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# **ACTS OF ACCOUNTABILITY**

The Individual's Moral Responsibility to Protect Refugees' Rights when  
the Rule of Law in Modern States Fails To Do So

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## **Abstract**

When human rights violations occur within the rule of law of modern states as a result of the instrumentalisation of human rights, it is inevitable to ask what role and moral responsibility the individual has to protect them. Not least if the rights are referred to as fundamental. This thesis addresses the individual's role and moral responsibility to protect refugees' rights when the rule of law in modern societies fails to do so. Furthermore, the thesis aims to look at the interaction between the morally responsible individual and the rule of law in those situations.

Different theories of moral philosophy will be presented. The moral theories of Immanuel Kant will be presented and analysed as he has had strong influence on the emergence of modern thinking. From his theories will follow critique deriving from philosophers in the area of contemporary moral philosophy; among which the foremost will be Hannah Arendt and Zygmunt Bauman. A specific case-study will then be provided in order to implement the theories of the different philosophers into practice. The case concerns the Swedish authority's deportation practices of Christian Iraqis. From without the moral negotiations possible consequences will be discussed. These possible consequences culminate from negative resistance, based on what *ought not to* be done, and positive action, based on *what ought to* be done.

## List of Acronyms

CEAS	the Common European Asylum System
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IDP	Internally Displaced Persons
KRG	Kurdistan Regional Government
LGBT	Lesbian, gay, bisexual and transgender
UDHR	Universal Declaration of Human Rights
UNAMI	the Human Rights Office of the United Nations Mission for Iraq
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees

## Table of Content

<b>1. Introduction</b> .....	5
1.1. Purpose and Central Questions .....	6
1.2. Method, Demarcation and Disposition.....	7
<b>2. The Instrumentalisation of Refugees' Rights in a Rule of Law: A Theoretical Background</b> .....	9
2.1. International Human Rights Law and International Refugee Law.....	9
2.2. The Concept of the Rule of Law <i>vis-à-vis</i> Human Rights.....	11
<b>3. The Individual's Role and Responsibility in a Modern Society Towards Others</b> .....	17
3.1. The Individual's Moral Responsibility Towards Others .....	17
3.1.1. <i>The Origin of Moral Obligations</i> .....	18
3.1.2. <i>Morality Confronting Obedience</i> .....	24
3.2. Morality in the Crises of Modernity.....	32
3.2.1. <i>The Individual's Responsibility and Totalitarianism</i> .....	33
3.2.2. <i>The Individual's Responsibility in Face of Contemporary Democracies</i> .....	39
<b>4. Present Challenges : a Case-Study of Sweden's Deportation Practices</b> .....	44
4.1. The Human Rights Situation for Christian Iraqis In Iraq and the Swedish Deportation Practices .....	46
4.2. The European Court of Human Rights' Verdict .....	49
4.3. Conclusion.....	54
<b>5. Analysis and Discussion: Possible Consequences when Considering Moral Negotiations Between the Individual and The Rule of Law</b> .....	55
5.1. A Critical-Enlightenment: The Responsibility to Evaluate.....	56
5.2. Negative resistance: Abstention, Refusal and Disobedience .....	58
5.3. Positive Action .....	60
5.3.1. <i>Civil Disobedience</i> .....	60
5.3.2. <i>The Individual's Moral Responsibility as A Matter of International Law</i> .....	62
<b>6. Conclusion</b> .....	65
Bibliography.....	70

## 1. Introduction

Numerous asylum-seekers belonging to vulnerable minorities in Iraq have been forcibly returned by the Swedish authorities during the last years.<sup>1</sup> Different judgements on whether the deportation practices are violating human rights and failing to provide refugee protection or not have been provided. This case is merely an example of a potential gap between the rule of law and refugee protection.

While efforts of comprising human rights through the rule of law are made, the scheme with its deficiencies cannot guarantee an absolute respect, protection and fulfilment of human rights at all times. Seeing that the rule of law is merely or amongst other ends an instrument, human rights will always be instrumentalised within the system we call rule of law. Due to this, there will always be a risk that human rights are being countered when being instrumentalised.

The fact that the United Nations High Commissioner for Refugees (UNHCR) and judges from the European Court of Human Rights (ECtHR), amongst others, have expressed serious concern over the Swedish deportation practises in this specific case, might be a reason for the individual in the modern society to take these judgements into consideration although a deportation might appear legal.

When human rights violations occur within the rule of law of modern states as a result of the instrumentalisation of human rights, it is inevitable to ask what role and moral responsibility the individual has to protect them. Not least if the rights are referred to as *fundamental*. Different theories of moral philosophy will give rise to different answers to this question. Loyalty to laws and authorities might be morally superior according to certain formulas of moral conduct, while other formulas force the individual to not only resist laws and directives, but to challenge the State to change them as well. Consequently, the interaction between the individual and the rule of law will look different when applying diverse theories of moral responsibility.

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<sup>1</sup> UNHCR, 2011(c), and Amnesty International, 2011.

## 1.1. Purpose and Central Questions

International agencies, amongst others, stress the importance to include human rights into the concept of the rule of law.<sup>2</sup> The fact that they should be included does however not mean that they are so. Human rights can still be neglected or abused within their own system. The efforts to include and to ensure protection of human rights in and through the scheme are crucial and must proceed, according to numerous human rights organisations.<sup>3</sup> Although, as long as human rights are instrumentalised, no full guarantees of their protection could be provided. This leads to the critical question: When the rule of law does not protect or fails to protect fundamental rights – what will? While there are continuing efforts to ameliorate legal systems so that human rights abuses will not take place within them, it is still vital to reflect on the society's or the individual's responsibility to protect fundamental rights if these are indeed considered to be fundamental.

On this basis, the objective of this thesis is to critically question how the *individual* should relate to law and authorities in the modern society when laws, processes and mechanisms are contradicting the rights of refugees. This will be analysed through different theories of the individual's moral responsibility. The term individual refers in this thesis to all individuals in all types of positions; it refers to public officials, citizens and the refugees themselves.

The purpose of this thesis is,

- a) to analyse and compare different theories of the individual's role in society and his/her moral responsibility to protect the rights of others;
- b) to present a case-study where the Rule of Law possibly fails to protect the rights of refugees;
- c) to provide possible consequences of when (a) and (b) are combined; the interaction between the individual and the Rule of Law in these situations

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<sup>2</sup> Zajac Sannerholm, 2009, p. 32.

<sup>3</sup> Ibidem.

When analysing philosophical contemporary problems in a Western context it is inevitable to take the consequences of modernity into consideration. Modernity as an epoch and as a concept to describe the context of the life of the individual has an essential influence on moral dilemmas. Modern values are guarded and profoundly permeate the institutions of society, but also deeply rooted in the society's self-consciousness as a whole.<sup>4</sup> The influence they have cannot be avoided by the individual when considering moral responsibility. The individual is obliged to relate to the modern society she lives in while making decisions. For this reason, the significance and the consequences of the modern society will be analysed throughout the thesis.

## 1.2. Method, Demarcation and Disposition

The question posed in this thesis has different epistemic spheres, although law is the nexus.<sup>5</sup> For the purpose of studying legal theory, moral theory and legal case-studies a combination of the two disciplines *law* and *philosophy* will be employed. These spheres are intertwined; the focus however, is on legal issues in the encounter with the individual.

*Chapter two* will provide a background discussion of the implications that enables human rights, and more specifically the rights of refugees, to be instrumentalised. The philosophical discussion of the foundation of human rights could be relevant to look at when studying moral responsibilities to protect human rights, however, this discussion will be left out as the space available here would not do justice to the topic.

Nevertheless, a short clarification of which rights this study will be based on will be provided. Furthermore, in order to identify the gap between human rights and the rule of law, two main theories of the concept of rule of law will be presented in the background.<sup>6</sup> In order to do so, the theories of Joseph Raz, follower of legal positivism, and Ronald Dworkin, critics of legal positivism, will be analysed.

The two differing concepts of the rule of law enable human rights violations to occur. This leads to the question whether the individual has a moral responsibility to

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<sup>4</sup> Bauman, 1993, p. 17.

<sup>5</sup> Trubek & Santos, 2006 p. 4.

<sup>6</sup> Dworkin, 1986, p. 11.

protect the rights of the refugee or not. If yes, then another question is how that responsibility takes form. Theories of the individual's role in society when human rights violations occur will for this purpose be explored in *chapter three*, as well as the moral responsibility of each individual in such situations. In general terms, two opposing standpoints will be conferred in order to reach a formula of human rights protection and law. The philosophical elaboration will be formulated from the theories of Immanuel Kant which have had strong influence on the emergence of modern thinking. His theories will then be followed up by the critique deriving from philosophers in the area of contemporary moral philosophy; among which the foremost will be Hannah Arendt and Zygmunt Bauman, though other prominent theorists will be referred to as well.

Sweden is often considered a relatively progressive country, highly developed and one of the industrialised countries that receives most asylum applications<sup>7</sup> – why it is arguable that they should be in the fore-front of providing refugee protection. For this reason, a concrete case regarding failed asylum-seekers in Sweden will, in *chapter four*, be conferred. This case-study concerns Christian Iraqis that have applied for asylum in Sweden, claiming that they are subjected to fundamental human rights violations on the basis of their religion. The Swedish authorities have, during the last five years, rejected numerous asylum applications on these grounds, and forcibly returned them back to Iraq. This case is interesting from the perspective of the moral dilemma, as there have been different judgements concerning the risks that the Christian Iraqis might be subjected to if deported to Iraq. These judgements will be presented in the light of different UN reports, the Swedish authorities and courts, and from the judgements presented in recent case-law of the European Court of Human Rights (ECtHR).

The different philosophical theories of the individual's moral responsibility to protect the rights of others will be analysed and discussed in the light of the presented case-study, in *chapter five*. Hence, from this analysis and discussion, possible consequences will be provided with the help of different theories in the fields.

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<sup>7</sup> UNHCR, 2010, p.1.



## **2. The Instrumentalisation of Refugees' Rights in a Rule of Law: A Theoretical Background**

When considering whether the individual has a moral responsibility to protect the rights of refugees when the rule of law fails to do so, it is essential to clarify which possible rights might be of concern and where they emanate from. The first part of this chapter will for this reason briefly elaborate on the refugee status determination, and the relationship between human rights and the rights of refugees. Furthermore, when the rule of law fails to protect fundamental rights one must ask how and why this happens. The rule of law has been described as a prerequisite for human rights to prevail.<sup>8</sup> However, human rights might not be a prerequisite for the rule of law to exist. In order to identify the reason why people that deserves refugee status, lack protection of the rule of law it is crucial to look into the concept of the rule of law and its functions. The second part of this chapter will, for this purpose, provide an overview of the complex internal relationship between the rule of law and human rights. The two differing concepts of the rule of law that will be presented are the “rule-book” conception, which provides a formal definition of the rule of law, and the “rights” conception, which provides a material definition of the rule of law.

### **2.1. International Human Rights Law and International Refugee Law**

To provide a background on the rights that are conferred in this study it needs to be clarified what they are based on. The foundation of human rights and the question of where fundamental rights emanate from are highly debated.<sup>9</sup> The major international treaties emphasises that human beings carry an inherent dignity of which the rights in the treaties derives from.<sup>10</sup> However, the question of the foundation of human rights has been revived in philosophical studies, and the concept of a universal foundation has

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<sup>8</sup> Zajac Sannerholm, 2009, p. 16.

<sup>9</sup> A Reidy & W Nickel, 2010, p. 44.

<sup>10</sup> See i.e. The General Assembly, *International Covenant on Civil and Political Rights*, 1966; The General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 1966.

been criticised in the postmodern context.<sup>11</sup> The question might be relevant when looking into the individual's moral responsibility to protect the rights of refugees in order to know which rights should be protected and why. However, even if this will be touched upon in the discussion of moral philosophy, it will not be mentioned *per se*. This study emanates from a democratic epistemology based on the international treaties that states have committed to, which deals with the protection of fundamental rights.

International treaties define refugee protection and all States that are party to them are bound to follow them. Human rights law and refugee law are closely related, why not only specific conventions treating refugee protection have to be taken into consideration in regard of refugees' rights but other human rights obligations as well. Most obviously, the fact that a human being becomes a refugee lays in the fact that the country of origin of that person is unwilling or unable to protect the fundamental rights that he or she is entitled to have according to international law. If a State is unable or unwilling to protect the fundamental human rights of its own citizens, it is the responsibility of other states to do so, in accordance with the laws of which the receiving state is bound by.<sup>12</sup>

The 1951 Convention Relating to the Status of Refugees<sup>13</sup> and its 1967 Protocol<sup>14</sup> (1951 Refugee Convention) is the only international legal instrument which provides a refugee definition and determines the rights of refugees. By 2011, 142 states had ratified both the 1951 refugee Convention and the 1967 Protocol.<sup>15</sup> The 1951 Convention set the standard for the modern refugee status determination; in general the international community has followed its lead and structure.

There are several regional instruments that have been inspired by these two instruments as well. Three examples are the Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>16</sup> and the 1984 Cartagena Declaration on Refugees<sup>17</sup>, as

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<sup>11</sup> Waldron, 2013, p. 1.

<sup>12</sup> UNHCR, 2011(b), p. 2.

<sup>13</sup> The General Assembly, *Convention Relating to the Status of Refugees* (1951 Refugee Convention), 1951.

<sup>14</sup> The General Assembly, *Protocol Relating to the Status of Refugees*, 1967.

<sup>15</sup> United Nations High Commissioner for Refugees (UNHCR), 2011(a).

<sup>16</sup> Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1969.

well as the Common European Asylum System (CEAS) as a whole.<sup>18</sup> According to the 1951 Refugee Convention the term “refugee” shall include each person who:

*[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*<sup>19</sup>

In addition to the treaties that regulate the rights of the refugee specifically, States are bound by other human rights obligations that they have assumed as well. These instruments complement the 1951 Refugee Convention regarding the rights of refugees as refugees are just as well human beings with human rights.<sup>20</sup> The preamble of the 1951 Refugee Convention itself confirms that the high contracting parties take into consideration the Universal Declaration of Human Rights (UDHR) and the Charter of the United Nations which states that all “human beings shall enjoy fundamental rights and freedoms without discrimination”.<sup>21</sup> This is the same for regional instruments. The European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>22</sup> (ECHR) is one example of this, although there is a possible exception regarding political activities of aliens according to Article 16.<sup>23</sup>

## 2.2. The Concept of the Rule of Law *vis-à-vis* Human Rights

The connection between human rights and the rule of law is a highly debated issue. There are competing perceptions of their internal relations, and the different theories entail different approaches. The reason why it is relevant to study this relation

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<sup>17</sup> Americas - Miscellaneous, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 1984.

<sup>18</sup> UNHCR, 2011(b), p. 1.

<sup>19</sup> 1951 Refugee Convention, Article 1.

<sup>20</sup> UNHCR, 2011 (b), p. 5.

<sup>21</sup> 1951 Refugee Convention, the first preambular paragraph.

<sup>22</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 1950.

<sup>23</sup> Grahl-Madsen, 2001, p. 79.

is to grasp the gap that repeatedly and sometimes systematically appears to arise between them. Human rights violations occur despite the existence of a rule of law, which compels an analysis of the phenomena. One must first pinpoint the problem in order to do something about it – whether it be the state, the society or the individual that will fill the gap in the end. A discussion of the meaning of the rule of law in relation to human rights will consequently hereinafter be conferred.

There are several competing definitions of the rule of law, and there has been criticism over the fact that there is no common understanding of its concept.<sup>24</sup> Different scholars define the rule of law in different ways, not least concerning its internal relationship to human rights. The main question in this regard is whether the rule of law and human rights are interdependent or if the rule of law could exist without any references to human rights. The Secretary-General of the UN defines the rule of law as, *[...] a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*<sup>25</sup>

This definition can be interpreted as stating that human rights are a precondition for the rule of law to exist. Despite that, when studying the language used in other UN documents it seems that human rights and the rule of law are two separate notions that are linked to each other, rather than the first being a precondition for the second.<sup>26</sup> In this sense the international agencies are advocating a human rights-based approach to the rule of law rather than providing a statement that human rights are one of the

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<sup>24</sup> Zajac Sannerholm, 2009, p. 16.

<sup>25</sup> The Security Council, 2004, p. 4 (emphasis added).

<sup>26</sup> UN Rule of Law, *What is the Rule of Law?*, available at: [http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3) [accessed 25 April 2013].

preconditions of the rule of law. Furthermore, the UDHR stresses the importance for the rule of law to protect human rights. In its preamble it states that:

*[...]Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights **should** be protected by the rule of law [...]* <sup>27</sup>

The formulation of this quote reveals that human rights are not considered to be automatically comprised by the notion of the rule of law as it urges that it *should* be protected by the rule of law. Thus, human rights are not necessarily given in the notion of the rule of law, according to the UDHR either, as the rule of law is recognised as a phenomenon existing even without the concept of human rights. Indeed, the definition provided by the UN Secretary-General could be considered to have a rather missionary approach to the definition. Similarly, the United Nations Development Programme (UNDP) emphasises a human rights-based approach to the rule of law as it is necessary to be able to provide access to justice. The interconnection between the two notions is stressed in the UNDP's advocacy and reform efforts.<sup>28</sup> The international agencies approach is that human rights are obvious references when distinguishing what is meant by the rule of law.<sup>29</sup>

When studying legal theory there are two main perspectives which differs from each other regarding the concept and content of the rule of law: the formal definition, and the material definition.<sup>30</sup> The *formal* definition, sometimes called the “rule-book” conception,<sup>31</sup> emphasises procedural limits on the state, but leaves out what the content of those limits are. The content involves substantive justice which is an independent ideal.<sup>32</sup> Joseph Raz is one of the legal philosophers who argue from this point of view. According to him the rule of law is precisely as it sounds: the rule of the law<sup>33</sup>; it is an

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<sup>27</sup> The General Assembly, 1948, the third preambular paragraph (emphasis added).

<sup>28</sup> United Nations Development Programme, 2004, p. 4.

<sup>29</sup> Zajac Sannerholm, 2009, p.32.

<sup>30</sup> Ibidem.

<sup>31</sup> Dworkin, 1986, p.11.

<sup>32</sup> Ibidem.

<sup>33</sup> Raz, 1979, p. 212.

instrument that could be disconnected with concepts such as democracy, justice, human rights or respect for persons or for the dignity of man.<sup>34</sup> He says that,

*[a] non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.*<sup>35</sup>

In his reasoning the rule of law is an inherent virtue of the law and a necessary instrument which enables the law to serve good, but also bad purposes. The rule of law could for this reason not be considered a moral good, as it is merely a mechanism that could be used for different outcomes. Human rights are not protected by the instrument itself but by the one using the instrument, depending on how it is used.<sup>36</sup> Also Aristotle described the concept of the rule of law as “a government of laws, not men”<sup>37</sup>; in other words, a versatile tool in the hands of men. This instrumental conception of the rule of law derives from the very idea that the rule of law is the virtue of law, which the courts and the legal profession are responsible for.<sup>38</sup>

The material definition on the other hand is very different from the formal definition, and could be described as more ambitious.<sup>39</sup> Just as the UN Secretary-General’s definition and the UNDP’s approach indicates, international agencies assume a material definition of the rule of law<sup>40</sup>, also referred to the “rights” conception. Meaning that, procedural limits are added by “substantive limitations on the exercise of authority by state actors”.<sup>41</sup> Hence, human rights are added and strongly emphasised when promoting the rule of law and when emphasising its concept. Ronald Myles Dworkin was one of the proponents of this idea. He argued that this conception “does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as a part of the ideal of law, that the rules

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<sup>34</sup> Raz, 1979, p. 211.

<sup>35</sup> Ibidem.

<sup>36</sup> Ibidem, p. 225.

<sup>37</sup> Aristotle, quoted in Zajac Sannerholm, 2009, p. 15.

<sup>38</sup> Raz, 1979, p. 226.

<sup>39</sup> Dworkin, 1986, p. 11.

<sup>40</sup> Zajac Sannerholm, 2009, p. 32.

<sup>41</sup> Ibidem.

in the rule book capture and enforce moral rights”.<sup>42</sup> According to Dworkin each individual has political rights against the state, and possess moral rights and duties in relation to other individuals. As far as possible, these moral and political rights must be recognised by positive law in order to insure the enforcement of them by the courts or other judicial institutions.<sup>43</sup>

Irrespective of what definition is applied the rule of law has, even as merely an instrument, potentials to respect and protect human rights. The rule of law could be the difference between justifiable claims of human rights and mere aspirations of them, no matter the content of its notion. In fact, the rule of law promotion “has become an instrument of rights advocacy”.<sup>44</sup> Despite this fact, it is clear that even if the rule of law is meant to comprise human rights the scheme has its flaws that allow violations of human rights to occur. No state is until now completely free from human rights violations,<sup>45</sup> although many of them assume the rule of law.

If the formal definition is assumed, then it is clear that human rights violations can occur within the rule of law as it is merely an instrument for procedural limits on the state and not an indicator of moral good in itself. The material definition emphasises the added substantive limitations such as human rights protection, although that does not infer that the procedural characteristics are not recognised. Dworkin himself pinpoints three dimensions of failure of the rights conception,

- a) the *scope* of the individual rights that the state purports to establish might decline, especially those against the state itself,
- b) the *accuracy* of the right cannot be guaranteed; in spite of the fact that individual rights are recognised official mistakes could occur,
- c) the *fairness* of the enforcement of rights might fail when prioritising the rights of the state over the rights of the poor or certain disfavoured groups<sup>46</sup>

Hence, when assuming a material definition of the rule of law, it is possible and liable to recognise violations of the rule of law through law itself as a particular form of

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<sup>42</sup> Dworkin, 1986, p. 12.

<sup>43</sup> Ibidem, p. 11.

<sup>44</sup> Zajac Sannerholm, 2009, p. 72.

<sup>45</sup> Grahl-Madsen, Atle, 2001, p. 77.

<sup>46</sup> Dworkin, 1986, p.12.

abuse.<sup>47</sup> As human rights are instrumentalised in the system of the rule of law, there is always a risk that they could be abused through the system itself. Consequently, both definitions assume that violations of human rights can occur despite the fact that the rule of law prevails.

To conclude, the efforts to comprise and to ensure protection of human rights in and through the scheme are crucial and must proceed. Although, as examined, as long as human rights are instrumentalised there are no guarantee that they will be protected. This leads to the critical question: when the rule of law does not protect or fails to protect fundamental rights – who will? There might be two potential answers to this question: the society as a community and/or the individual. The following chapters will focus on the individual's role and moral responsibility to protect fundamental rights, and what that might entail in a modern society.

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<sup>47</sup> Zajac Sannerholm, 2009, pp. 31-32.



### **3. The Individual's Role and Responsibility in a Modern Society Towards Others**

This chapter considers the individual's role and moral responsibility to protect human rights when the rule of law fails to do so. Embedded in this discussion are the rights of potential refugees, although they will not be mentioned *per se*. It departs from Immanuel Kant's moral theories and interpretations of the Kantian morality, as one of the most important influences of the philosophy and culture of the modern society. In order to investigate in the individual's moral responsibility to protect the rights of others, the core of Kant's theory of moral obligations will be studied. Furthermore, the question whether disobeying state authorities or the law of society is compatible with the moral law, according to interpretations of Kantian theory, will be conferred. From Kant's theories will follow a critic of Modernity, that of which the Kantian morality is said to be one of the antecedents of, as "dialectic of civilisation and barbarism".<sup>48</sup> The critic will mainly derive from theories of the contemporary philosophers Hannah Arendt and Zygmunt Bauman, although interpretations of Theodor Adorno and Max Horkheimer's ideas will be touched upon as well as they are philosophers who are said to have been the first to illuminate the dialectic of the enlightenment, which is a core part of modernity.<sup>49</sup> The Holocaust will in a natural way set as an example of the crisis of modernity as it is an event that, in accordance with the critic of Kantian moral theory, defines the epoch of modernity.

#### **3.1. The Individual's Moral Responsibility Towards Others**

From where derives moral worth? From where can the human being access moral knowledge? What defines moral conduct? What role does reason, inclinations or will play in relation to moral decisions? And most importantly, what will the answers to these questions entail in the encounter of the law and/or public authorities? These are the questions that this following section will handle through a distinct inventory in the subject of the theories of Kant, Arendt and Bauman primarily.

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<sup>48</sup> Barreto, 2006, p. 73.

<sup>49</sup> Bauman, 1993, p. 17.

### 3.1.1. *The Origin of Moral Obligations*

The modern era have, and are, greatly influenced by the “Age of Reason”, of which Immanuel Kant’s theories have had a foundational impact on.<sup>50</sup> Dire examples on the impact of his theories will be discussed further on. But first it is crucial to grasp where moral obligations come from and what components morality consists of according to Kant’s philosophy on morality.

According to Kant there must be metaphysics of morals if any moral requirements exist; a set of synthetic *a priori* judgements which tells the individual what she ought to do.<sup>51</sup> Kant argues that morality and moral obligations derives from universal principles and from a categorical imperative – which he calls a supreme principle. Hence, moral obligations do not derive from the individual’s personal desire or needs, as health or happiness does, but from universal principles.<sup>52</sup>

A morally good action has a special value because of its motivation. Good will is central for the special kind of value that derives from morally good actions. The only end good will have is to do the right thing for the right reason. It is the only thing independent from other ends.<sup>53</sup> Kant argues therefore that if the motivation of an action is based on good will it is, subsequently, morally good. In other words, the motivation or the principle behind the action is what defines its special value. Therefore, when we know on what principle an act is based on, we will know its moral worth. As a consequence to this, we will know what is morally good and what we *ought to do* when we know what makes an act morally good. Kant argues that not even the purpose of an act is the basis of the moral worth – solely the principle on which a person acts upon. He calls this the moral law.<sup>54</sup>

Essential to Kant’s theory of moral law are his thoughts on human nature. Kant argues that human nature contains incentives that motivate human beings to make specific actions. Desires and inclinations are rooted in the incentives. The desire to help could for example be rooted in sympathy. The incentives provide us with considerations

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<sup>50</sup> Barreto, 2006, p. 74.

<sup>51</sup> Kant, 1997, p. 67.

<sup>52</sup> Ibidem, p. 27.

<sup>53</sup> Ibidem, pp. 18-19.

<sup>54</sup> Ibidem, pp. 17-18.

that we adopt when deciding upon what to do. When the decision of an act is made upon the incentive it becomes his “maxim”, which in other words means the principle on which the act is made on.<sup>55</sup> The maxim of a person that helps someone based on sympathy and the maxim of a person that helps someone based on duty are different. The purpose of both acts is the same, but the reasons are different. The sympathetic person helps because he enjoys doing so. The reason of why she chooses to act is, in other words, only because she *wants* to. This is the reason why his act lacks moral worth. The maxim of the dutiful person on the other hand, is based on the fact that she is required to help; she is convinced that other’s needs results in a claim on her.<sup>56</sup> This kind of maxim is what Kant thinks constitutes a moral worth. The fact that she thinks that she is required to help could be regarded, by her, as a law. Just as law is based on principles, the maxim is the basis of a morally good act. When a person acts upon her incentive to perform an act based on a maxim which expresses a requirement, the incentive is a respect for law.<sup>57</sup> The motives of an act are, in other words, independent from the rightness of that act.<sup>58</sup>

Actions done from duty, from the respect of the universal law, is what Kant thinks embodies moral obligations. Hence, the maxim of each individual must derive from the universal laws. The acts of the human being are, in other words, a representation or conception of the universal law. This stipulates that actions with moral worth derive from rational decisions and not from feelings. Practical reason consists of the moral law as one of its principles. The concept of duty follows therefore from reason. Hypothetical imperative tells us what to do if we want something else; an imperative that leads to another particular end, to be happy for instance. A categorical imperative on the other hand is an imperative which unconditionally tells us what we ought to do on the basis of the “legitimate requirements of reason”.<sup>59</sup> Kant states that the only categorical imperative that exists is this: “act only in accordance with that maxim through which you can at the same time will that it become a universal law”.<sup>60</sup> A person knows that she

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<sup>55</sup> Kant, 1997, pp. 19-20.

<sup>56</sup> Ibidem, pp. 21-22.

<sup>57</sup> Ibidem, pp. 23-24.

<sup>58</sup> Timmons, 2002, p. 256.

<sup>59</sup> Kant, 1997, p. 25.

<sup>60</sup> Ibidem, p. 26 (translated from Swedish).

*will* her maxim to be universal law when she, as part of this world, can *will* it to be a law of nature. This is by Kant called the Formula of Universal Law. It is central to consider what would happen if everybody in this world acted the same when duties to others are concerned. The maxim of an act has moral worth when it is “universalisable”.<sup>61</sup> The teleological aspects of certain acts must however also be considered; to achieve something by making false promises to someone else for instance is not coherent with the “natural purpose” of promising. The natural purpose of promising is to generate cooperation and trust, why false promising is not coherent with the teleological system of the laws of nature. The natural purpose of promising generates cooperation because the act of promising invites the person that receives the promise to exercise his own reason freely. If an act is inconsistent with the “value of humanity” the maxim of that act is not a law.<sup>62</sup>

The fact that Kant believes that all persons are legislative beings, and therefore autonomous, derives from the conception that human beings are bearer of dignity, according to the interpretation of Christine M. Korsgaard,<sup>63</sup> Professor of Philosophy.<sup>64</sup>

Kant’s formula to distinguish right from wrong is a formula accessible for all individuals as it is located in the “rational structure of the human mind”.<sup>65</sup> Hannah Arendt, one of the most important political philosophers of modern time, criticises Kant on this point; for human beings are not only rational beings, but also creatures with senses. The fact that human beings are creatures with senses stipulates that they will not always act according to their reason, but also according to the inclinations they might have. According to Arendt, temptations and inclinations are not rooted in reason but in human nature. Moral knowledge is something obvious, although moral conduct is not.<sup>66</sup> Furthermore, she argues that conscience is a way of “feeling beyond reason”. It is presumably a way of knowing what is right and wrong through sentiments. However, Arendt maintains the opinion that feelings are merely an indication of guilt. These

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<sup>61</sup> Kant, 1997, p. 27.

<sup>62</sup> Ibidem, pp. 26-27.

<sup>63</sup> Korsgaard, 1997, pp. xxv.

<sup>64</sup> Department of philosophy: Harvard University, Faculty of the Department, available at: <http://www.fas.harvard.edu/~phildept/korsgaard.html> [accessed 22 July 2013].

<sup>65</sup> Arendt, 2003, p. 62.

<sup>66</sup> Ibidem.

feelings results in a perception of guiltiness or innocence, it is not an indicator of what is right or wrong. They could result in a conflict between the individual's old habits, not to kill for instance, with the new command, to kill. The point Arendt makes however is that feelings could also result in the opposite direction for the very same person; if the demands to kill, which have become the "new morality", results in a habit, the fact not to conform to the command would lead to guilt and therefore a bad conscience. What could be understood, according to Arendt, is that the feelings that emanate from conscience do not indicate morality, but rather conformity and nonconformity. In a secular term, conscience is therefore nothing more than the individual deliberating in order to be at peace with herself.<sup>67</sup>

Kant has as stated, a different view on emotions. Acts deriving from emotions are, according to the sociologist and Post-Doc. José Manuel Barreto's interpretation of Kant, acts with no moral worth. Inspired by Plato, Barreto argues that Kant thought emotions had nothing to do with thinking, arts or moral philosophy, and that "affections would be proper only to women, children and men with womanish or immature characters".<sup>68</sup> Furthermore, according to Arendt, Kant argued that a person who acts upon her emotions is forced to despise herself as she is in contradiction with herself and her own reason. The self-contempt is therefore, according to these interpretations, Kant's weapon against immoral conduct. When this kind of fear did not work, Arendt claims that Kant reasoned that the person in question lied to herself. Arendt suggested that lying to oneself was, for Kant, the worst thing a human being could do.<sup>69</sup> Self-respect must in this way of thinking be the highest standard and therefore the individual has a duty to herself in the first place rather than to others.<sup>70</sup>

Arendt argues that moral as well as immoral-conduct, are motivated by the *will*. It is the individual's *will* that dictates her actions. Neither desire, meaning "to be attracted by something outside myself",<sup>71</sup> nor reason is decisive factors; they are the voices of which the will chooses to listen to or not. In other words, both reason and desire are

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<sup>67</sup> Arendt, 2003, pp. 107-108.

<sup>68</sup> Barreto, 2006, p. 74.

<sup>69</sup> Arendt, 2003, p. 63.

<sup>70</sup> Ibidem, p. 67.

<sup>71</sup> Ibidem, p. 113.

sources of action, although the *will* has the final saying. The *will* can say yes or no to the precepts of reason and the same regarding the temptations of what I desire; for “the mind is not moved until it wills to be moved”<sup>72</sup>.<sup>73</sup> According to Peg Birmingham’s interpretations of Arendt in *Hannah Arendt and Human Rights*<sup>74</sup>, Arendt supposed that the majority of the Germans and the Nazis during the atrocities of the holocaust must at some point have felt a temptation not to murder. The fact that they had learned how to resist temptation resulted however in their actions. They had learned, in accordance with the fascist imperative, that obedience to the authorities and the sacrifice of their convictions was what was considered morally good.<sup>75</sup>

The ethics of human rights have been dominated by the philosophy of rationalism that Kant has contributed pre-eminently to. Indeed, it could be understood that human rights are “one of the characteristic expressions of the Age of Reason”.<sup>76</sup> Kant is not criticised by Arendt alone regarding the role of emotions, but by others as well. Barreto argues that practical reason has at all times been challenged by emotions, just as Arendt claims. However, according to Barreto’s interpretations of Theodor Adorno and Max Horkheimer, the philosophers go even further regarding the role of emotions. According to Barreto’s interpretation, Adorno and Horkheimer claim that emotions have an important role to play in contemporary theory concerning morality and human rights, which have not been taken into consideration during the age of modernity.<sup>77</sup> Zygmunt Bauman strengthens this argument by saying that Adorno and Horkheimer was the first who spelled out that the Enlightenment “has extinguished any trace of its own self-consciousness”<sup>78</sup>.<sup>79</sup>

Adorno and Horkheimer criticises the instrumental character that the modern reason has; a precise calculation of means that is used to attain a practical end, according to Barreto. This method, used in the field of science to calculate natural law, now also extends to the sphere of morality. It is practised as an instrument to control

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<sup>72</sup> Augustine, *De libero arbitrio voluntatis* 3.1.2, quoted in Arendt, 2003, p. 113.

<sup>73</sup> Arendt, 2003, p. 113.

<sup>74</sup> Birmingham, 2007.

<sup>75</sup> Ibidem, p. 109.

<sup>76</sup> Barreto, 2006, p. 74.

<sup>77</sup> Barreto, 2006, p. 75.

<sup>78</sup> Adorno & Horkheimer, quoted in Bauman, 1993, p. 17.

<sup>79</sup> Bauman, 1993, p. 17.

human beings. The fact that it is instrumentalised is not the sole problem; according to Barreto's interpretation, Adorno and Horkheimer claim that the coldness of reason is problematic as well,<sup>80</sup> and that "coldness is a condition for disaster".<sup>81</sup> According to the interpretation of Barreto, Adorno thought that coldness together with indifference to the fate of others were preconditions for the Holocaust to happen.<sup>82</sup> Kant's moral theory is based on two rules: the "duty of self-control", meaning that reason have control over emotions, and the "duty of apathy" that forbids emotions to have authority. Both duties results in the same end: to exclude emotions in order to act in accordance to the moral law. The only difference is that the duty to self-control is a positive duty, while the duty of apathy is a negative duty. Both duties predict Kant's fear for the impact that emotions may have on the individual.<sup>83</sup> Kant is here being criticised as the modern rationalisation has not contributed to the individual's emancipation from all kinds of tutors, it have rather led to the opposite result in many cases. Indeed, Barreto argues that Adorno and Horkheimer thought that the "'canon' of totalitarianism" emanates from the modern moral philosophy.<sup>84</sup> In order to secure the future from atrocities such as the Holocaust, Barreto's understanding of Adorno is that he stresses the importance to reduce coldness and to adopt sensitivity and sympathy.<sup>85</sup>

To conclude, the fact that the individual thinks according to her own reason, and the universal law, that she is required to act in a certain way is what Kant says constitute an act with moral worth. The origin of moral obligations is therefore, according to his theory, independent from the rightness of an act. Arendt, Adorno and Horkheimer argue that Kant fails to see the role of emotions when calculating the moral worth of an act. Arendt stresses that emotions cannot be controlled by reason, but by the individual's will which considers both her own reason and her desires. It is, according to her theory, the will that dictates the individual's actions.

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<sup>80</sup> Barreto, 2006, p. 79.

<sup>81</sup> Ibidem, p. 90.

<sup>82</sup> Ibidem, p. 92.

<sup>83</sup> Ibidem, p. 80.

<sup>84</sup> Ibidem, p. 83.

<sup>85</sup> Ibidem, p. 93.

### 3.1.2. *Morality Confronting Obedience*

Kant argues that all individuals are rational beings and therefore also legislators of the laws of morality. The laws of morality are in other words, our own moral laws. The autonomy also paves the way for all to decide when to obey these laws. Individuals could be motivated to conform to the law of the society in two ways. One of them is on the basis of a specific interest a person might have; if obedience would lead to a reward, to salvation or to God being pleased, or if disobedience would lead to a negative sanction such as social ostracism, a fine or being sent off to prison, a person might be motivated to obey the law of society. The other sort of motivation is one that is autonomous and based on morality; an individual is motivated to obey the universal law because she endorses it as a law. She believes it is a law that should be obeyed by all, a moral law. Unlike the first sort of motivation, she bounds *herself* to the law, why it is autonomous. The first kind of motivation binds a person to the law by external circumstances, by nature, the state or by God that issues the sanctions connected to the law. This kind of motivation is by Kant called heteronomous and the imperative that individuals comply within these cases are hypothetical imperatives, not categorical. A person does not choose to act with unconditional requirements, and therefore the motivation is not autonomous. Kant believes that the fact that individuals are autonomous makes them attached by the moral law.<sup>86</sup>

According to Arendt's interpretation of Kant, Kant makes a distinction between legality and morality: any law given by the outside is unrelated to moral conduct. He uses legality as terminology regarding institutionalised religion or politics as something which is morally neutral. As the rational creature is the legislator of morality, hence the universal law, the individual is not in the first place disobeying the law of men or God when committing a crime or a sin, but acts as a legislator of the moral law and not the law of the world.<sup>87</sup>

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<sup>86</sup> Kant, 1997, pp. 67-68.

<sup>87</sup> Arendt, 2003, p. 69.



An interesting interpretation of Kant's theories concerning obedience is made by Sarah Williams Holtman, associate professor at the University of Minnesota.<sup>88</sup> She claims that despite Kant's view on the autonomous individual, revolutions against the legislative, executive and judicial authorities are for Kant never justifiable. Unjust legal systems or corrupt public officials can never justify revolutions. It is a duty to put up with the authorities abuses.<sup>89</sup> Nevertheless, this does not mean that Kant thought that disobedience is wrong and that the citizen should not renounce from performing immoral acts.<sup>90</sup>

Kant's view is according to critics problematic when taking the theory of justice into account.<sup>91</sup> However, Holtman reads Kant as meaning that revolution is not compatible with respecting all citizens as free, equal and independent.<sup>92</sup> It is, according to him, only realizable that the state does something about the injustices in a society. Kant says,

*[B]efore a public lawful condition is established, individual human beings, peoples and states can never be secure against violence from one another...unless [a people] wants to renounce any concepts of right...it must leave the state of nature.*<sup>93</sup>

Moreover, Holtman argues that, according to Kant, for a civil society to have the possibility to be stable, revolution cannot take place. It destroys the foundation of the commonwealth and is therefore the highest punishable crime, according to his theories. Justice and the very foundation of justice are threatened when revolutions take place in conjunction with the removal of the higher authorities. It is the role of the State to secure justice, and as long as the State does not do so, none else than the State should or can take that responsibility alone. The conditions to secure justice exist only within the State. In this perspective, it is self-contradictory to be part of revolutionary activity and

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<sup>88</sup> University of Minnesota, College of Liberal Arts: Philosophy, available at: [http://experts.umn.edu/expertProfile.asp?n=Sarah+W+Holtman&u\\_id=1178&oe\\_id=1&o\\_id=136](http://experts.umn.edu/expertProfile.asp?n=Sarah+W+Holtman&u_id=1178&oe_id=1&o_id=136) [accessed 22 July 2013].

<sup>89</sup> Williams Holtman, 2002, p. 209.

<sup>90</sup> Ibidem, p. 221.

<sup>91</sup> Ibidem, p. 209.

<sup>92</sup> Ibidem, p. 212.

<sup>93</sup> Kant, Immanuel, quoted in Williams Holtman, p. 213.

it is, according to Holtman's interpretation, by Kant considered as a "blind pursuit of personal interest".<sup>94</sup> The State with its three branches of power: the legislative, the judicial and the executive power, constitutes the "general united will". This is the reason why the State is the foundation for the laws which are entirely justifiable.<sup>95</sup> They are built on the value of humanity. Although this requires that the State is just. Respect for the freedom, independence and equality of each person must exist within the realm of a State, for the State to be just.<sup>96</sup> Holtman says that this is the reason why Kant claims that while State authorities might be unjust, the advocacy of 'negative resistance' is crucial. While individuals have the responsibility to act in accordance with this 'negative resistance', the categorical imperative prohibits revolutions. It is a moral obligation to refrain from carrying out acts which are immoral although they are demanded by the state. Kant argues, according to Holtman's interpretation, that the individual has not merely a freedom but a responsibility to "evaluate the legal system to determine whether the laws as expressed, applied, and executed in fact satisfy the demands of justice".<sup>97</sup> This is what Kant called "the spirit of freedom". This view is based on Kant's claim that each citizen has rights against the state, rights that are absolute.<sup>98</sup> Kant supports the good intentions of the reformer as its motivation is justice, Holtman says. According to her, the practical way of how to achieve it is what Kant criticise and believes is contradictory and resulting in an unstable condition.<sup>99</sup>

Yet to declare an absolute prohibition of revolutionary activities is to skew Kant's idea of "the spirit of freedom", Holtman continues. She argues that if revolution is consistent with the individual's own moral obligations it cannot be dismissed in a just state. It is therefore difficult to argue that Kant would do so in certain circumstances. To avoid contradiction, revolution might be necessary to achieve justice.<sup>100</sup> An example of that are the events in Germany during the nineteen-thirties and -forties. The fact that many felt that obedience was supreme was one of several factors that countered the

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<sup>94</sup> Williams Holtman, 2002, p. 213.

<sup>95</sup> Ibidem, p. 217.

<sup>96</sup> Ibidem, p. 218.

<sup>97</sup> Ibidem, p. 221.

<sup>98</sup> Ibidem.

<sup>99</sup> Ibidem, p. 224.

<sup>100</sup> Ibidem, p. 230.

possibility of removing the government at place.<sup>101</sup> It is, moreover, doubtful that revolution necessarily would be an infringement on moral equality.<sup>102</sup> According to Holtman, if reading Kant consistently, the fact that citizen's evaluation of the legal system is a requirement for the existence of a just state implies that revolutions cannot be deemed as opposed to justice in certain cases.<sup>103</sup>

Arendt was brought up with the same idea of a sharp distinction between legality, the law of society, and morality. It was a matter of course that morality should conduct the law of society. The moral law was the law that should be obeyed in first place as it was considered as the higher law. No matter if the origin of moral obligations comes from human reason or divine commandments, each individual carries a conviction of what is right and what is wrong. The law of society can therefore be disregarded when acting upon the moral law. However, Arendt argues that while moral knowledge is a matter of course, moral conduct is not.<sup>104</sup> Temptations and inclinations are not rooted in reason, as Kant argues, but in human nature. Obeying the law of society might be one of the inclinations rooted in human nature although it could contradict moral law. Because of this moral conduct cannot be taken for granted when leaning on reason alone. Kant in comparison argues that wrong acts exercised due to temptation of inclinations are "radical evil" and nothing that could not be controlled by reason. Kant's categorical imperative is a formula that he describes as a "compass", hence the problem that Arendt stresses is according to Kant non-existent.<sup>105</sup>

Seeing that the core of the theories of Arendt and Kant concerning the prerequisites of moral conduct differ significantly, Arendt is of the opinion that disobeying orders or laws of the society when they are in contradiction of the individual's moral law is not the only moral obligation that the individual have, acts of civil disobedience could also be needed.

Arendt says that if the reason of disobeying the law is merely to refrain from being "the agent of injustice to another" then it is simple: "break the law".<sup>106</sup> If this is

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<sup>101</sup> Williams Holtman, 2002, p. 230.

<sup>102</sup> Ibidem, p. 227.

<sup>103</sup> Ibidem, p. 229.

<sup>104</sup> Arendt, 2003, p. 61.

<sup>105</sup> Ibidem, p. 62.

<sup>106</sup> Arendt, 1970, p. 72.

the basic reason for breaking the law, then it is merely an act to dampen the bad conscious of the individual. It is not a political act, as “consciousness is unpolitical”.<sup>107</sup> The conscience does not consider the consequences for the future of the world when wrong is committed. Socrates once said “it is better to suffer wrong than to do wrong”,<sup>108</sup> this statement is according to Arendt clearly based on the fact that it is better for the individual to do so because it will not be in disagreement with *herself*. The intercourse with the fellow-man prescribes also the intercourse between the individual and herself – “these are the rules of conscience”, according to Arendt.<sup>109</sup> Disobedience to the law of society as a result of the voices of conscience derives solely from the urge to resist one’s own involvement in acts of which one could not bear to live with. In other words, if the individual would act in contradiction with her own moral laws she would not bear with *herself*. This consciousness is however reserved to the man or woman who communicates with himself or herself. These are self-evident truth only for the thinking being. This kind of awareness, though, cannot be taken for granted. Another point Arendt makes is that acts based on this type of justification have an exclusively negative character; the question is not what the individual *ought to do*, but what she *ought not to do*. This foundational cause of disobedience presents boundaries, but no “principles for taking action”.<sup>110</sup> In a political and legal perspective there are two problems with resisting injustices because of the individual’s own well-being. First of all, the conscience of the individual is subjective and cannot be generalised since individuals can bear with different things more or less. In the secular world this results in conflicts between different consciences. The second problem with this type of justification as basis for resistance is that individuals might lack self-interest. According to Arendt, this problem might be even worse than the first. The human being has the capability to communicate with herself, although it cannot be taken for granted that all individuals are interested in this profitless activity. On this concern, Arendt argues that there is a vast discrepancy between “the good man” and “the good citizen”.<sup>111</sup>

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<sup>107</sup> Arendt, 1970, p. 72.

<sup>108</sup> Socrates, quoted in Arendt, 1970, p. 74.

<sup>109</sup> Arendt, 1970, p. 74.

<sup>110</sup> Ibidem.

<sup>111</sup> Ibidem.

Furthermore, Arendt makes a distinction between conscientious objectors that have been elaborated on until now, and those who practice civil disobedience. The moment conscientious objections of an individual come together with another individual with the same conscientious objections, and they make their voices heard in public – it becomes civil disobedience. In that moment alone, the act becomes politically significant as it has now become part of public opinion. Even though their acts still are based on their own individual conscience, it has now become something more; since they are no longer alone in their objection – it has become an opinion, which according to Arendt cannot be distinguished from other opinions. The purpose of the organised minorities who carry out civil disobedience is primarily to “take a stand against an assumed majority” in order to take a stand in the public opinion.<sup>112</sup> Hence, the “willingness to accept whatever punishment the law might impose” which is a central condition for the individual objector is not the sole aim of civil disobedience.<sup>113</sup> Arendt claimed in her article published in *The New Yorker* in 1970 that the defiance of established authorities are growing all over the world, and she adds that one day it might as well be considered to be “the outstanding event of the last decade”.<sup>114</sup>

Moreover, Arendt stresses the fact that civil disobedience and criminal disobedience are by no means the same. For the jurist, the law has been violated just as much in both cases. Arendt, though, proposes that civil disobedience should by no means be equated with criminal acts. It can certainly not be neglected that radical movement attract criminal elements, nevertheless, criminals are no less dangerous to political movements than to society in overall.<sup>115</sup> The criminal disobedient is avoiding the public eye, while the civil disobedient looks for it. Moreover, the criminal disobedient “acts for his own benefit alone”,<sup>116</sup> while the civil disobedient,

*[...]though he is usually dissenting from a majority, acts in the name and for the sake of a group; he defies the law and the established authorities on the ground of*

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<sup>112</sup> Arendt, 1970, p. 78.

<sup>113</sup> Ibidem.

<sup>114</sup> Ibidem.

<sup>115</sup> Ibidem, p. 84.

<sup>116</sup> Ibidem, p. 86.

*basic dissent, and not because he as an individual wishes to make an exception of himself and to get away with it.*"<sup>117</sup>

Arendt argues therefore that it is rather the other way around; that civil disobedience is considered by the civil disobedient to be legitimate *because* there is a persuasion that the institutional powers have an important role to play and therefore needs to change. Arendt continues in the article in *The New Yorker* by saying that civil disobedience is used as method when "the normal channels of change no longer function, and grievances will not be heard or acted upon" or when it is the other way around, when "the government is about to change, and has embarked upon and persists in modes of action whose legality and Constitutionality are open to grave doubt".<sup>118</sup> There is a myriad of examples of these kinds of events in the Western democracies. Arendt mentions a few, such as the undeclared war by the United States of America in Vietnam or the invasion of Cambodia by the very same nation-state, in 1970 – the very same year Arendt writes the article in *The New Yorker*. According to Arendt, civil disobedience can turn out to be necessary in these cases, in order to preserve rights which should be guaranteed intrinsically by states.<sup>119</sup> Hence, change must sometimes imply extra-legal action, but once the change has happened, the change is legalised and stabilised by law.<sup>120</sup> The abolition of slavery is a prominent example of that.<sup>121</sup>

According to the Kantian theory, the individual is assumed as the legislator of the laws of society, or at least that she has consented to them through the rule of law; which leads to the conclusion that the individual obeys herself. It turns out to a relation between me and myself. The fact that it turns to the individual and her conscience is according to Arendt, the defect of Kant's theory of moral obligation. What is more, according to Arendt, is that "...from the point of view of modern political science, the trouble lie in the fictitious origin of consent";<sup>122</sup> as if the majority's will would be based on a social contract. For the reason that the individual has the right to vote, she is bound

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<sup>117</sup> Arendt, 1970, p. 86.

<sup>118</sup> *Ibidem*, p. 84.

<sup>119</sup> *Ibidem*, p. 86.

<sup>120</sup> *Ibidem*, p. 90.

<sup>121</sup> *Ibidem*, p. 92.

<sup>122</sup> *Ibidem*, p. 94.

to obey the law of society. The right to vote is merely what constitutes the basis of a democracy. This fact is, according to Arendt, the reason why democracy has “come under attack”<sup>123</sup>.

To conclude, the individual’s moral obligation is, according to the Kantian theory, to act in accordance with her own moral law, which is the universal law. Moreover, a just State is constituted by the “general united will”, why revolution is self-contradictory. However, the individual still has a responsibility to evaluate whether the laws of society are expressed, applied and executed in a just way. If not, then the individual’s moral obligation is to refrain from carrying out acts which are immoral although the law of society or the State authorities might demand it. According to Arendt, there is a lacuna in this reasoning. Inclinations are, according to her, rooted in human nature why moral conduct is not a matter of course when leaning on reason alone. It might not be as easy to act in accordance with one’s own moral law when inclinations to obey the law of society are strong. In any event, Arendt argues that this type of disobedience presents boundaries, but no action. It is an act to avoid bad conscience, in order to be able to bear with *oneself*. It is not a political act, as consciousness is apolitical. However, the moment when two persons with the same conscientious objections come together and declares their objections in public – it becomes civil disobedience and the disobedient act becomes political as it is now part of public opinion. Civil disobedience is therefore, according to Arendt, necessary in certain circumstances in order to protect human rights which the State should have guaranteed in the first place.

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<sup>123</sup> Arendt, 1970, p. 94.

### 3.2. Morality in the Crises of Modernity

To be able to analyse the moral issues that the individual faces in relation to the rule of law in certain dilemmas, it is inevitable to take into account the context of time and place. The individual is forced to choose her moral standpoints in relation to the structures, processes and social conditions she lives under. Historical events have with robustness shown that this is true; external conditions affect the morals of the individual. Modern society has paved the way for shifted morals. The Holocaust will in this following section set as an example of this, seeing that it took place in the midst of Europe in a developed stage of rationalisation and the project of Enlightenment. The Holocaust sets as a good example of how “the culture of [m]odernity produced the opposite to that which it sought”, why it is now known as the crisis of Modernity.<sup>124</sup> The epoch of modernity lives on; it is therefore vastly relevant to look into the theories of how it may influence the decisions of the individual.

*Modernity* is used as a concept when discussing the rise of the modern society and the consequences it has on the context of the life of the individual.<sup>125</sup> Followed by the Reformation and the Enlightenment, modernity is most commonly identified with the western lifestyles and community institutions that have evolved since then.<sup>126</sup> Kant said that the enlightenment is “man's release from his self-incurred tutelage”.<sup>127</sup> In other words, an enlightened individual thinks on his own terms for himself. The unenlightened individual is lazy and needs the guidance of another person to make decisions. She is lazy because he lacks moral resolution and courage in order to use her intelligence in a critical way. The individual can grow intellectually only by taking personal responsibility for it to happen. It is, in other words, her individual moral responsibility to do so. At the same time, one could argue that Kant admits that it is a difficult task to work off the immaturity which has become a more or less natural state for the individual.<sup>128</sup> It is therefore crucial that the society provides the opportunity for the individual to speak and think for herself, so that she can exercise her reason. This is

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<sup>124</sup> Barreto, 2006, p. 77.

<sup>125</sup> Engdahl & Larsson, 2011, p. 291.

<sup>126</sup> Ibidem, p. 292.

<sup>127</sup> Kant, Immanuel, quoted in Zhang, Wei, 2010, p. 10.

<sup>128</sup> Zhang, Wei, 2010, p. 10.



the reason why it is a paradox; the enlightenment of the individual is dependent on the society's political culture and its matureness.<sup>129</sup> The perception of Kant and other enlightenment philosophers concerning rationalism and the development of reason has many times been criticised. It is according to the critics a strongly optimistic perception.<sup>130</sup> The enlightenment is said to be the ideational origin of modernity and the starting point of the modern society. It has however been greatly developed since then.<sup>131</sup>

To define modernity is a complex task. It could however be described as dynamic processes rather than a specific condition. Processes that could be included in the concept of modernity are democracy, industrialisation, urbanisation, rationalisation, bureaucratisation, capitalism, the expansion of individualism, affirmation of reason and science, and many other. A common characteristic of the modern society is that the institutions of the society are rationalised and differentiated. The judicial system is for example rational, legitimate and effective as it emanate from parliamentary decisions and state monopoly on violence.<sup>132</sup> According to Bauman, the main task that modernity set itself is the task of order, or more precisely of *order as a task*.<sup>133</sup> The individual is therefore forced to conform to this orderly society, as she is a part of society. The consequence of that is that the individual, in the mass society, sees herself as a cog in a wheel rather than an individual that acts on her own.<sup>134</sup>

### 3.2.1. *The Individual's Responsibility and Totalitarianism*

For those who witnessed the nineteen-thirties and –forties in Hitler's Germany or in Stalin's Russia, it is not difficult to trace back to the total collapse of all moral standards. Arendt, which is one of them, argues that the modern times have been permeated by the collapse of morality. According to her, no new values have been declared as new moral principles; the negation of morality has instead become *the new*

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<sup>129</sup> Zhang Wei, 2010, p. 11.

<sup>130</sup> Engdahl & Larsson, 2011, p. 291.

<sup>131</sup> Ibidem.

<sup>132</sup> Ibidem, p. 292.

<sup>133</sup> Bauman, 1993, p. 4.

<sup>134</sup> Arendt, 2003, p. 57.

moral principle.<sup>135</sup> She differentiates however between the two different events in Russia and in Germany from a moral point of view. Stalin did not admit his crimes, he was a hypocrite, and his followers alleged the temporary means that was necessary to achieve the “good” cause. The Germans involved in the holocaust on the other hand did not have any hypocritical tendencies. In moral terms the Nazi regime in Germany was, compared to the Stalin regime when it reached its worst, more extreme.<sup>136</sup> The legal system in Germany changed according to the new set of values. The moral convictions that anyone had, had been immediately replaced and individuals that never had sympathised with the Nazi ideas before conformed to the regime. The true moral issue is not the behaviour of the Nazis, according to Arendt, but the fact that individuals who did not sympathise with those ideas abandoned their moral convictions and acted in coordination with the regime.<sup>137</sup> Arendt says,

*[m]orality collapsed into a mere set of mores – manners, customs, conventions to be changed at will – not with criminals, but with ordinary people, who, as long as moral standards were socially accepted, never dreamt of doubting what they had been taught to believe in.*<sup>138</sup>

Arendt emphasises the importance of court proceedings as it has a way of uncovering the responsibility of the individual. Legal and moral issues have one thing in common – they do not deal with systems or organisations, but with persons. This is important precisely because of the tendencies that the modern society contributes to, namely to shift the responsibility. The individual in the modern totalitarian society sees himself as part of a machine, as a function rather than a man. He sees himself as a replicable thing – rather than a man that can act out of conviction.<sup>139</sup> The bureaucracy of totalitarian governments is built to dehumanise men and make them as cogs in the machinery of administration. Hitler’s dream of a perfect bureaucracy was very well

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<sup>135</sup> Arendt, 2003, p. 52.

<sup>136</sup> Ibidem, p. 53.

<sup>137</sup> Ibidem, pp. 53-54.

<sup>138</sup> Ibidem, p. 54.

<sup>139</sup> Ibidem, pp. 57-58.

portrayed in the wish he ones expressed – that the day would come when being a jurist would be considered a disgrace in Germany.<sup>140</sup>

It is, according to Arendt, the ordinary people and the crimes they committed solely because they were told to which led to the atrocities, that are interesting for the moral questions.<sup>141</sup>

Harald Welzer, professor in social psychology, affirms Arendt's theory concerning the ordinary man which becomes a murderer. He argues that it is frequently assumed that when a person acts in a peculiar or inexplicable way, the person is declared to have a "one-dimensional personality". If a person kills another person, his personality is defined by the act. These preconceptions overlook the psychological phenomena called fundamental attribution failure when the behaviour is, by the criminal, rather justified by the situational factors which "gave him no other choice". In this respect the factors that had impact on the choice of behaviour was not primarily based on personality but on external conditions. It is common to describe brutal and horrifying situations as binary; as persons acting morally good or morally bad, as perpetrators or victims or as Anti-Nazis or Nazis, to name a few examples. The fact is however that it is never that clear cut when it comes to ordinary men with no pathological circumstances.<sup>142</sup> It is affirmed that the majority of the perpetrators that caused the Holocaust was indeed ordinary men who were not pathological or abnormal.<sup>143</sup> It is not uncommon to see a severe discrepancy between the moral norms of an individual and her acts. Depending on the situation human beings are capable of acting in different ways.<sup>144</sup> According to Welzer, people argued in regard to the atrocities made during the Holocaust, that even though it was against their morals to kill innocent people they considered the duty to what seemed necessary as uncompromising. Perpetrators argued that they could overcome themselves in order to do what they were expected. The very fact that they did what was regarded as necessary despite that it was in contradiction to their own morals, made them deem themselves as good persons

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<sup>140</sup> Arendt, 2003, p. 58.

<sup>141</sup> Ibidem, p. 59.

<sup>142</sup> Welzer, 2007, p. 22.

<sup>143</sup> Bauman, 2011, p. 19.

<sup>144</sup> Welzer, 2007, p. 23.

doing the right thing. Hannah Arendt confirms this behaviour by providing Himmler, the *Reichsführer* of the Schutzstaffel (SS), as an example,

*The trick used by Himmler... consisted in turning these instincts around, as it were, in directing them toward the self. So that instead of saying: What horrible things I did to people! The murderers would be able to say: What horrible thing I had to watch in the pursuance of my duties, how heavily the task weighted upon my shoulders!*<sup>145</sup>

This reasoning has been detected in numerous diaries, notes and interviews. A repetitive wish in those materials from the perpetrators is not to appear as bad persons, but as persons that acted in accordance with good moral conduct.<sup>146</sup> Effort were made to helping the perpetrators viewing their doings as business rather than crimes made by the individual. If any individual initiative with personal gain or motive was exerted it was penalised. Unlike killings that are results from orders emanating from the organisation, killings made of pleasure or desire could result in trials and convictions. The personal motive made the act immoral, while the act based on orders made the ordinary man involved in the profound human rights violations to believe that he was a decent man.<sup>147</sup>

The duty to follow orders rather than following one's own convictions was superior in a chronological moral latter. The sociologist and philosopher Zygmunt Bauman argues that “[t]he SS leaders counted (rightly, it would appear) on organisational routine, not on individual zeal; on discipline, not ideological dedication. Loyalty to the gory task was to be – and was indeed – a derivative of loyalty to the organisation”.<sup>148</sup> The criminal acts that the ordinary man performed were not considered as his own responsibility, but the responsibility of the one that gave the order. An example of that is how Stangl, commander in the extermination camp *Sobibór* for seven months, in an interview explained how he judges the moral implications of his actions. He explained that he was ones taught at the police Academy that for a crime to be

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<sup>145</sup> Arendt, Hannah, quoted in Birmingham, 2007, p. 110.

<sup>146</sup> Welzer, 2007, p. 24.

<sup>147</sup> Bauman, 2011, p. 20.

<sup>148</sup> Ibidem.

committed there must be four elements; an object, a subject, an offence and an intention. He then argued that the first three requirements existed in his case, but not the fourth – at least not for him. In Stangl’s reasoning he could not take responsibility for the acts committed since the intention or purpose of the crimes came from someone other than him.<sup>149</sup> Welzer argues that from a social psychological point of view, Stangl was not corrupted and did not lose his ability to make moral decisions; he simply chose to act in accordance with the contemporary social norms, perception of military duty and scientific doctrine of that time and place. He was, even many years after the atrocities, keen to declare that he acted in accordance with the definition of moral conduct of that time; Stangl did what was considered right at that time in the context he was in, according to himself. Perpetrators of the Holocaust have often wanted to stress their personal integrity by distinguishing between their own morals and the mandated duty to kill.

The acts made by the perpetrators cannot be related to a perception of universal morality if such thing exists, but with a particularistic morality that was valid according to them at that time.<sup>150</sup> This particularistic morality bounds the individual to perform acts which serves the public good, and not necessarily the individual’s own interest. The problem becomes then related to the fact that the definition of what constitutes the public good varies depending on society and epoch. Hence, moral concepts become easy to influence.<sup>151</sup>

Serious and factual anti-Semitism, with profound belief in the National Socialist principle of totality, could most predominantly be found amongst the members of the German academic elite. The fight against the Jewish race were, according to these political convictions, justified by the claim that the interest of “their own people” must be guarded, and that the fight against the Jews were a natural law that had to be enforced.<sup>152</sup> The serious anti-Semitism had mainly two foundations; racial doctrine and the people’s well-being as a whole, not the well-being of the individual. These two elements did not in itself result in contempt of individuals but in a conviction that the

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<sup>149</sup> Welzer, 2007, p. 25.

<sup>150</sup> Ibidem, pp. 30-31.

<sup>151</sup> Welzer, 2007, p. 36.

<sup>152</sup> Ibidem, p. 32.

Jews were the Germans enemies because of their ancestry. How someone related to the Jews as individuals had nothing to do with it.<sup>153</sup> Perpetrators of the Holocaust often pointed out that they were decent men that had nothing against the individual; in fact, they have gladly told about events when they have treated Jews in a nice way. The reason why many perpetrators want to point out these events or this approach towards the individual is because all perpetrators want to be regarded as persons that observe moral conduct, according to Welzer. The fact that the Jews as a group had to be exterminated was simply a duty that had to be done, according to perpetrators.<sup>154</sup>

The factual anti-Semitism was presumed to have greatest influence amongst the elite, as mentioned before. The executive power was represented by those who were one step lower in the hierarchy; the head agencies of Gestapo and their staff for instance. Many of them were on the other hand merely or not at all influenced by the factual ideas. Generally, this group did not consist of intellectuals; their anti-Semitism culminated rather in the desire to use violence.<sup>155</sup> In any case, according to Arendt, the National Socialist language changed the title of this group from “recipients of orders” (*Befehlsempfänger*) to “bearers of orders” (*Befehlsträger*). This implied that, if and despite being a burden, they had to “carry” the objectives of the public good in accordance to this particularistic morality.<sup>156</sup>

In short, the social and societal pressure, amongst other elements, contributed to shifted morals in the heart of Europe during the nineteen-thirties and –forties. Arendt illustrates that this was an example of when moral conduct proved not to be a matter of course. Modernity paved the way for totalitarianism to rein, which resulted in a bureaucracy built to dehumanise men and make them as cogs in the machinery of administration – rather than men that acted from their personal convictions. The ordinary man involved in grave human rights violations justified her acts by saying that she followed orders. A distinction was made between the individual’s own morals and the mandated duty to kill, as the duty to follow orders was deemed morally superior.

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<sup>153</sup> Welzer, 2007, p. 33.

<sup>154</sup> Ibidem, p. 30.

<sup>155</sup> Ibidem, p. 34.

<sup>156</sup> Ibidem, pp. 36-37.

### 3.2.2. *The Individual's Responsibility in Face of Contemporary Democracies*

Drawing upon Arendt, Adorno, Horkheimer and Welzer, Bauman developed the critics of modernity and the effects it had during the nineteen-thirties and –forties. He argues that the Holocaust was not something unique that “happened to the Jews” simply as an event in Jewish history.<sup>157</sup> According to him, it should rather be seen as deeply connected to the paradigm of modernity and its bureaucratic rationality.<sup>158</sup>

Bauman focuses on what the Holocaust has to say about us and the context we live in today.<sup>159</sup> He argues that the same processes of exclusion that existed in the Holocaust could be seen in our societies today.<sup>160</sup> Subsequent history has not changed course. Our self-understanding and collective consciousness have developed little. The impact that the modern civilisation had on the holocaust have not resulted in any change, according to Bauman. The fact that our understanding has not been ameliorated enables that we once again could end up unprepared to see the warnings. And indeed, Bauman states that warning signs are displayed everywhere in our societies today just as they once were.<sup>161</sup> Seeing that the conditions have not changed – strong morality is a precondition to prevent a recurrence. Bauman criticises the need to control and the strong belief in reason that primarily derives from Kant's theories of which the modern society is constituted by. According to Bauman, the goal of modernity is order.<sup>162</sup> It is easy to know how to go on, or otherwise how to find out how to go on, in a structured world in order. Randomness and contingency is suppressed or denied in an orderly world. Order is desirable because within order one can calculate the “probability of an event” and from without that information one is able to adjust that probability. Furthermore, our learning/memorising ability is a reason why we are interested in preserving the order; to have past events to relate to, as guidelines, for our future success. Everything that the human being cannot control becomes uncomfortable or

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<sup>157</sup> Bauman, 1989, pp. 1-2.

<sup>158</sup> Engdahl & Larsson, 2011, .p. 308.

<sup>159</sup> Bauman, 1989, p. 5.

<sup>160</sup> Ibidem, p. 6.

<sup>161</sup> Engdahl & Larsson, 2011, pp. 85-86.

<sup>162</sup> Ibidem, p. 308.

even, a threat.<sup>163</sup> In other words, modernity does not tolerate anything which is difficult to determine or control such as strangers or anything that is foreign.<sup>164</sup> To avoid ambivalence, classifying, as the function of language, is practiced. When classifying, inclusion and exclusion is natural consequences.<sup>165</sup> The modern state creates a collective identity by educating its citizens to distinguish between “us” and “them”.<sup>166</sup> The stranger is a threat more horrifying than the enemy; he is an object of fear. The stranger is neither a friend nor an enemy – although the fact that he could be both, the absence of knowing and the inability of classifying, is what is threatening. For the reason that he is outside the borders of the social context, or what Bauman calls *sociation*, he cannot be ordered or controlled.<sup>167</sup> According to Arendt, Jewishness was first considered exotic in a social perspective before it was regarded as something that had to be expunged.<sup>168</sup> In Bauman’s analysis the Jews kept being strangers in Europe, which is why they did not fit within the frame of the society. He argues that this is not only true for the Jews, but also for foreigners in our societies today. Just as Anti-Semitism, racism is a product of modernity and its order-making efforts to reach what is believed to be the perfect society.<sup>169</sup>

The order-making efforts are constituted by the bureaucratic rationality which consists of certain interlinked elements, some of which have been mentioned before, such as loyalty to the organisation as morally superior. Another, interlinked, element is the compartmentalisation of tasks based on distinct areas of expertise, and a taxonomic categorisation. The division of labour seems to make it more difficult to perceive a personal responsibility in the final result. It is therefore easier for the individual to shift the morals to the higher authority, also for this reason. Conversely, Bauman argues that the fact that the individual is a piece in the puzzle is what makes atrocities, such as the Holocaust, possible. Moreover, the decision-making procedures were clearly

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<sup>163</sup> Bauman, 1993, pp. 1-2.

<sup>164</sup> Engdahl & Larsson, 2011, p. 308.

<sup>165</sup> Bauman, 1993, p. 2.

<sup>166</sup> Engdahl & Larsson, 2011, p. 308.

<sup>167</sup> Bauman, 1993, p. 55.

<sup>168</sup> Birmingham, 2007, p. 113.

<sup>169</sup> Engdahl & Larsson, 2011, p. 308.



hierarchical and the case management were routine and rule-governed.<sup>170</sup> In a society with this shape, it may not be easy for the individual to see the effect and importance of her acts. However, Bauman argues that,

*[...] the action of visualizing the consequences of action or inaction (and the guilt of neglecting the need of visualising them, or not visualising them properly), and cutting the action to the measure of such consequences, rests fairly and squarely with the actor. The excuse 'I did not know', 'I did not mean it', is not an excuse which moral responsibility at whatever level would accept (though it is an excuse admissible in a court of law, unless the ignorance referred to is the ignorance of the Law itself).<sup>171</sup>*

The Holocaust could happen because the violence was authorised, routinized and the victims were dehumanised. The modern society with its bureaucratic rationality is built in a way where these elements can fit.<sup>172</sup> Nevertheless, this does not mean by any means that bureaucracy initially was meant to result in atrocities. It simply means that the structures made it possible in an effective and comprehensive way – an impact which should not be diminished.<sup>173</sup> Bauman stresses that there is a strong potential risk that the individual's morality can shift, or even disappear, as long as modernity prevails. Something Bauman in his theories evidently wants to remind of in order to give awareness of the risks there is in the modern society. He argues that the state has the highest moral power in a modern society.<sup>174</sup> Bauman believes that the human ability to regulate on basis of individual responsibility is lost in the procedural bureaucratic rationality of the modern society.<sup>175</sup> Mechanisms that have the capacity to erode moral responsibility are strengthened by the principle of sovereignty; the state has moral authority of supreme character, on behalf of the society. In other words, mechanisms that could be found in the modern society pave the way for rulers of state to act as dictators in the area of moral judgement. This leads to the fact that the conflict between

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<sup>170</sup> Engdahl & Larsson, 2011, p. 308.

<sup>171</sup> Bauman, 1994, p. 220.

<sup>172</sup> Bauman, 2011, p. 21.

<sup>173</sup> Engdahl & Larsson, 2011, p. 209.

<sup>174</sup> Bauman, 2011, p. 86.

<sup>175</sup> Ibidem, p. 198.

the law of society and the moral law increases. According to Bauman, this conflict is in fact becoming more frequent and profound. Bauman states that moral behaviour in the modern society will in many cases signify actions which are “anti-social or subversive by the powers that be *and* by public opinion (whether outspoken or merely manifested in majority action or non-action)”. This means that moral action will in many cases entail resistance to the State and its authorities in order to interplay with its purpose: to take responsibility for the other.<sup>176</sup>

To conclude, what Bauman emphasises is that the same processes, mechanisms and social conditions that existed in Germany during the nineteen-thirties and –forties, lives on today. The loyalty to the organisation, the compartmentalisation of tasks based on distinct areas of expertise, the decision-making procedures which are clearly hierarchical and the case management which is routine and rule-governed, are all order-making efforts in the modern society. It is these inter-linked elements that made the Holocaust possible, why Bauman stresses the importance to be aware of these mechanisms, to be vigilant and to learn from history.

The individual’s role and responsibility in the modern society towards others has now been discussed with the help of differing theories. Kant’s theories, of which the modern society has been greatly influenced by, depart from rational thinking as central, as it is only through reason that the individual can know what is morally good. While the contemporary criticism of Kant’s theories, exemplified by the theories of Arendt, Adorno, Horkheimer, Welzer and Bauman in this study, argues that there is a lacuna in the Kantian moral theory. According to them, inclinations cannot be controlled by reason, why moral conduct cannot be taken for granted when leaning on reason alone. Inclinations are part of human nature and have to be considered when making decisions as well.

The Holocaust and the time before the atrocities have, by the contemporary philosophers, been used as an example of the influences modernity have had on the individual’s moral decisions. The failures of the rule of law to protect human rights can be seen in the light of the crisis of modernity. As an instrument in the modern society, the rule of law cannot act as an ultimate guarantee of protection when considering the

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<sup>176</sup> Bauman, 2011, p. 199.

elements of the modern society that, according to these theories, are stronger. The fact that the legal system in Germany changed in accordance with the new values and made it legal to kill innocent civilians for instance elucidates this. However, the rule of law can fail to protect human rights even without a drastic change as presented in chapter two. A present-day example of the crack in the rule of law will now follow in the next chapter. Just as the Jews in early nineteen hundred were strangers in Germany, this case-study concerns the situation of what some would consider as strangers in Sweden in the twenty-first century.

## 4. Present Challenges : a Case-Study of Sweden's Deportation Practices

The events that played out in the middle of Europe during the Nazi regime in Germany clearly indicated that human rights did not include peoples' or minorities' rights in the European nation-state system. The Holocaust sets as an example of when fundamental rights was left out and never safeguarded by the nation-state. Arendt argues that this would have looked entirely different in the heart of Africa, where minorities' and peoples' rights are emphasised.<sup>177</sup> Evidently, the victims of the Holocaust had no government to fall back upon, no institution which secured their rights, no authority who provided them protection. The fact that they lost their "national" rights entailed a loss of their human rights; this was true for the stateless persons just as for the minorities.<sup>178</sup>

Today there are numerous examples of states that are unwilling or unable to protect fundamental rights of their own citizens. For this purpose, international law clearly protects those covered by the refugee status definition. Despite this fact, receiving states' unwillingness to fulfil their obligation to protect refugees has been demonstrated in countless occasions and situations. In pace with increasing numbers of refugees and Displaced Persons all around the world,<sup>179</sup> it might appear that receiving states tightens their hospitality quota.

A specific case-study will now be presented and analysed. This case concerns failed asylum seekers from Iraq who applied for asylum in Sweden during the last five years. In 2009 Sweden was one of the industrialised countries with the highest number of asylum applications.<sup>180</sup> One could therefore assume that it is a country in the fore-front of refugee protection that is willing to take responsibility by granting refugees the rights they are entitled to. The fact that Sweden may be in the fore-front of providing refugee protection does however not indemnify the violations made and potentially still taking place. No matter if the cause of human rights violations and lack of refugee

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<sup>177</sup> Arendt, 1976, p. 291.

<sup>178</sup> Ibidem, p. 292.

<sup>179</sup> The General Assembly, 2001, p. 1.

<sup>180</sup> UNHCR, 2010.

protection are based on states unwillingness to take responsibility, or on technical flaws of the rule of law the fact that refugees have been sent back to persecution, torture and death by Sweden is affirmed by the UNHCR amongst others.<sup>181</sup> Facts prove that Sweden have violated human rights, and more specifically refugees' rights on numerous occasions. Sweden has for instance been charged for violating the freedom from torture according to Article 3 of the ECHR twice during the year of 2012 alone.<sup>182</sup> In fact, according to the UNHCR, systematic violations of refugees' rights have occurred under the responsibility of the Swedish authorities.<sup>183</sup> These are not bad apples, or a couple of events in Swedish history; they could in fact be considered to be on-going violations that have taken place for several years.<sup>184</sup> This case-study will focus on the Christian minority from Iraq who has applied for asylum in Sweden. Other groups of Iraqi minorities have applied for asylum in Sweden as well; Lesbian, gay, bisexual and transgender (LGBT) Iraqis are for instance one example. The LGBT community in Iraq is profoundly marginalised and vulnerable; according to the UNHCR they "continue to face threats, torture and extra-judicial killings", both by State and non-State actors.<sup>185</sup> In order to delimit and to look at a specific group of asylum-seekers, the situation of the Christian minority from Iraq will be studied.

There is a diverse understanding whether Christian Iraqis have been and possibly still are in great risk of persecution if being sent back to Iraq or not. The Swedish authorities have since 2008 until now been remarkably reductive in granted asylum status to Iraqis on the basis of their religion. According to the Swedish Migration Board's source of country of origin information, the rights of the Christian Iraqis can be protected in parts of Iraq, why it is eligible, according to the Swedish Migration Board, to deny them asylum and deport them.<sup>186</sup> Sweden has received strong criticism in this regard. According to reports from the UNHCR Christian Iraqis in Iraq have undeniably

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<sup>181</sup> UNHCR, 2011(c), and Amnesty International, 2011.

<sup>182</sup> *F.N. and Others v. Sweden*, European Court of Human Rights (ECtHR), 2012; *S.F. and others v. Sweden*, ECtHR, 2012.

<sup>183</sup> UNHCR, 2011(c), and Amnesty International, 2011.

<sup>184</sup> Dissenting Opinion of Judge Power-Forde Joined by Judge Zupancic in *M.Y.H. and Others v. Sweden*, ECtHR, 2013; *N.A.N.S. v. Sweden*, ECtHR, 2013; *N.M.B. v. Sweden*, ECtHR, 2013; *S.A. v. Sweden*, ECtHR, 2013; *N.M.Y. and Others v. Sweden*, ECtHR, 2013.

<sup>185</sup> UNHCR, 2009, p. 193.

<sup>186</sup> Home Office: UK Border Agency, 2011, pp. 159-160.

been at risk and should have been granted asylum.<sup>187</sup> It has been tried in the ECtHR and in June 2013 the ECtHR gave their verdict.

A short description of the situation for the Christian minority in Iraq that has proceeded during the last five years will now be presented. From this information a discussion of the Swedish deportation practices will be provided. Furthermore, important and recently given case-law from the ECtHR will be analysed, in order to give as full picture as possible of the actual situation.

#### 4.1. The Human Rights Situation for Christian Iraqis In Iraq and the Swedish Deportation Practices

Christian Iraqis have been victims of targeted attacks by armed Sunni groups since 2003 when the former regime of Iraq collapsed. Due to serious and comprehensive attacks in 2010, over 1,300 Christian families from southern and central Iraq fled to find refuge under the Kurdistan Regional Government (KRG) in north of Iraq, but also abroad. According to the UNHCR “more Christians were displaced in 2010 than any other year since 2003”.<sup>188</sup> Targeted attacks and violence against Christian Iraqis specifically, and personally, increased and continued in 2011 and 2012. It has been reported that Christians have been subject of threats, attacks on their home, kidnappings and assassination during these years.<sup>189</sup>

In 2008 the UNHCR criticised Sweden for deporting failed asylum-seekers to certain areas in Iraq despite the dire situation for them in those areas. The UNHCR stated that there was a great risk that the deportations would result in violations of fundamental rights of refugees.<sup>190</sup>

The Swedish authorities did not take the criticism into account, but continued to act against their international obligations. The UNHCR reported in December 2010 about the Swedish deportation practices concerning Christian Iraqis and manifested

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<sup>187</sup> UNHCR, 2012.

<sup>188</sup> UNHCR, 2012, p. 28.

<sup>189</sup> Ibidem.

<sup>190</sup> UNHCR: Refugees Daily, *Sweden Refugee Policy Criticised*, Swedish Radio International, 18 March 2008, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=47e0ba928> [accessed 23 July 2013].

serious complaints against them.<sup>191</sup> The UNHCR criticised Sweden for having deported five Christians back to Baghdad on 15 December 2010. Three of the Christian Iraqis were interviewed by UNHCR staff in Baghdad. One of the Christians, originating from Baghdad just as the other two, told the staff that he had been directly threatened to be killed by militiamen in 2007. As he feared for his life he escaped and ended up applying for asylum in Sweden. The Swedish authorities rejected him asylum as they considered that he had not been personally targeted. The asylum claims of the other two Christian Iraqis were rejected as the Swedish authorities claimed that the security conditions in Iraq were improved.

The UNHCR reported that it “strongly reiterates its call on countries to refrain from deporting Iraqis who originate from the most perilous parts of the country”.<sup>192</sup> The church attack in Baghdad on 31 October 2010 that killed 68 people,<sup>193</sup> and other targeted attacks that took place after that, combined with personal threats had led numerous Christian Iraqis to seek refuge. Consequently, the UNHCR strongly stressed the importance for asylum-seekers originating from Iraq’s governorates of Baghdad, Ninewa, Diyala, and Salah-al-Din, as well as from the province of Kirkuk, to benefit from international protection and not be returned to Iraq.<sup>194</sup>

Shortly thereafter, in January 2011, the UNHCR stressed once again its concern over the continuing deportation practices to Iraq by the Swedish authorities. It had come to the UNHCR’s attention that Sweden was about to deport 25 Iraqis back to Iraq and amongst the returnees were religious minorities at risk. The UNHCR claimed that those minorities “appear to have profiles that would warrant protection under the 1951 Refugee Convention or the European Union’s Qualification Directive”.<sup>195</sup> The UNHCR were strongly concerned over the fact that Sweden had not taken into account the advice

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<sup>191</sup> UNHCR, *UNHCR reports increase in flight of Iraqi Christians; reiterates advice on protection needs*, 17 December 2010, available at: <http://www.refworld.org/docid/4d0f0bcc2.html> [accessed 23 July 2013].

<sup>192</sup> Ibidem.

<sup>193</sup> Gulfnews.com, *UN raps Sweden for deporting Iraqi Christians*, 17 December 2010, available at: <http://gulfnews.com/news/region/iraq/un-raps-sweden-for-deporting-iraqi-christians-1.731925> [accessed 23 July 2013].

<sup>194</sup> UNHCR, *UNHCR reports increase in flight of Iraqi Christians; reiterates advice on protection needs*, 17 December 2010, available at: <http://www.refworld.org/docid/4d0f0bcc2.html> [accessed 23 July 2013].

<sup>195</sup> UNHCR, refworld, *UNHCR concerned at planned forced return from Sweden to Iraq*, 18 January 2011, available at: <http://www.refworld.org/docid/4d37e0c42.html> [accessed 23 July 2013].

given by them in 2008 and 2009, concerning Sweden's negative decisions. This fact combined with the deteriorating situation aggravated the UNHCR's concern.<sup>196</sup>

These events created concern also amongst NGO's such as Amnesty International which pleaded individuals to take urgent action by urging the Swedish authorities to stop the forced returns to Iraq, in particular to the dangerous provinces. Consistent with the claims of the UNHCR, Amnesty International stressed the serious risks of human rights abuses that Iraqi minorities would face if returned to the dangerous areas.<sup>197</sup>

The UN Assistance Mission for Iraq (UNAMI) published in May 2012 the *Report on Human Rights in Iraq: 2011*.<sup>198</sup> The report stated that the violent situation in Iraq remained high during the year of 2011, and religious minorities continued to be specifically targeted.<sup>199</sup> Due to targeted attacks, 14 Christian Iraqis had been killed during the year of 2011, according to UNAMI.<sup>200</sup>

While in the Kurdistan region the human rights situation had been improved, notwithstanding there were still important challenges to be dealt with, such as the freedom of expression and association.<sup>201</sup>

On 31 May 2012 the UNHCR published the *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Iraq* (hereinafter the 2012 UNHCR Guidelines).<sup>202</sup> According to the 2012 UNHCR Guidelines there was still a need of international refugee protection for religious minorities from southern and central Iraq. Moreover, there was a high probability that Christian converts from the whole country, including the Kurdistan region, were in need of international refugee protection. The UNHCR Guidelines reported that "[a] significant number of religious minorities, in particular Christians, have sought refuge in the [Kurdistan] region".

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<sup>196</sup> UNHCR, refworld, UNHCR concerned at planned forced return from Sweden to Iraq, 18 January 2011, available at: <http://www.refworld.org/docid/4d37e0c42.html> [accessed 23 July 2013].

<sup>197</sup> Amnesty International, Urgent Action: Sweden Must Stop Forced Returns to Iraq, 17 January 2011, available at: <http://www.amnesty.org/en/library/asset/EUR42/001/2011/en/1e6eba95-05fd-45b9-a312-506a96d62d8e/eur420012011en.pdf> [accessed 23 July 2013].

<sup>198</sup> UN Assistance Mission for Iraq (UNAMI), *Report on Human Rights in Iraq: 2011*, May 2012, available at: <http://www.refworld.org/docid/4fc726582.html> [accessed 24 July 2013].

<sup>199</sup> UNAMI, 2012, pp. Vi-vii.

<sup>200</sup> Ibidem, p. 30.

<sup>201</sup> Ibidem, p. viii.

<sup>202</sup> UNHCR, 2012.



However, this did not apply for the Christian converts.<sup>203</sup> Moreover, even if numerous Christian Iraqis have found refuge in the region of Kurdistan, there were several kidnappings of Christians reported in 2011 in Ankawa, hence within the Kurdistan region. This resulted in fear amongst the Christian community in the region which led internally displaced persons (IDP) that exercised their fundamental right to freedom of religion through their Christian faith, to flee and to find refuge in other countries.<sup>204</sup>

Relocation to the Kurdistan region was an option. However, according to the UNHCR Guidelines, despite the hospitality of the KRG to accept a prodigious amount of IDPs, Christian Iraqis may “still be within reach of the actors of persecution or face undue hardship”.<sup>205</sup> Even the actual travel from central Iraq to the Kurdistan region was manifestly unsafe according to the UNHCR Guidelines. No matter if the roads were under the control of the KRG or not numerous attacks on civilians have been reported. Moreover, the checkpoints have been *ad hoc* and therefore unreliable, and the borders of the KRG have sometimes closed for security reasons without any warning.<sup>206</sup>

#### 4.2. The European Court of Human Rights’ Verdict

On 27 June 2013 the lead case *M.Y.H and others v. Sweden*<sup>207</sup>, which regarded failed Christian Iraqi asylum-seekers, was decided and publically announced.

The case concerned three Iraqi nationals who alleged that their rights, in accordance with Article 3 of the ECHR, would be violated if deported back to Iraq.<sup>208</sup>

The applicants, a married couple and their child, were from Mosul and Baghdad and lived 13 years in a Muslim neighbourhood in Baghdad before they had to seek refuge. In the neighbourhood where they lived one of the applicants had been threatened with the kidnaping of his family members if he did not pay them a certain amount of money. He did not have the capacity to pay the whole amount, and as a result of that, his son was kidnapped. His son managed to flee but the threats continued. Moreover,

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<sup>203</sup> UNHCR, 2012, p. 27.

<sup>204</sup> Ibidem, 2012, 28.

<sup>205</sup> Ibidem, 2012, p. 49.

<sup>206</sup> Ibidem.

<sup>207</sup> *M.Y.H. and others v. Sweden*, ECtHR, 2013.

<sup>208</sup> Ibidem, p. 1.

due to fear of terrorists the applicants claimed that it was impossible to practise their religion where they lived. Also, their daughter had not been able to study at the university as there was a fear that she would have been kidnapped, raped or murdered on her way to the university as it was common that this happened to Christian women. Consequently, due to these events, the three applicants fled and on these grounds they applied later on for asylum in Sweden. Their asylum application was rejected on 20 September 2008.

The Swedish Migration Board held that “the fact that the applicants were Christians [...] did not constitute grounds for asylum”.<sup>209</sup> Moreover, they held that the basis for why the family had been threatened was not related to their religion, but due to security issues in Baghdad.<sup>210</sup> The Migration Board therefore concluded that the individual threat did not reach such intensity or severity if they were returned to Iraq.

An appeal took place, and the applicants added to their story that in September 2008 someone had written on their house “Your blood should be spilled” and “Christians are to be killed”, according to information provided by their former neighbour in Baghdad. In 2009 the Migration Court sustained the decision of the Migrations Board, saying that the fact that time had elapsed since these events occurred, together with the improved security in Baghdad, gave no reason to believe that there existed an individualised threat against the applicants if returned. The same year, the Migration Court of Appeal rejected the leave to appeal of the applicants.<sup>211</sup>

The applicants then turned to the ECtHR alleging that if they were deported back to Iraq they would face torture or inhuman or degrading treatment or punishment in accordance with Article 3 of the ECHR.<sup>212</sup> They argued that there was a well-founded fear of this to happen not on the basis of the general security issues in Baghdad, but because of “their belonging to a vulnerable minority”.<sup>213</sup> Moreover, if they returned to Baghdad they would have been recognised by Islamist groups and they argued that the messages written on their house were a concrete example of the fact that their faith was

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<sup>209</sup> M.Y.H. and others v. Sweden, ECtHR, p. 2.

<sup>210</sup> Ibidem.

<sup>211</sup> Ibidem, p. 3.

<sup>212</sup> Ibidem, p. 19.

<sup>213</sup> Ibidem, p. 20.

the ground for the threats they had been victims of. Furthermore, the applicants claimed that relocation to the Kurdistan Region would imply a risk to suffer inhuman or degrading treatment. The fact that they had a poor financial situation, combined with the fact that two of the applicants had bad health related to hypertension and depression affirmed by medical certificate, and that they had no links with the region and could not speak Kurdish would result in the impossibility for them to settle there.<sup>214</sup>

The majority of the ECtHR's panel of judges found that the general violent situation in Iraq did not qualify to the level of severity required according to Article 3, and for this reason there was no reason to prevent all returns to the country.<sup>215</sup> Moreover, the risks that the applicants claimed were based on their religion were considered by the ECtHR. Consequently, they confirmed that Christians are a particular vulnerable group in the southern and central parts of Iraq, and that the authorities in those parts were unable to provide protection. However, the ECtHR considered that an internal relocation alternative to the Kurdistan region where they could be protected was available.<sup>216</sup> However, this availability was dependent on the ECtHR's requirement that the expelling Contracting State takes responsibility to ensure that relocation really is possible and safe. It is, according to the ECtHR, a precondition that the expelling Contracting State provide guarantees. The expelling Contracting State must guarantee that there are safe travel possibilities within the country of origin to the region where the person is presumed to be safe. Moreover, it must be guaranteed that the person is admitted to that region and has the possibility to settle there as well. If these guarantees are assured by the expelling Contracting State, it could not be considered that a violation of Article 3 is liable.<sup>217</sup> As regards the applicants' specific circumstances and the applicant's claim that they would be subject to ill-treatment in the region of Kurdistan, the ECtHR found no information that supported it. Moreover, their health condition was no obstacle for deportation. No other allegation constituted, according to the ECtHR, any risk of ill-treatment if the applicants were to be deported back to Iraq. Consequently, the ECtHR held by a majority of five out of seven, that it would not

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<sup>214</sup> M.Y.H. and others v. Sweden, ECtHR, p. 21.

<sup>215</sup> Ibidem, p. 24.

<sup>216</sup> Ibidem, p. 25.

<sup>217</sup> Ibidem, p. 26.

constitute a violation of Article 3 of the ECHR if the applicants were deported back to Iraq.<sup>218</sup>

Worth noting is the dissenting opinion by Judge Power-Forde joined by Judge Zupancic. The fact that two judges out of seven had another judgement strengthens the argument that the deportation of the applicants may just as well have been in contradiction to Article 3, and may therefore involve a violation of human rights.

Judge Power-Forde, joined by Judge Zupancic, stressed that this case was about internal flight relocation, and more specifically about the quality of the guarantees that must be provided by the expelling Contracting State before returning vulnerable groups back to their country of origin.<sup>219</sup> Power-Forde continued and said that,

*[t]here is a critical lacuna in the majority's judgment that prevents me from joining them in finding that the implementation of deportation orders made in respect of the applicants would not give rise to a violation under Article 3 of the Convention.<sup>220</sup>*

Power-Forde disagreed with the majority's opinion that Christian minorities could be forcibly returned to Iraq in 2009. She put substantial weight to the view of the UNHCR at that time that held that Iraqis should be granted international protection, and "considered to be refugees 'on a prima facie basis'" from without the given circumstances.<sup>221</sup> The fact that the general human rights situation in Iraq had been ameliorated according to the 2012 UNHCR Guidelines, signified that there might no longer be a need to presume international refugee protection to all Iraqis, and that a case-by-case assessment is now recommended. However, the UNHCR held that it is likely that asylum-seekers with religion based claims, amongst others, still were in need of international refugee protection, which Power-Forde took into consideration. Moreover, the fact that the UNHCR claimed that threats to safety and security is a result

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<sup>218</sup> M.Y.H. and others v. Sweden, ECtHR, p. 28.

<sup>219</sup> Ibidem, p. 32.

<sup>220</sup> Ibidem.

<sup>221</sup> Ibidem.

of poor internal flight options in Iraq had to most carefully be taken into account according to Power-Forde.<sup>222</sup>

An internal relocation of Christian Iraqis to the Kurdistan region would, according to Power-Forde, not necessarily entail a violation of Article 3. However, she claimed that the majority's decision had failed to take into account the *application* of the ECtHR's jurisprudence concerning internal flight relocation. Power-Forde argues that the majority's decision, based on the required guarantees that must be in place in order to carry through a deportation, has not been tested whether they are *de facto* in place. To do so is, according to Power-Forde, to "set a high threshold of evidence in terms of the returnee's future safety".<sup>223</sup> When taken into account the grave situation that the applicants are at risk of, positive indications, chances or likelihoods cannot set as basis for such guarantees. Power-Forde refers to *Salah Sheekh v. the Netherlands*<sup>224</sup>, where the ECtHR stated that guarantees must be at place when assessing whether there is a risk in accordance with Article 3 of the ECHR. If the ECtHR does not know that such guarantees are *de facto* at place, then a violation of Article 3 cannot be excluded.<sup>225</sup> These principles were confirmed in *Sufi and Elmi v. the United Kingdom*<sup>226</sup>. Hence, Judge Power-Forde argues that the majority's approach in this case regarding the application of these principles are neglected and in contradiction to the ECtHR's jurisprudence.<sup>227</sup>

In three other twin-cases that were announced the same day and decided upon by the same judges, the judgements looked similar. So did the dissenting opinion held by Judge Power-Forde, joined by Judge Zupancic.<sup>228</sup>

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<sup>222</sup> M.Y.H. and others v. Sweden, ECtHR, p. 32.

<sup>223</sup> Ibidem, p. 33.

<sup>224</sup> Salah Sheekh v. the Netherlands, ECtHR, 2007.

<sup>225</sup> M.Y.H. and others v. Sweden, ECtHR, p. 33.

<sup>226</sup> Sufi and Elmi v. the United Kingdom, ECtHR, 2011.

<sup>227</sup> M.Y.H. and others v. Sweden, ECtHR, p. 34.

<sup>228</sup> N.M.Y. and Others v. Sweden, EctHR, 2013; N.M.B. v. Sweden, ECtHR, 2013; N.A.N.S. v. Sweden, ECtHR, 2013.

### 4.3. Conclusion

The fact that there are different views whether the situation for Christian Iraqis in Iraq is safe enough to fast-track them back to Iraq or if it is likely that they, as part of a vulnerable minority in Iraq, are at risk, makes the moral dilemma even more intense. The fact that the ECtHR have, through a majority-decision, established that the deportation of Christian Iraqis to Iraq does not violate the ECHR confirms the legality of that act. However, when considering the judgements of reputable agencies, such as the UNHCR and judges of the ECtHR, it is clear that the deportation of this specific minority is most likely a violation of fundamental rights. The question in this study is not whether acts are based on a *legal* responsibility, but whether there are *moral* responsibilities to protect human rights. It is worth noting that Judge Power-Forde raised a responsibility issue that the majority of the judges did not take into account; a principle concerning the *application* of the required guarantees that have been determined as decisive according to the jurisprudence of the ECtHR. This point made could state as a fitting example of when the legal system fails to take into account important aspects; which, if Judge Power Forde is right, could be decisive for the protection of fundamental rights. In other words, this case-study illuminates the gap that might occur between the rule of law in modern States and human rights protection. Therefore, if it is indeed legalised and even regulated that these deportations shall proceed, it is crucial for the individual to consider her role and responsibility in it. This is true solely if individuals are not merely cogs in a machinery, but men and women with convictions and moral responsibilities towards others; a question for the moral philosophers to answer.

## 5. Analysis and Discussion: Possible Consequences when Considering Moral Negotiations Between the Individual and The Rule of Law

The analysis and discussion that will follow will consider an implementation of the theories of morality presented in chapter three into the practical case-study presented in chapter four. Throughout this analysis the interaction between the individual and the rule of law will carefully be taken into account. What will follow from this analysis are potential consequences when theory and practice are added together.

When there is a probable, and according to legitimate international organisations – a likely, risk that a person might fall into the hands of horror, what rule should the individual choose to follow? When there is a risk that the instruments applied are lacking, what responsibility does the individual have within the system itself? Will the Administrative Officer be even more encouraged to decline asylum to Christian Iraqis now because the majority of the judges in the case of *M.Y.H and others v. Sweden* gave Sweden right, or will he/she take into consideration the facts addressed by the UNHCR, NGO's and the two judges dissenting opinion? Is there a moral responsibility for the individual to do so? Should the individual in general take into consideration facts that would entail that a deportation might be morally wrong in order to protect human rights, in spite of the fact that the deportation might appear legal? If the failed asylum-seeker is being returned to Iraq through a commercial flight to take an example, is it the moral responsibility of the pilot to refuse to start the engines? Is it the responsibility of passengers, including the failed asylum-seeker, to refuse to sit down in the very same plane? Is it the responsibility of all individuals to stand in the way of that airplane with their bodies?

According to the moral theories studied there is a distinction made between 'negative resistance', meaning what the individual *ought not to do* in order to avoid being part of immoral acts, and 'positive action', meaning what *ought to be done* or what the individual *ought to do* to stop the immoral acts.

‘Negative resistance’ applies for individuals involved in the process, assigned to fulfil a specific task. This could be public officials such as the Administrative Officer at the Swedish Migration Board, the Police or other involved in the process which would not necessarily be public officials, such as the pilot. ‘Positive action’ on the other hand could be conducted by any individual in society.

These two categories of moral responsibility will be discussed from without the analysis of the theories studied. However, in order for the individual to make moral decisions, it is a prerequisite that there is an awareness of the unjust situation in the first place. The individual’s awareness and responsibility to evaluate State practice will for this purpose initially be discussed.

### 5.1. A Critical-Enlightenment: The Responsibility to Evaluate

First of all, it is of utter importance that the individual collects knowledge and information of the potential on-going human rights violations that threatens Christian Iraqis if returned. This is particularly relevant if the individual is assigned to be involved in the asylum- or deportation process. Arendt points out in *Responsibility and Judgement*, that the origin of the word “conscience” in all languages was “not a faculty of knowing and judging right and wrong but what we now call consciousness, that is, the faculty by which we know, are aware of, ourselves”.<sup>229</sup> The word consciousness in Greek and Latin came to mean for what we know as conscience. In English the word *conscience* has been used to indicate consciousness until quite recently when its moral meaning emerged. Moreover, the word *conscience* in French is still used for both consciousness and conscience.<sup>230</sup> From this linguistic development it could be argued that *conscience* has been and is considered as dependent on the *consciousness* of oneself.

Moreover, as a citizen, the evaluation of laws and State practice is crucial and something that Kant, Bauman and Barreto’s interpretation of Adorno emphasises as a prerequisite in order to act morally good.

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<sup>229</sup> Arendt, 2003, p. 76.

<sup>230</sup> Ibidem.



According to Kant, the individual is the legislator of moral law. This stipulates as stated, according to the interpretations of Kant's theories, that the individual has not merely a freedom but a responsibility to "evaluate the legal system to determine whether the laws as expressed, applied, and executed in fact satisfy the demands of justice".<sup>231</sup> This spirit of freedom is crucial as the State is, according to Kant, the ultimate protector of justice. Hence, if this spirit of freedom does not exist, the State is not just. In order for the universal law, which is superior to any other law, to prevail, the individual has a duty to evaluate the laws and the practices of the State authorities so that they go hand in hand with the universal law.

Bauman claims that the modern society's order-making efforts, such as the hierarchical decision-making procedures and routine and rule-governed case management, diminishes the ability to have a full awareness of State practices – even when being a part of it. For this reason only, it is critical that all individuals within the modern society are aware of these mechanisms in order to be vigilant and on guard. Bauman argues that excuses as "I did not know" or "I did not mean it" are excuses that could be accepted in a court of law "unless the ignorance referred to is the ignorance of the Law itself".<sup>232</sup> However, these excuses are not acceptable at any level when considering moral responsibilities. An individual has the responsibility to visualise what consequences could come out of actions or from inaction. Absence of such visualisation is, according to Bauman, what enables human rights violations to occur.

Adorno affirms Bauman's theory, according to the interpretation of Barreto; the mechanisms in the modern society that enables human rights violations to occur must be known for all individuals in order to prevent human rights abuses. If the individual is aware of these mechanisms and conditions of the modern society, the tendency of falling into the acts of collective cruelty would be weakened.<sup>233</sup>

What can be concluded is that when applying these theories in practice, awareness is decisive. For the individual to take responsibility of her acts, facts which proves that there is an important risk that Christian Iraqis might be persecuted in the country of

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<sup>231</sup> Williams Holtman, 2002, p. 221.

<sup>232</sup> Bauman, 1994, p. 220.

<sup>233</sup> Barreto, 2006, p. 91.

origin, must be considered. The question remains what this consideration will entail in moral practice – a question which now will be deliberated upon.

## 5.2. Negative resistance: Abstention, Refusal and Disobedience

Acts based on the individual's maxim that can become a law that could be applied by all intelligible beings is the formula and moral compass of Kant. According to this formula the individual is obliged to conform to the universal law and the categorical imperative in order to make decisions with moral worth. This universal principle needs to be based on good will, as good will is the only principle independent from any other end than to do the right thing for the right reason. It is based on the individual's perception of the duty that follows from reason; the maxim that expresses a requirement. This duty could entail disobedience to the laws of society or demands of the State if they are in contradiction to the moral law. A just state embraces the spirit of freedom which implies that the individual is required to refrain from acts although they are demanded by the State. This negative resistance concerns only the individual who actually receives such demand. Hence, if the individual thinks, exclusively with her own reason excluding all inclinations, that the deportation of Christian Iraqis to Iraq is morally wrong, she is required to refrain from being part of the process.

Arendt believes that the fact that inclinations are part of human nature and cannot be controlled by reason, implies that one cannot rely on reason alone when making moral decisions. If interpreting Arendt's theory, an individual who is convinced that it is morally wrong to forcibly return Christian Iraqis to Iraq, might in spite of that be inclined to do what is required of her according to the laws, directives and orders of the State. Moral knowledge can be obvious, while moral conduct is not. What could be understood, according to Arendt, is that the feelings that emanate from conscience do not indicate morality, but rather conformity and nonconformity. Therefore, if the individual feels a strong nonconformity to disobey the laws or orders, she might obey them despite the fact that her act would be in contradiction to her own convictions. As Administrative Officer at the Swedish Migration Board for instance, there is a probability that the individual feels obligated to obey the rules of the authority she works for in the first place. The Holocaust is here provided as an example when

obedience to the authorities and the sacrifice of their own convictions was learned to be considered morally good. The fact that officials had learned to resist temptations, such as not to kill, and solely listen to their reason, was what contributed to their decisions. Arendt stresses that moral responsibility requires the individual to take into account both rational and emotional elements. In addition to that, in order to avoid being part of human rights violations it requires that the individual is “a good man” above being “a good citizen”. This entails that it is of utter importance that all individuals meant to have a part in the asylum- or deportation process of Christian Iraqis, makes their own judgement according to the information that is provided not only by the authority or office they operates for, but also those provided by the UNHCR for instance.

It must be taken into consideration when interpreting the theories of Adorno and Horkheimer that the so called modern reason has an instrumental character which was a contributing factor to the atrocious acts made under the Nazi regime. The Holocaust could happen because emotions were excluded in accordance with the Kant’s moral compass to control emotions through reason and to forbid emotions to have authority over the individual’s decisions. This theory adds to the fact that a negative resistance is unlikely to be obvious when influenced by the Kantian moral theory.

Bauman stresses the elements coming out of the crisis of modernity and enables the individual to shift her moral responsibility. The compartmentalisation of tasks based on distinct areas of expertise and a taxonomic categorisation are contributing factors to that shift. The division of labour seems to make it more difficult for the individual to see her own moral responsibility in her act that has contributed to the final result. A critical-Enlightenment is absent. Other inter-linked elements that in a modern society influences the individual’s perception is the loyalty to the organisation, the decision-making procedures that are clearly hierarchical, and the case management that is routine and rule-governed. All these mechanisms, processes and conditions prevent the individual to take her moral responsibility to disobey the authorities and resist being part of human rights abuses. Furthermore, since the modern societies lives on according to Bauman, individuals operating in Sweden must carefully take these mechanisms, processes and conditions into their moral considerations. As part of the modern society, the individual

is forced to choose her moral standpoints in relation to the structures and social conditions that she has to relate to.

### 5.3. Positive Action

In contrast to ‘negative resistance’, ‘positive action’ indicates *what ought to be* done instead of *what ought not to be* done. Two entirely different possible consequences of positive action will from here be discussed. The first positive action is one that Arendt has emphasized, since ‘negative resistance’ is not enough for the morally responsible individual according to her. As long as the laws of society or the practices of State authorities operate against human rights and refugee protection, there is according to Arendt a moral responsibility to act with civil disobedience. Kant’s theories could on the other hand be interpreted as opposing civil disobedience, which will be discussed as well.

The second positive action and possible consequence that will be discussed is a proposal of an innovative development of international law; namely, to include the morally responsible individual in international law. If this development would be implemented, civil disobedience would no longer be necessary. Hence, this would imply an entirely different relation between the individual and the rule of law of modern states.

#### 5.3.1. *Civil Disobedience*

According to Kant, a just state with its three branches of power constitutes the “general united will”. The spirit of freedom that exists in just states empowers the individual to overlook and evaluate the laws of society and practice of the State authorities so that they are consistent with the categorical imperative; a freedom that could lead to ‘negative resistance’. However, Kant believes that disobedience to laws and directives of the society stops there. The fact that there is a spirit of freedom combined with the right to be part of elections makes it self-contradictory to act against State authorities as it is based on the “general united will”. In the end it is solely the State that can secure justice, according to Kant. Therefore, one can assume that civil disobedience is not relevant according to Kant’s theories. The individual’s moral

responsibility to protect Christian Iraqis from persecution can accordingly only be prevented through elections and negative resistance when immoral acts are demanded on the individual, e.g. the police or the Migration Board employee.

Arendt firmly criticises Kant's view on this point. She claims that the assumption that laws have been legislated or at least been consented upon by all citizens, and that no individual is subject to alien will under the rule of law but indeed are obeying themselves, is an assumption with serious flaws. The defect of this theory is, according to Arendt, based on the fact that it turns once again to the relation between the individual and herself. Arendt argues that if the reason of disobeying laws of the society is merely to refrain from being "the agent of injustice to another" then there is no question – those laws should be broken. When implying it on the specific case regarding the asylum – or deportation process of Christian Iraqis it is a matter of course that the individual, implicated in the process, should refrain from it. However, the reason that the individual acts in such a way is based on her need to be able to live with herself and to be in conformity. It is an act deriving from her conscience – hence the act has no political value.

First of all, it does not change anything on a political level. The distribution of asylum rejections to Christian Iraqis will continue and there will be no change for future Christian asylum-seekers from Iraq. Conscience does not consider the consequences for the future of the world when wrong is committed; it merely considers her own conformity. Secondly, it could not be taken for granted that all individuals interact with themselves. This activity is reserved exclusively to the *thinking* being.

For these reasons, Arendt believes that moral obligations require more. States are the only legal protection providers for refugees, hence individuals are morally obliged to challenge states to change their practice in order to fulfil their obligation to respect human rights and the rights of potential refugees. This challenge is made when a minority with the same conscientious objections in the society comes together and make their objections publicly known. This is what Arendt calls civil disobedience. When actions of civil disobedience are made the conscientious objections becomes part of public opinion – which is a crucial element in democracy. The purpose of the civil disobedience carried out by organised minorities is primarily to declare their objections

which are opposed to the assumed majority in order to take a stand in the public opinion and possibly change practice. Civil disobedience can turn out to be necessary according to Arendt in order to preserve rights which should be guaranteed intrinsically by states.

Therefore, it could be understood that civil disobedience is necessary, according to the theories of Arendt, in order to challenge the Swedish authorities to stop the deportations of Christian Iraqis if they are violating rights that they are entitled to have according to the individual's judgement. Arendt argues that change must sometimes imply extra-legal action, but once the change has happened, the change is legalised and stabilised by law.

### 5.3.2. *The Individual's Moral Responsibility as A Matter of International Law*

Another possible consequence of the individual's moral responsibility to protect refugees' rights is the possibility to make individual's moral responsibility a matter of international law. The Universal Declaration of Human Rights<sup>234</sup> (UDHR) states in its preamble that the UDHR is,

*[...]a common standard of achievement for all peoples and all nations, to the end that every **individual** and every organ of society, keeping this Declaration constantly in mind, **shall** strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.*<sup>235</sup>

Accordingly, the individual as such is recognised on the international arena as an important actor for the promotion, recognition and observance of human rights. Article 14(1) in the very same declaration affirms that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution”.<sup>236</sup> Reading this Article together with the preamble, the UDHR clearly emphasises that the individual has a role to play in the recognition of refugees' rights. One could therefore argue that the UDHR affirms that

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<sup>234</sup> The General Assembly, *the Universal Declaration of Human Rights* (UDHR), 1948.

<sup>235</sup> The General Assembly, *UDHR*, 1948, the eighth preambular paragraph (emphasis added).

<sup>236</sup> The General Assembly, *UDHR*, Article 14(1).

individuals are actors that can share sovereignty with states, or possibly to hold another sovereignty alongside the State.<sup>237</sup> However, it may be difficult to identify what this implies, according to the preamble of the UDHR, in a concrete way.

A positive action could therefore imply an innovative development of the international law by including actions of morally responsible individuals. This would be an alternative to the system we have today where states have the “primary role as protection providers”.<sup>238</sup> A proposal to “share sovereignty with states, or to create new forms of sovereignty, as a way of limiting and opposing the sovereign nation states and their unwillingness to fulfil their obligation of protection towards refugees” has been provided.<sup>239</sup> It draws from Jacques Derrida’s ideas of sovereignty and unconditional hospitality, and from a practical example taken from the “operation of the Canadian private sponsorship of refugees program”.<sup>240</sup> It could be understood that Derrida’s idea of another form of sovereignty of which individuals would be the bearer of, is based on the fact that individuals are, in comparison to states, more suitable entities to protect fundamental rights. This theory is based on the assumption that individuals are more willing to provide protection to the suffering other as they are more sensitive than states which are institutionalised entities.<sup>241</sup>

The Canadian private sponsorship programme is an accurate example of when international legal obligations can, and are legally allowed to, be covered by individuals in the place of the State, although the Canadian State still are the primary actor. The Canadian Immigration and Refugee Protection Act allow citizens or permanent residents, corporations, organisations and associations to “sponsor a Convention refugee or a person in similar circumstances”.<sup>242</sup>

Derrida’s ideas combined with this concrete working example, forms what could be a credible possible consequence to this study. Unlike states, individuals are no abstract entities – hence, individuals are the only alternative actors that could consider moral obligations in international law. With this in mind, the innovative development of

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<sup>237</sup> Yahyaoui Krivenko, 2012, p. 589.

<sup>238</sup> Ibidem, p. 580.

<sup>239</sup> Ibidem, p. 579.

<sup>240</sup> Ibidem.

<sup>241</sup> Ibidem, p. 588.

<sup>242</sup> Ibidem, pp. 590-591.

international law that would include individuals, would contribute to a more efficient way of implementing international obligations, such as the protection of refugees' rights.<sup>243</sup>

By including morally responsible individuals as actors on the arena of international law, the gap between the rule of law and human rights that occurs when the rule of law as an instrument fails to protect human rights, could legally be covered by individuals. If this responsibility based on moral grounds would be affirmed in international law, it would most certainly imply that the interaction between the individual and the rule of law of the modern State would look entirely different when individuals acts according to their moral responsibilities. Refugee protection would in this scenario be "independent from states evolving political interests and changing preferences".<sup>244</sup> Consequently, the individual would no longer need to disobey any laws of society, since the individual would according to international law be recognised as an alternative actor in order to protect refugees' rights. Moreover, this would imply that despite the majority's judgment and thereby the ECtHR's decision in *M.Y.H and others v. Sweden*, the individual's moral responsibility to evaluate and consider her own judgement in that case would still be an obligation according to international law. The individual would have a moral responsibility to go beyond the verdict of the ECtHR in order to safeguard fundamental rights. The gap between the rule of law and human rights protection could in such circumstance be guaranteed within the scheme itself.

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<sup>243</sup> Yahyaoui Krivenko, 2012, p. 579.

<sup>244</sup> Ibidem.



## 6. Conclusion

The relationship between the Rule of Law and Human Rights is highly debated. There is no unanimous answer to whether the two notions could be completely separated or not, as it depends on which definition is applied. Despite this fact, there is a risk that human rights could, within the rule of law, be abused as a result of their instrumentalisation.

When the State has, according to international law, the ultimate *legal* responsibility to protect potential refugees, but fails to uphold it, it becomes relevant to investigate what other alternative there is to guarantee their fundamental rights. The individual's role and *moral* responsibility to protect fundamental rights becomes exceptionally relevant in such situation. When the routine and rule-governed processes are lacking, the individual is, especially if she is assigned to be part of the asylum – or deportation process, forced to take a stand. The question in this situation is what moral formula the individual chooses to follow.

Kant is one of the most important predecessors of modern thinking. His moral philosophy is based on rationalism that dominates the philosophy of modern society. For this reason, his theories could be considered to be most relevant to look at in the study of the application of human rights law and international refugee law.

According to Kant, morality and moral obligations derives from universal principles that the individual can find through the categorical imperative. The categorical imperative is an unconditional moral law that could be known through reason alone, it is independent from the individual's own desires or motives, such as happiness or health – the only end it has is to do the right thing for the right reason. Morally good actions are based on the assumption that the act is required of the individual, that it is a duty according to her own reason. Moreover, an act has moral worth when the maxim of the individual's act can become a law applicable for all intelligible beings. Furthermore, a precondition for the Kantian morality is to reject emotions in order to make decisions with moral worth. Emotions are, according to the Kantian theory, controlled by reason and must be so when making decisions.

Kant argues that the State with its three branches of power constitutes the general united will. According to interpretations of Kant, revolutions are for this reason self-contradictory and merely a “blind pursuit of personal interest”. However, just states have what Kant calls “a spirit of freedom”. It is the responsibility of the citizen to evaluate the laws of society and State practice so that they comply with the demands of justice. If not, then the individual, assigned to carry into effect a law, an order or a directive, must disobey in accordance with concept of ‘negative resistance’.

The fact that Kant’s theories on morality have been, and still are, an important influence on the moral philosophy of the modern society makes the critique over its shortcomings relevant to look at.

While moral knowledge is something obvious, moral conduct is not; this is the main critic that all contemporary philosophers and scholars presented in this study puts emphasis on. Arendt stresses that the reason why there is a lacuna in Kantian theory of morality, remains in the fact that human beings are not only rational beings, but also creatures with senses which cannot be controlled by reason. Inclinations are rooted in human nature and must therefore be considered when making decisions. Both reason and desire are sources of action, although the will has the final saying, according to Arendt. She argues that one reason why individuals conformed and obeyed orders of the Nazi regime in Germany during the nineteen-thirties and –forties was because they had learned to think rationally and to exclude their emotions. The psychologist Harald Welzer affirms Arendt’s theory and claims that the perpetrators saw themselves as decent men because they in spite of feeling reluctant to kill overcame their feelings and did what was required of them. The duty to follow orders was deemed morally superior. Adorno and Horkheimer agree, according to Barreto’s interpretation, to Arendt’s and Welzer’s theories on this point. They stresses that the coldness of reason is problematic in this perspective.

Moreover, Arendt argues that the modern thinking paved the way for totalitarianism to rein. This resulted in a bureaucracy that dehumanised men and made them see themselves as cogs in the machinery of administration, instead of men with personal convictions. Bauman confirms Arendt’s theory; he says that the crisis of modernity contributed to shifted morals. Order-making efforts such as the loyalty to the

organisation, the compartmentalisation of tasks based on distinct areas of expertise and taxonomic categorisation, the decision-making procedures clearly hierarchical and the case management which were routine and rule-governed, were inter-linked elements that made the Holocaust possible.

Bauman stresses that these mechanisms, processes and conditions are the same that exists in our modern societies today. The procedural bureaucratic rationality of the modern society prevents morally good actions. It is therefore necessary that the individual are aware of them in order to make morally good decisions. The individual is forced to relate to the modern society she lives in.

Moreover, Arendt states that Kant's 'negative resistance' is an act to avoid bad conscience. However, conscience does not indicate morality according to Arendt, but rather conformity and nonconformity. Conscience tells the individual what she ought to do or ought not to do in order to be able to bear with herself. It is not a political act, as consciousness is apolitical. The conscience does not consider the consequences for the future of the world when wrong is committed.

However, the moment when two persons with the same conscientious objections come together and declares their objections in public – it becomes political. In that moment it becomes part of public opinion. This is what Arendt defines as civil disobedience and as something necessary in order to protect human rights when the State fails to protect them.

The theories studied relating to the individual's role and moral responsibility in modern society has then been confronted by a specific case-study. This case concerned Christian Iraqis who became failed asylum-seekers in Sweden and who were forcibly returned by the Swedish authorities. This case was provided as an example of when states are unwilling to take responsibility, or when technical flaws of the rule of law results in potential human rights violations and lack of refugee protection. According to the Swedish Migration Board Christian Iraqis have the possibility to find refuge in parts of Iraq, and because of this the Swedish authorities found it eligible to deny them asylum and deport them back to Iraq. However, a diverse understanding regarding the situation has appeared. Strong criticism of the Swedish deportation practices have since 2008 been provided by the UNHCR amongst others. The UNHCR have claimed that

Christian Iraqis in Iraq have been undeniably at risk and should have been granted asylum as the relocation availability in Iraq is beneath contempt. Cases were tried in the ECtHR and in June 2013 the ECtHR gave their verdict. The majority of the judges gave Sweden right as they upheld that this specific vulnerable group could find protection in the region of Kurdistan and added that with the guarantees provided by the expelling State that relocation within the country is accessible and safe, there is no violation of Article 3. There were however a dissenting opinion by another judge that held that there was a violation of Article 3 of the ECHR in accordance with the ECtHR's jurisprudence. According to the dissenting opinion, the majority of the judges did not consider that the required guarantees were *de facto* at place.

The fact that there are different judgements regarding the risks that these potential refugees might be subjected to if forcibly returned indicates that an act might appear morally wrong although it is legal. This is the work of the instrumentalisation of human rights. When the deportation is legal according to Courts and State authorities the moral dilemma for the individual become more intense. Hence, there are different possible consequences when implementing the different theories of the individual's moral responsibility into the specific case-study provided.

As long as states are the only duty bearers of international human rights law, individuals have an obligation to disobey the law of society or the directives of State authorities when they are in contradiction to her moral law. This is something that all philosophers in this study agree upon. However, the fact that Kant's moral formula is based on rational decisions is what makes the contemporary philosophers deem that there is a significant gap in his theory. Moral conduct is not a matter of course if leaning on reason alone. For this reason, negative resistance cannot be taken for granted when applying the Kantian theory of morality. The individual assigned to have a specific role in the asylum- or deportation process of the Christian Iraqis needs to consider all elements that modernity consists of in order to make a decision with moral worth.

Moreover, Arendt emphasises that negative resistance merely derives from the individual's conscience. That is, what she ought to do in order to be in conformity with herself. These acts have no political value and contribute therefore to no change for the future of Christian Iraqis. However, if an individual comes together with another

individual with the same conscientious objections towards these deportations, and makes them heard in public, they become part of public opinion. These civil disobedience acts are necessary in order to change State practice.

Another positive action that could be considered as a possible consequence when applying the different moral theories in practice is to make the individual's moral responsibility a matter of international law. This innovative development of international law is a proposition to include morally responsible individuals as actors that are allowed to protect the rights of refugees, when states fail to do so, on the basis of their moral obligations.

These are possible consequences of the individual's role and moral responsibility to protect human rights in modern States from without the theories studied. These consequences could be the difference for the lives of numerous refugees which would otherwise fall in the gap between the rule of law and human rights protection.

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