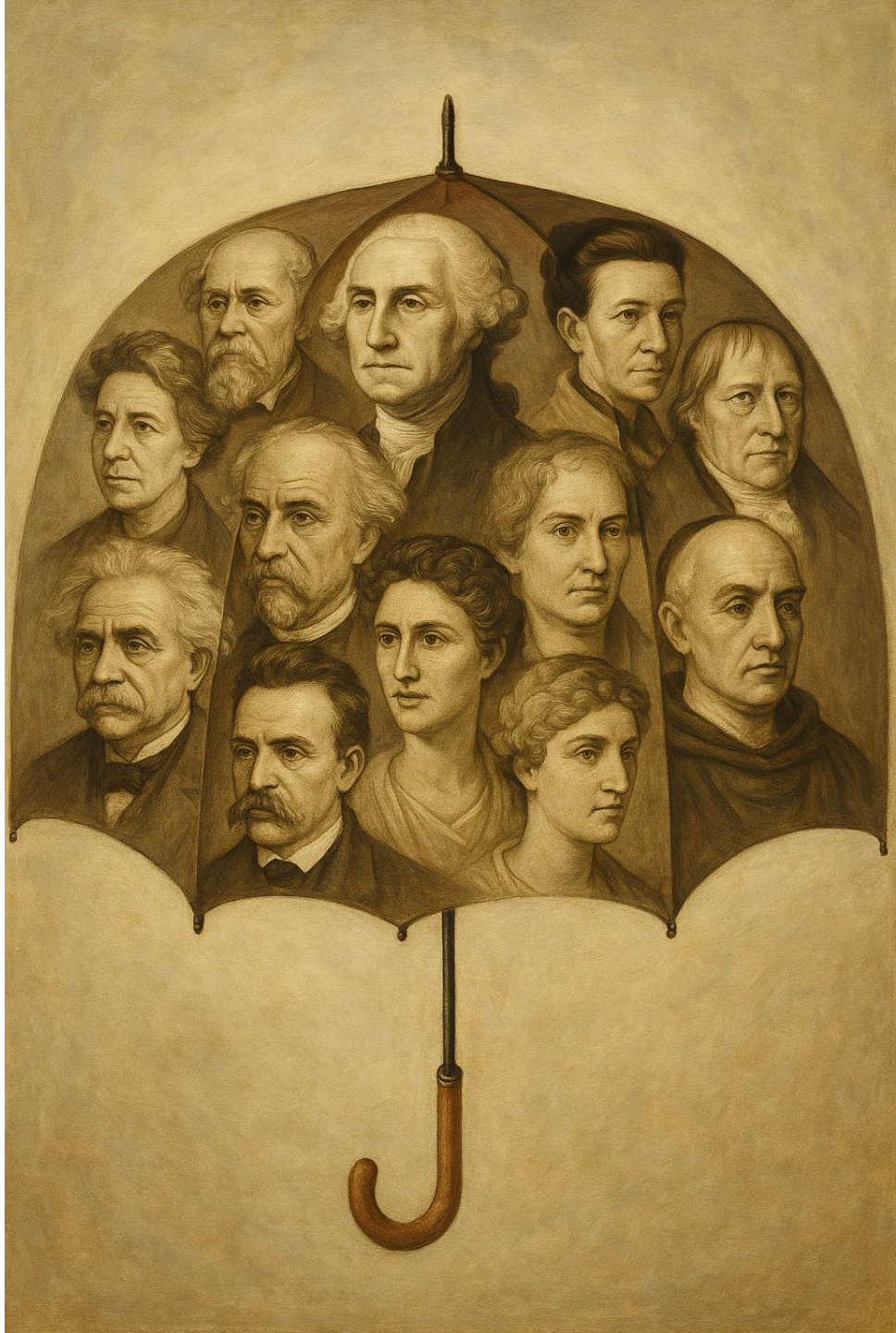
Human rights

- Justification of human rights, e.g. concerning freedom of religion: rich discourse on why we should tolerate other religions, religious deviation and non-religious positions, e.g.
  - Futility of religious coercion
  - Instrumental reasons such as securing social peace and avoiding harm/suffering
  - protecting functions, capabilities or interests
  - human dignity
- Linking human rights with theory of justice: Why human rights?
  - Need for identification of central goods which are equally important to all human beings
  - Explanation why human rights are the ideal means to secure these goods within a social order
  - Justification of the principles which normatively charge human rights
  - Justice, solidarity and equal respect at the heart of the human rights project

The remains of the day

- Different theories of law: explanatory, analytical, normative
- Relation between law and morality
- Objective truth in the normative sphere
- Theories of justice and the founding values/principles
- Human rights

So, should you take the umbrella?



Any questions?

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