

Bradley Shingleton | Eberhard Stolz [eds.]

The Global Ethic and Law: Intersections and Interactions



Nomos

B L O O M S B U R Y

Bradley Shingleton | Eberhard Stolz [eds.]

The Global Ethic and Law: Intersections and Interactions



Nomos

B L O O M S B U R Y

Die Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the Internet at <http://dnb.d-nb.de>

ISBN: HB (Nomos) 978-3-8487-1474-2
ePDF (Nomos) 978-3-8452-5517-0

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB (Bloomsbury): 978-1-4742-5926-2
ePDF (Bloomsbury): 978-1-4742-5927-9
ePub (Bloomsbury): 978-1-4742-5925-5

Library of Congress Cataloging-in-Publication Data

Shingleton, Bradley/Stilz, Eberhard
The Global Ethic and Law: Intersections and Interactions
Bradley Shingleton/Eberhard Stilz [eds.]

183 p.

Includes bibliographic references.

ISBN 978-1-4742-5926-2 (hardcover Bloomsbury)
ISBN 978-1-4742-5927-9 (ebook (pdf) Bloomsbury)
ISBN 978-1-4742-5925-5 (ebook (epub) Bloomsbury)

1. Edition 2015

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2015. Printed and bound in Germany.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the editors.

Dedicated to Hans Küng
In appreciation and gratitude

Acknowledgments

The editors wish to thank the following persons for their assistance in bringing this book into existence: each of the authors for their contributions; the Stiftung Weltethos in Tübingen, especially Stephan Schlenzog, Guenther Gebhardt, and Markus Weingardt for their generous support of this volume; and Ilonka Oszvald, Washington, D.C., for her most helpful and professional assistance in editorial matters. Without the invaluable assistance from each of these persons and institutions, the publication of this book would not have been possible.

Foreword

„Die theoretische Arbeit bewegt ... mehr Zustände in der Welt als die praktische; ist die Welt der Vorstellungen revolutioniert, so hält die Wirklichkeit nicht aus.“

“Theoretical work does more ... to change conditions in the world than practical work; once the world of ideas is revolutionized, reality cannot hold out.”¹

—Georg Wilhelm Friedrich Hegel

Theory and Practice

These words by Georg Wilhelm Friedrich Hegel provide a good justification for why Bradley Shingleton and I intend to publish this work. It presents in updated and revised form a majority of the presentations given in 2011 at the Washington symposium “Global Ethic and Law.”² The contributions aim consistently to stimulate theoretical discussion on the complex relations between law and ethics. For if one knows only about the law and nothing of ethics, one knows little and certainly nothing profound about the law. Likewise, if one is interested in the mechanisms by which ethics becomes real, one cannot ignore what the state makes possible or indeed translates into legal norms. Legal and ethical norms order and determine daily how we live our lives and coexist with others, including when we are not thinking about such norms and even when we resist or reject them. It is not for theory’s sake alone that law and ethics are so important, but rather for their practical significance in a complex society. Hegel’s timeless insight quoted above highlights the fundamental importance of intellectual work in shaping our reality.

But one might ask: are there not already enough scholars working on this subject? Or as the Tübingen grandfather of German corporate law Harm

1 “Hegel to Niethammer on October 28, 1808,” in *Briefe von und an Hegel*, 1st ed. (Hamburg: Johannes Hoffmeister, 1952), 253.

2 Video of the presentations is available at <http://berkeleycenter.georgetown.edu/events/symposium-on-global-ethic-law-and-policy>. Jochen von Bernstorff and Peter Kirchschlaeger added their important contributions later.

Peter Westermann put it: is not “the advancement and effectiveness of ‘ethics’ or ethos now so timely a subject as to be on every man’s tongue?”³ And is there not already in Germany and the United States an exhaustive list of notable publications on the relation between law and ethics?”⁴

Conceptual Confusion

These are rhetorical questions. Each contribution in this volume lays out clearly for sympathetic readers what is missing from the discussion in both principle and detail. Take terminology to start. What law and justice are; how ethics, ethos, and morality are to be differentiated: these are in no way adequately defined concepts. Consider just one example: according to Ronald Dworkin, moral norms prescribe how we should treat others, while ethical commandments relate to how one leads one’s own life.⁵ In the German-speaking world, by contrast, it appears that morality encompasses both categories, while ethics as a philosophical discipline refers to a self-reflexive theory of morality.⁶ Inevitably we will continue thinking about the concepts of law and justice, especially their relationship to each other. Our views will, furthermore, diverge.

This should come as no surprise. We can define only that which has no history, as Friedrich Nietzsche understood already. Even the concept of law

3 In Mathias Habersack, Karl Huber, and Gerald Spindler, eds., *Festschrift für Eberhard Stolz zum 65. Geburtstag* (Munich: Verlag C.H. Beck, 2014), 689.

4 Among recent German-language publications, the following deserve emphasis (in general and for English-language scholarship, refer to the contributions in this volume): Tatjana Hörnle, *Kultur, Religion, Strafrecht—Neue Herausforderungen in einer pluralistischen Gesellschaft, Gutachten C zum 70. Deutschen Juristentag* (Munich: Verlag C.H. Beck, 2014); B. Beylage-Haarmann, A. Höfelmeier, and A.-K. Hübler, eds., *Ethik und Recht—Die Ethisierung des Rechts* (Berlin: Springer, 2013); Hartmut Kreß, *Ethik der Rechtsordnung* (Stuttgart: Kohlhammer, 2011); Anton Pelinka, ed., *Weltethos und Recht* (Münster: LIT Verlag, 2011); Silja Vöneky, *Recht, Moral und Ethik* (Tübingen: Mohr Siebeck Verlag, 2010).

5 Ronald Dworkin, *Gerechtigkeit für Igel* (Frankfurt a.M.: Suhrkamp, 2012), 33 ff, 323.

6 See, for example, (following Niklas Luhmann) Heinz-Dieter Assmann, “Recht und Ethos im Zeitalter der Globalisierung,” in *Juristen-Rechtsphilosophie*, ed. Kristian Kühl (Hamburg: Verlag Dr. Kovac, 2007), 25ff; Otfried Höffe, “Stichwort Ethik,” *Lexikon der Ethik*, 7th ed. (München: C.H. Beck, 2008); see also Hans Küng, *Handbuch Weltethos. Eine Vision und ihre Umsetzung* (München: Piper, 2012), 33f.

is bound by time. Change applies not just to statutes, a substrate of law (“congealed law”), but to the concept of law itself—and simply because what law regulates and refers to is always changing: our social existence, our experiences, our values.

Globalization and Law

Globalization is a defining characteristic of our age. We come closest to doing this concept justice if we understand it as indicative of an unfolding process for which there is still no end in sight: a progressive coming together of the world and its inhabitants that has been unleashed by new modes of communication and transportation. Its result is above all an ever stronger (and ever more apparent) interdependence. What an individual, a company, a state does or allows, no matter where in the world, has potentially global consequences.

If law is truly about ordering our coexistence, it cannot ignore this unfolding process. Lawyers must increasingly think outside the box of their national legal systems and their own conventions of legal thought. Since law is determined by the state, legal systems are self-contained regulatory spaces effective within the boundaries where they originate. Those applying the law look within those boundaries for the “right” law to apply to their legal problem. The fact that there are often corresponding legal problems in other legal systems is left to comparative law specialists and rather seldom taken into account in practice. This is not a sustainable approach. In matters pertaining to the foundations of law and not a particular national manifestation of it, a perspective limited by national boundaries will be completely untenable.

Global Ethic

Ethical thought, on the other hand, has for a long time—if not always—taken shape free of the constraints of national boundaries. The stream of philosophical-ethical thought has reached humanity everywhere, having over the ages made fruitful the most diverse fields, and having emptied finally into a truly global discourse of today.

Nevertheless, scholars have been slow to consider systematically and scientifically whether or not there is a global human ethic and how one might explain and describe it. Hans Küng got things started with his 1990 “Global

Ethic Project” and has since attracted an increasing number of scholars.⁷ The first globally recognizable initiative was the declaration of a global ethic by the Parliament of World Religions in 1993.⁸

In his contribution to this volume, Shingleton notes correctly that this was the point when criticism began. According to the critics he cites, the declaration was an expression of static thinking. It attempted to codify and thereby circumscribe a global ethic in a document. But Küng is well aware of how dependent upon time and context ethical norms are.⁹ The Global Ethic Foundation does not consider the currently identifiable core values of the globe to be immutable and beyond discussion. The process of forming humanity’s values is not closed off and never can be—so long as humans remain intellectually active beings.

Ethics, Science, and Law

Among the drivers of change are external circumstances. Ethics, too, must search for new responses to new life circumstances. Conversely, we might recall Hegel’s words quoted above: our thought does not simply follow changes in reality, but can just as well influence them and even bring them about.

The focal points of ethical reflection change as well. Increasingly, the world of commerce is coming under the purview of ethics. Corporate social responsibility found a way of acting that goes beyond formal laws in following prescribed rules (“compliance”): these are no longer foreign concepts to today’s corporations. The liberalism of Milton Friedman, for whom such ideas were the product of an illiberal socialism, can be regarded as overcome. Today’s corporations see all too clearly that they are members of society and recognize all too well the economic benefit to be gained from this new way of thinking and acting. Initiatives such as the “Manifesto for a Global Economic Ethic,”¹⁰ the “Global Compact” of the UN, the OECD’s “Guiding

7 See “Einführung,” in *Wissenschaft und Weltethos*, ed. Hans Küng and Karl-Josef Kuschel (Munich: Piper, 1998); see also Küng, *Handbuch Weltethos*, passim.

8 See Hans Küng, ed., *Ja zum Weltethos. Perspektiven für die Suche nach Orientierung* (Munich: Piper, 1995), 21f.

9 *Ibid.*, 34f.

10 Hans Küng, Klaus Leisinger, and Josef Wieland, *Manifest Globales Wirtschaftsethos, Konsequenzen und Herausforderungen für die Weltwirtschaft* (Munich: Deutscher Taschenbuch Verlag, 2010).

Principles of Multinational Corporations,” or the current “ISO-Norm 26000 on the Corporate Responsibility of Organizations” prove that we are dealing here with a global development.

Such proclamations notwithstanding, it seems to me that the economic sphere is just now on the verge of a new ethical consciousness. Certainly, isolated declarations printed on glossy brochures or cultural patronage will not suffice. In the long run, it will also not be enough to treat the subject from a utilitarian perspective in terms of economic advantage.

Presently, it remains to be seen if and how far applicable law will compel corporations to act accordingly.¹¹ In the end, corporate leaders will be judged on the basis of how well their actions benefit the firm’s bottom line. In the corporate world then, does “Ethic pays” simply mean “Ethics, so long as it pays?” Certainly, we can anticipate that the ethical turn in the law mentioned at the outset will influence traditional ways of thinking more powerfully than before—a noteworthy and substantial example of how necessary cooperation between lawyers and ethicists will be.

It seems equally certain to me that commercial law will not be the only realm in which law and ethics meet fruitfully. The connection between human rights and values is obvious. Its impact is felt in the emergence of constitutions and resounds in their interpretation. The international foundation of human rights in the UN Charter, the Treaty on European Union, and in many individual international conventions cannot fail to have an effect on international law and at the same time on global ethical sentiment.

In the same way, we hope this work will widen the impact of the Global Ethic project. We are grateful to the authors for participating in this effort and for contributing their work—in the Hegelian sense—to changing “conditions in the world.”

Eberhard Stilz

President of the Higher Regional Court (ret.)

President of the State Constitutional Court of Baden-Württemberg

President of the Global Ethic Foundation

Tübingen, July 2014

11 See, for example, Bernd Erle et al., eds., *Festschrift für Peter Hommelhoff: zum 70. Geburtstag* (Cologne: Otto Schmidt Verlag, 2012), 1133, 1137ff; Habersack et al., *Festschrift für Eberhard Stilz*, 689, 690f.

Contents

Global Ethic, Law, and Politics <i>Hans Küng</i>	17
The History and Essence of the Global Ethic <i>Stephan Schlenzog</i>	37
Law, Principle, and the Global Ethic <i>Bradley Shingleton</i>	43
A Global Ethic and Global Law: The Role of Fundamental Ethical Principles in International Law and World Religions <i>Brian D. Lepard</i>	65
Global Ethic and Human Rights <i>Peter G. Kirchsclaeger</i>	79
Dignity, Human Rights, and the Vulnerability of the Individual <i>Jochen von Bernstorff</i>	105
Religions, Religious Conflicts, and the Dynamics of Global Law <i>Markus Kotzur</i>	119
A Case Study in Consilience: Law, Regulation, and the Global Ethic in the Struggle for Biosecurity <i>Timothy L. Fort and Joshua E. Perry</i>	145

Contents

In Lieu of a Conclusion <i>Bradley Shingleton</i>	161
Contributors	179