

## Bonum Commune – An Outline

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The common good – or *bonum commune* – has become a popular topic again. At least in part, this seems to be a consequence of the revival of communitarism in the 1980s and of the debate about human self-definition in the context of biotechnology and bioethics in the 1990s. While the other references to the *bonum commune* in this volume are usually issue-specific, this contribution is an attempt at a systematic analysis of all aspects of the problem on the basis of the current level of knowledge and discussion. Such a systematic analysis has to go beyond ethical issues and encompass in particular questions of political philosophy. Furthermore, it has to concretize these disciplines in the context of legal norms and constitutional structures.

Amongst the questions to be answered are the reasons why an individual should orient itself toward the *bonum commune*. In addition, there is the question about the localization of *bonum commune* in those social structures and social incorporations that in one way or another refer to it.

### A. The Bonum Commune as an Ethical Problem in Legal Philosophy

To see the *bonum commune* as an ethical problem implies a series of far reaching assumptions. First of all, it implies that *bonum commune* is not a natural phenomenon but manmade. Furthermore, it implies that human activity is not naturally oriented towards the *bonum commune*, that a conscious decision is required, which in turn has to be based on normative reasoning. After all, if one could assume that everyone anyway tends to do what is best for the *bonum commune*, a moral obligation to that end would be quite superfluous. Conversely, if one has to assume that *bonum commune* and *bonum individuale* are often incompatible and that in the absence of moral obligations, most people will most of the time tend to maximize their *bonum individuale*, the ethical problem of promoting *bonum commune* becomes evident.

Nevertheless, the claim that promotion of *bonum commune* is an ethical problem, while promotion of *bonum individuale* is not, has never been universally accepted. Apparently, it is possible to define promotion of *bonum individuale* as a moral obligation. The obligations against oneself in Kant's *Metaphysic of Morals* are one example and the commandment of self-love in

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Christian ethics, as the necessary basis for neighbour-love and philanthropy, is another. More importantly for the present context, any moral obligation toward *bonum commune* has here and there been deemed superfluous. A variety of reasons have been advanced for such claims.

One line of arguments consists of the claim that there is a kind of natural instinct in humans to orient their activities towards promotion of the *bonum commune*, an individual interest or an individual need to do so. Theories advocated in the 18<sup>th</sup> century, based on a natural 'moral sense' are examples.<sup>1</sup> Promotion of the *bonum commune* would be something necessitated by the *bonum individuale*. Individual and common good are connected via this 'moral sense' and literally become one. Some modern theories go into a similar direction where they claim that highly individualized living conditions in modern societies make it difficult to satisfy individual needs for recognition. The individual needs for recognition, combined with desires for identity-building self-worth, are thought to motivate socially responsible behaviour and solidarity.<sup>2</sup>

Another doctrine that also originated in the 18<sup>th</sup> century, arrives at the same result from the opposite direction. This is the theory of the 'invisible hand', pursuant to which the sum total of each individual's quest for individual benefit should lead quite naturally, even automatically, to the enhancement of the common good.<sup>3</sup>

The dominant opinion today, however, acknowledges at least the possibility of conflict between individual benefit and common good. Corresponding evidence cannot be seriously contested. At least if individual benefit is not normatively defined in very specific terms, i.e. if each individual can define his or her individual benefit autonomously, there are vast numbers of examples how humans are pursuing their individual benefit at the expense of the common good. Environmental pollution, corruption in public office, and tax evasion, are problems that prove this point. These experiences clearly contradict harmonizing theories based on a natural 'moral sense' or an 'invisible hand', at least where the latter attempt to provide a general theory that should be empirically verifiable.

For these reasons, one has to assume a potential conflict of interest between individual benefit and common good, as well as the fact, which can be empirically verified, that humans will frequently prefer their individual benefit over more general benefits for society as a whole. As a consequence, there really is an ethical problem; (almost) each act of orientation towards *bonum commune* requires normative reasoning.

<sup>1</sup> See F. Hutcheson, *An Inquiry into the Original of our Ideas of Beauty and Virtue*, Treatise II (1725), reprint of the London edition Hildesheim 1971, at 107 *et seq.* See also Anthony Earl of Shaftesbury, *Characteristics of Men, Manners and Opinions*, Vol. II (1714), at 28 *et seq.*, at 65.

<sup>2</sup> See F.-X. Kaufmann, *Sozialpolitik zwischen Gemeinwohl und Solidarität*, in H. Münkler & K. Fischer (Eds.), *Gemeinwohl und Gemeinsinn - Rhetoriken und Perspektiven sozial-moralischer Orientierung* 19 *et seq.*; 47 (2002).

<sup>3</sup> See A. Smith, *An Inquiry Into the Nature of the Wealth of Nations*, Book IV, Chapter II, at 32 (1776) (here quoted from the 1999 reprint). It is noteworthy that this claim, which later became famous, was quite ancillary to Smith.

Having clarified this point, the discussion will now turn to the scope to be given to *bonum commune* as the reference point for ethical considerations (I). Subsequently, there will be an analysis of the ways in which *bonum individuale* and *bonum commune* can differ and/or collide (II). Finally, the normative reasons for individual obligations to pursue *bonum commune* will be examined (III).

## I. What is Bonum Commune?

So far we have only a pre-definition of *bonum commune* in the sense that it may be the opposite of *bonum individuale*. The scope of the concept needs to be further defined before it can be used as a benchmark for ethical conduct.

In historical perspective<sup>4</sup> it is noteworthy that *bonum commune*, for example in medieval discourse, was often seen as a religious concept, and was sometimes even equated with God as the most general goal. In early modern times, *bonum commune* was used synonymous for justice and peace, and during the times of enlightened absolutism, it was frequently thought of in economic terms, as the general welfare. Nowadays, the term “*bonum commune*” in the singular form is quite often put in question because it falsely suggests that the term is unambiguous and that there could be a general win-win-situation in society. That, it is claimed, would ignore the fact that the benefits from various social institutions are rarely spread out equally.<sup>5</sup>

This indicates that the question of the scope and content of *bonum commune* can be differentiated on several levels. For one, *bonum commune* can be seen more formally, as structure and order, or more materially, as the provision of essential goods and services. In another way, the term can be understood in a continuum somewhere between material and spiritual; it can be applied to many notions, from joint possessions of a community to common spiritual values. Finally, the term can be differentiated as a function of the universalization of goods in their relationship to the individual. Thus, a *bonum commune* can be an interest or need that is shared by all or at least the majority as an individual need, such as the common need for food, clothing, and shelter; or it can be an interest or need of the community as such, for example the desire for power and recognition of a community or nation in the world.

The more the term is formalized, intellectualized and collectivized on these three levels, the harder it becomes to develop a normative imperative for these goods, the more difficult it gets to oblige the individual to pursue them. Insofar, there is little difference between morals and law, except that the problem has probably been differentiated and structured more accurately in the context of law over the last two centuries. In particular, the discussion of the welfare-state in constitutional law and the theories about the protected goods in criminal law,

<sup>4</sup> See Th. von Aquin, *Summa Theologica*, I II q. 19, a. 10.

<sup>5</sup> See C. Offe, *Wessen Wohl ist das Gemeinwohl?*, in L. Wingert & K. Günther (Eds.), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit, Liber Amicorum Jürgen Habermas* 459 (2001).

have sought to bring some order to the debate. On this basis, it is quite obvious that only those economic assets that are at the same time the object of desire of many and in short supply can easily be described in normative terms. Mainly what is required in this respect is an obligation of the individual to respect the ownership or possession of others. This is quite straightforward even if the 'other' is the community as a whole. The situation is much more complicated if the goods are more formal or more abstract. For example, what does it mean and how can it be legitimized to demand from the individual to respect the rule of law, the functioning of the market, the status and reputation of the state, or the views of the majority, let alone their conception of the world, for example if they are against cloning of humans? Can it be the duty of the individual to accept responsibility for the security needs of the population at large, and consequently desist from activities that are not particularly unsafe per se but still a cause for disconcertion for many? Is everyone co-responsible for the preservation of a feeling of orientation and safety of everyone else, for the image society has of itself and of man? And what would follow from such a co-responsibility if it were to be translated into negative prohibitions and positive duties, cast into a legal framework suitable of enforcement?

While the discussion around the future of the welfare state approaches such duties rather restrictively and seeks to balance them against the guarantee of individual freedoms, criminal law seems constantly tempted to create ever new duties to respect immaterial interests of society as a whole.

## II. Types of Conflicts of Interest Between *Bonum Individuale* and *Bonum Commune*

Next, we have to examine how individual and common interests can collide in practice.<sup>6</sup> Theoretically, it is possible that all individual interests of a particular kind in a society would be identical and non-competitive, i.e. that they would all be compatible. An example might be an identical need of everyone for clean water in a society that has plenty of clean water, where more for one does not have to mean less for another. An ethical problem would arise in such a situation only if and when one began to pollute and thus restrict others from access to clean water. A more difficult and conflict ridden situation arises with respect to interests that are identical and mutually compatible only in the long term but not in the short term. An example would be traffic regulations in general and speed limits in particular. All members of society would seem to have an interest in their application because they are collectively and individually protecting human life and health and promoting the smooth flow of traffic. In spite of this common interest that the rules should be observed and enforced, it is obvious that drivers will at times have the opposite individual preference and

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<sup>6</sup> For a more comprehensive analysis of different interpretations of the common good see P. Koller, *Das Konzept des Gemeinwohls. Versuch einer Begriffsexplikation*, ZIF Mitteilungen (Zentrum für Interdisziplinäre Forschung, Bielefeld University) 3 (2002).

accord it priority over the common, namely when they have personal reasons for trying to get somewhere faster than the rules would permit.

The latter kind of situations, where everyone benefits from a general rule most of the time, yet occasionally finds the general rule in conflict with individual interests, can lead to two kinds of moral and legal assessments. In some cases, the breach of the general rule for the sake of the individual need can be acceptable because it is justified by good reasons, which ultimately make even the breach compatible with *bonum commune*. An ambulance speeding to the hospital with an accident victim would be an example. In other cases, there are no such good reasons, and the breach serves only the *bonum individuale*, at the expense of the *bonum commune*. A person who supports the rule in general but refuses to submit to it individually, however, is a free-rider. He wants to benefit from the fact that others are bound by the rule but refuses to be bound himself.

The potential for conflict is further exacerbated when a certain common interest is supported in the abstract by everyone, yet collides both in the short term and in the long term with individual interests. A well developed rail transport system would seem to be in the common and individual interest of everyone, at least in the abstract. However, if a railroad is to be built past the home of someone, that particular construction would contradict that person's individual interests both in the short and in the long term.

Both the traffic rules and the railroad will benefit the society as a whole and each individual. However, the railroad also imposes a special burden on some but not on others. Therefore, society as a whole may have to compensate these individuals for the special burden imposed on them.

The most difficult cases are those, where a collective benefit on the one side does not correspond to any individual benefit on the other side. An example would be medical experiments done to a human being who is terminally ill or classified as a 'superfluous' embryo. While mankind as a whole may benefit from ensuing progress in medicine, it is certain that the particular individuals will not participate in that benefit. By contrast to the railroad that is being built in someone's backyard and will, at least potentially, also be of use to those who have to endure the noise, even the smallest and remotest individual benefit is lacking in the latter example. Can society nevertheless impose the duty and burden in the name of *bonum commune*?

This brings us back to the question, how compliance with *bonum commune* to the detriment of *bonum individuale* can be justified.

### III. Ethical Foundations of an Obligation to Promote Bonum Commune

Which arguments can be advanced to justify individual obligations to pursue the common good? We shall first look at two classical lines of arguments from the 18<sup>th</sup> century: utilitarianism and rational egotism. In utilitarianism, actions or rules are evaluated on the basis of their overall benefit or usefulness to society,

their utility.<sup>7</sup> Utilitarianism is quite simply the ethical theory that promotes *bonum commune* above any other ethical value and literally does not have another purpose besides this one. In its extreme form, utilitarianism can justify using or consuming one human being for the benefit of many, at least as long as the risk, the anticipation of possibly being used or consumed in such a way, does not diminish the quality of life of many human beings to an extent that exceeds the overall benefit of the procedure. From the perspective of the individual, the problem with utilitarianism lies in the fact that it may require extreme sacrifices for the benefit of the common and thus leads to results that are intuitively perceived as unjust. The enslavement of an ethnic minority would be perfectly justifiable, for example, as long as certain conditions were met and the benefit for the majority exceeded the detriment to the minority.

By contrast, the equally classical theory of rational egotism leads to opposing conclusions.<sup>8</sup> This theory is based on the maximization by individuals of their rationally determined long-term self-interests. Usually, it assumes that the aggregation of many individuals pursuing their self-interests indirectly promotes the common good, at least in the long term. As before, rational egotism provides a biased resolution for the conflict between individual and common good. As before, the theory intuitively seems wrong. The problem here is the above-mentioned free-rider syndrom. Rational egotism can justify why it is better – in general – to accept a rule, such as the prohibition against murder, because this ultimately benefits everyone. However, rational egotism cannot explain why each individual should stick to the rule at all times, even in situations where this is obviously contrary to self-interest. In the end, rational egotism can only legitimize a requirement to pursue the common good in those cases where common good and long-term self-interest coincide.

The problem was recognized early on and attempts were made to resolve it via recourse to various contractual theories.<sup>9</sup> The reason for an individual to accept a rule of general benefit at all times and in each case was seen in a quasi-contractual agreement between all members of society to do so. The quasi-contractual arrangement was not a historical event but an assumption, a hypothetical construct. Thus, the ethical foundation for an obligation of the individual to pursue the common good rather than individual benefit was seen in a fictitious contract which could not possibly be refused by any rational member of society.

Since it would be naive in most cases to construct a historical event as point of departure for such a quasi-contractual obligation, and since a hypothetical construct that would reasonably have the elements of a fictitious contract has to take reason as point of departure and not the fictitious contract, contractual legal theories can hardly suffice to establish a requirement to pursue the common

<sup>7</sup> See O. Höffe, *Einführung in die utilitaristische Ethik* 12 *et seq.*; 28 *et seq.* (1992).

<sup>8</sup> See, for example, J. Leslie Mackie, *Ethik. Auf der Suche nach dem Richtigen und Falschen* (1981), in particular at 216 *et seq.*

<sup>9</sup> For a good overview see W. Kersting, *Die politische Philosophie des Gesellschaftsvertrags* (1994), in particular at 59 *et seq.*

good. John Rawls pointed out as much in his modern variant of contractual theory.<sup>10</sup> The question which structure of society would be chosen by someone who does not know about the position he or she will later have in that society involves uncertainty and risk. Hence we take considerations of risk theory and reason as points of departure. Contracts and contract theory do not add substance nor meaning to these considerations.

It is merely consequent, therefore, that Rawls came up with a modern version of Kant's ethics of principles, which essentially seeks to circumvent the difficulties of utilitarianism and rational egotism by declaring that the orientation towards universal principles – and in this sense towards *bonum commune* – is the result of individual rational and moral choices. Nevertheless, a mix of 'rational facts' and 'moral sense' would seem to be a weak basis for a moral obligation.

If my impression is correct, the balance between individual self-interest and common good is currently being pursued once again more on the basis of Hegel's philosophy of intersubjectivity and its model of mutual recognition.<sup>11</sup> In this context, recognition of the other is understood as a constitutive element of subjectivity: whoever does not recognize the totality of rules governing the relations between members of the same society, and other individuals as bearers of rights and freedoms in that system, denies his own subjectivity because he cannot experience mutual recognition. The balance between collective and individual interests is determined by mutual respect for human dignity according to this theory of recognition. On the one hand, the resurrection in legal philosophy of the notion of individual dignity provides the foundation for a need to pursue the common good. On the other hand, the same notion of dignity can protect the individual from being absorbed into a common good that disregards individual interests, as would be the case, for example, with medical experiments done to one person entirely for the (potential) benefit of one or more other persons. If human dignity<sup>12</sup> is used (again) as a key concept in the discourse on bioethics or in inter-ethical disputes, this indicates a resurrection of the theories that stipulate mutual recognition as constituting elements of socialization. This, in turn, brings us to an examination of *bonum commune* in the framework of different models of socialization.

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<sup>10</sup> J. Rawls, *A Theory of Justice* (1971) and the German translation *Eine Theorie der Gerechtigkeit* (1975).

<sup>11</sup> Regarding Hegel's teachings on mutual recognition see L. Siep, *Anerkennung als Prinzip der praktischen Philosophie* (1979); A. Wildt, *Recht und Selbstachtung im Anschluss an die Anerkennungslehre von Fichte und Hegel* (1992); and A. Honneth, *Kampf um Anerkennung. Zur moralischen Grammatik sozialer Konflikte* (2002).

<sup>12</sup> A central text for the modern discussion of human dignity is M. Avishai, *The Decent Society* (1996).

## B. *Bonum Commune* in Political Philosophy of Law and Justice

Since the early 19<sup>th</sup> century, a tradition has emerged to analyze the ethical conflict between *bonum individuale* and *bonum commune* in relation to various elements of socialization, namely civic society and the nation state.<sup>13</sup> In this model or analysis, civic society is the place where the rational egotisms of many individuals collide and interact with each other in the context of economic and other activities. The state intervenes by enforcing certain rules for the common good in order to correct shortcomings of the civic or bourgeois society arising out of unrestrained individualism. More fundamentally, the state creates the permanent framework within which civic society can exist and flourish.

This model is usually credited to Hegel's legal philosophy, as an advancement over Rousseau's differentiation between *volonté de tous* and *volonté générale*. This is not entirely correct, however, since Hegel counted 'corporations' and 'the police' among the elements of civic society. In this respect, Hegel's interpretation of civic society already includes requirements of *bonum commune*, constructed from the bottom up via corporative elements of economic life, and protected from the top down via the state's security forces and welfare institutions.<sup>14</sup> The nation state itself, by contrast, is seen by Hegel as a cultural and symbolic meeting of the individual minds, created by the members of society not because of material or security needs but because of an acknowledgment that structures for mutual recognition and respect are not only in the common but also in the individual self-interest.

This approach was superseded in the early 20<sup>th</sup> century as a result of the historically important impact made by the works of Ferdinand Tönnies,<sup>15</sup> who introduced the terminological differentiation between 'society' and 'community' to describe the socio-structural difference between individual and common good. 'Society' is understood as the socialization form where rational egotisms collide and individuals use each other, for example by entering into contracts with each other, for their own rational satisfaction of needs. 'Community', by contrast, is the socialization form where individuals are held together via the pursuit of common goals and mutual love and respect. This distinction, which was adopted by many writers of the emerging discipline of sociology, is essentially similar to the simple interpretation of Hegel's model of civic society, however now in the interpretation of competing socialization models rather than a concurring correction of unrestrained individualism via social structures for the preservation of the common good. On the basis of Hegel's concept and ter-

<sup>13</sup> For a good overview see M. Riedel, *Bürgerliche Gesellschaft und Staat* (1970).

<sup>14</sup> See G.W.F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaften im Grundrisse* (1821), republished by Moldenhauer/Michel, Vol. 7 of the complete works (1970).

<sup>15</sup> See, in particular, F. Tönnies, *Gemeinschaft und Gesellschaft. Grundbegriffe der reinen Soziologie* (1912).



minology, there is now a dichotomy between a family-type ‘community’ and a simplified model of civic or bourgeois society as ‘society’. While Hegel still held on to normative individualism as a necessary element, it now becomes optional, something that can be renounced by conscious decision, as happened indeed in certain mass movements during the 20<sup>th</sup> century. ‘Community’ is postulated as the model of the future and ‘society’ as the model of the past. In retrospect, we can say today that the entire model was somewhat simplistic.

Another terminological innovation for the description of the common good in social structures appeared towards the end of the 20<sup>th</sup> century with the notion of ‘civil society’.<sup>16</sup>

The distinctive feature of ‘civil society’ is its independence from state-integrated forms of social activity and organization. Thereby, the differentiation made since the 19<sup>th</sup> century between apolitical individual good and political common good – reflecting the differentiation between civic society and state – is basically turned on its head. For one, civil society has nothing to do with the state and has everything to do with self-realization of the individual. At the same time, civil society is not merely a playground for the pursuit of self-interest. Via citizens’ initiatives, private foundations, self-help organizations and other activities that transcend the individual good for the common good, a new and independent public space is created for an active public.

This really does turn the Hegelian model on its head<sup>17</sup> because the members of this new civil society no longer expect the state to take care of the common good or at least no longer consider the state willing and able to do so. The sceptical American understanding of the state was probably an important influence. However, another influence can be found in developments throughout the 20<sup>th</sup> century, namely its creation of an ever larger number of states that more or less openly serve individual or group interests and betray the original purpose of the state to serve the common good. The new dichotomy, therefore, is between a civil society and its active organizational forms and individuals on the one side and an increasingly detached state with less and less credibility as provider of *bonum commune* on the other.

This brings us to the debate about the (appropriate) social structure of the common good that has been going on for over a decade, namely the debate about the relationship between ‘communitarism’ and ‘liberalism’. Ultimately, this is a discourse between representatives of different directions that are all part of civil society because even communitarists see the community that should be protected and promoted not primarily as the state community but as the multitude of intermediate communities between the individual and the state. Although this debate is already dying down and we can nowadays find more and more liberal communitarists and communitarian liberals in academic and

<sup>16</sup> Regarding the term see J.L. Cohen & A. Arato, *Civil Society and Political Theory* (1994).

<sup>17</sup> See E. Angehrn, *Öffentlichkeit und Partizipation*, in K. Seelmann (Ed.), *Kommunitarismus versus Liberalismus*, ARSP-Beiheft #76 (Archiv für Rechts- und Sozialphilosophie) 9 *et seq.*, in particular 10 (2000).

other writings,<sup>18</sup> what remains is the fact that the debate about social and structural prerequisites for the common good has shifted somewhat away from the state and towards civil society. In sum, if modern communitarism has added anything new to Aristotle and Hegel, it is the location of community in civil society.

Upon closer inspection we may conclude, therefore, that the analysis has moved away from the simplified model of civic or bourgeois society and back to the original Hegelian model, which already acknowledged corporations as an intermediate element for the common good on a level below the state, although in a much less flexible way.

Still, there is one important difference between modern civil society and Hegel's civic society: the former is no longer tied to national boundaries. Quite to the contrary, the empowerment of civil society was driven by NGOs promoting efforts for the common good independent of national boundaries and nationalities.

On the one hand, this difference creates a problem because civil society lacks democratic legitimation, which so far remains largely limited to state structures. Within civil society the promotion of the common good is subjective, which means that pretty much everything and everyone, including individual and group egotisms, can claim to serve the common good and none of these claims can be validated by majority support in democratic procedures. As a consequence, we should not ignore that the transcendence of a self-evident national frame for the pursuit of the common good allows very nearly every collective or shared form of life or identity to declare *its own* common good to be *the* common good without falling foul of intuitively accepted boundaries.<sup>19</sup> Since the lack of democratic legitimation cannot be resolved within civil society, democratically legitimated states or communities of states remain necessary and will not become superfluous anytime soon.

On the other hand, pursuit of the common good gains an international dimension and the debate is no longer about what is good for one community at the expense of another but rather what is in the best interest of humanity as a whole. The way towards this goal is controversial, however. While some communitarians emphasize the nuclear family or group and the importance of the feeling of belonging in the context of social norms, the so-called egalitarian or universalist communitarians are already oriented towards one global community.

This describes the coordinates of the modern discourse about *bonum commune*. In many respect, the discourse takes old ideas and presents them in a modern mix. Further careful analysis will show which ideas in this modern mix are just nostalgic, which are short-lived trends, and which are really contributing to a better understanding and resolution of the underlying issues.

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<sup>18</sup> Just see the different contributions in the abovementioned ARSP-Beiheft, preceding note.

<sup>19</sup> See Offe, *supra* note 5, at 475.