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INTERVIEW WITH CHRISTOPH MÖLLERS: ON THE POSSIBILITIES AND AFACTICITY OF NORMS

INTRODUCTION

*Christoph Möllers, Professor of Public Law and Jurisprudence at the Humboldt Universität zu Berlin, discussed his recent book, *The Possibility of Norms*,¹ and related concepts of jurisprudence on June 16, 2016 with Alex Holzniekemper, Ph.D. of Baylor University. The following is an edited transcript of their interview as translated by Dr. Holzniekemper.*

Q: Prof. Möllers, since 2009 you have been the Professor for Public Law at the Humboldt University of Berlin, and you have just recently published your most comprehensive, and possibly most ambitious, book, *The Possibility of Norms*, in the fall of 2015. In your own words, would you mind providing a concise overview of the concerns of the book?

The book is driven by three concerns. The first concern stems from the recognition that we face a highly fractious discourse, which often talks about norms in general but ends up merely concerned with a subdiscipline's own norms—legal, theological, aesthetic, or other social norms. And yet, we employ the term “norm” uniformly. There is a need for a discursive coherency in which this uniformity is accounted for—where the common conception of norms is upheld. A second concern can be found in the idea that this commonality is unlikely to be found in moral philosophy; the terms of which are quite dominant in all disciplines. To me, this appears to severely inhibit cognition in discourse as a whole. A third and final concern was to put forward the idea that we should not think about norms merely in terms of limitations and restrictions, but rather in categories of enabling and facilitating. After all, norms are means with which we can do things that we otherwise would not be able to do.

Q: Before we get to questions about the book, and your work more generally, could you offer some reflections on your everyday work? Aside from your position as professor at Humboldt Universität's law school, you are also an active participant working towards outlawing the Nationaldemokratische Partei Deutschlands (Germany's far right political party). How has such practical, hands-on work shaped your research and teaching responsibilities?

¹ CRISTOPH MÖLLERS, DIE MÖGLICHKEIT DER NORMEN [THE POSSIBILITY OF NORMS] (2015).

In Germany, jurisprudence has always been closely linked to practice. I have served as judge in numerous constitutional proceedings, and I took on a secondary appointment as a judge for four years. This entailed having a say as professorial judge as a senate member. When you delve into legal practice, you certainly gain a more lucid impression of the multitude of pragmatic phenomena, of how careful you have to be in trying to make them more uniform, and how carefully you need to find a conceptual vocabulary that can conform to norms and yet avoid reducing or visiting violence upon such phenomena.

Q: In this coming academic year, you will serve as Bok Visiting International Professor at the University of Pennsylvania Law School. What do you envision from this time in the United States, and are there current issues in the American context of particular interest to you? What experiences have you already had in the United States?

On the whole, I find the United States to be a stimulating source of intellectual curiosity. I spent a year in Chicago, which turned out to be one of the most enticing years of my life. In the 1990s, the constitutional debate in the United States was particularly rich—maybe more so than it currently is. Back then, I was interested in behavioral law and economics and was working with [Cass R.] Sunstein, who taught there. As things stand now, I do not have a very specific field of inquiry during my visits. I want to revisit some specific debates, but I generally appreciate how the United States currently has an academic culture in which each person writes his or her own book and pursues his or her own interests, and that the discussion actually is not totally homogenized. You simply happen upon stimulating new lines of inquiry.

Q: On the German theory blog, www.theorieblog.de, you mentioned in a discussion of your book that it was a “leftover product” of an unwritten theory of law.² Could you explain the genesis of the book project? What was the general impetus for it? And who is the envisioned audience for the book? In German bookstores, it can be found prominently displayed in the philosophy sections, but it is hard to imagine stumbling upon it at a Barnes and Noble in the United States. Is this a specifically German or European discourse, or might the book have a wider audience in mind?

The book has a rather unique genesis. At first, I wanted to write a discourse comparison between German legal and literary theory of the nineteenth and twentieth centuries, spanning the time period between Early Romanticism and National Socialism. In that process, I got stuck in problems of legal theory and began writing a second book on a theory of law. There, too, I got caught up in the concept of normativity and the question of what it actually means for a legal norm to be a norm. It seemed to me that it was necessary to compare those [legal]

² Cristoph Möllers, *Möllers-Buchforum (5): Die (Un-)Möglichkeit der Normen—Replik des Autors* [Möllers Book Forum (5): *The (Im)possibility of Norms—Author’s Reply*], THEORIEBLOG (Dec. 21, 2015), <http://www.theorieblog.de/index.php/2015/12/moellers-buchforum-5-die-un-moeglichkeit-der-normen-replik-des-autors/>.

norms with other forms of norms in order to get to the bottom of it. That is how I ultimately ended up on a third project—the one that led to this book publication. Around 2008, I was stuck in a little bit of a crisis, as I was not quite sure how to [continue]. So, I simply opted for what seemed to be the most challenging—and abstract—and ended up finishing this book. The German audience is certainly a more intellectually open one; for that reason you will find such books in public interest bookstores here. On the other hand, the potential audience is an academic one—particularly in the social sciences, literary criticism, aesthetics, and, also, legal theory—but that is less immediate.

Q: Was it your intention to make the title ambiguous? On first impression, one might think the book is concerned with exploring the conditions of possibility for norms. But it is also about the realm of possibilities opened up by norms, right? Or do they both play a role?

Indeed, the book's title encompasses three meanings. The first meaning is that norms are a social possibility. At least theoretically, one could imagine social orders that could manage without or with few norms—that is, such a society would not perceive the possibility of norms. Secondly, norms are enabling in the sense that they are not merely constricting, but make possible certain practices that would otherwise not exist without norms. And the third meaning concerns the conditions of possibility of norms—that is, the social conditions in which one can more or less successfully implement normative practices.

Q: The central claim of your work is: “Norms are to be understood as positively marked possibilities. Norms point towards a possible condition or a possible event. The positive marking indicates that this possibility is to be realized.”³ I myself found the term “positive marking” to be slightly unwieldy. Certainly, you chose this terminology very carefully—why not resort to terms such as “affirmation,” “consensus,” or “agreement”?

Ultimately, my concern was with employing a term that is clean, that does not carry too many connotations with it—one that does not piggyback off of an entire moral philosophical tradition. After all, a fundamental function of the term is to sideline the question of the norm's justification, and I do not want to claim that only reasons or preferences account for the generation of a norm. Towards that end, I may have inconsistently availed myself of too many open terms, such as “prostance,” “affirmation,” or “marking.” This is because I believe that they carry the least amount of conceptual baggage and help sideline all the meta-ethical debates that are concerned with the nature of what makes a norm a norm. Considering that norms operate and are accounted for very differently in social practice, I purposefully did not want to presumptively answer the philosophical question of norm justification in this context.

³ MÖLLERS, *supra* note 1, at 13–14.

It is crucial to distinguish two levels of affirmation. At the conceptual-analytical level, we are concerned with a two-tiered conception of norms. We have a possibility, and the realization of this possibility is affirmed. On the practical level, it is important to recognize that this affirmation—this “marking,” as I call it—needs to be made explicit. We need to see that norms are disclosed as norms; otherwise, they cannot operate in practice. This also hinges on the problem of depiction and representation. In any case, we can observe that communicating with norms is not self-evident, but rather that norms need to be explicitly formulated as norms.

Q: We are circling around some of Rainer Forst’s critique of your book.⁴ Could you briefly summarize the opposing viewpoint from Prof. Forst? How does he believe to solve the problem of norm justification?

Prof. Forst wrote a critique of the book that is indebted to his own theoretical background. He comes from the critical theory tradition and was a student of Jürgen Habermas marked by a more analytical vantage point—a more Kantian approach to the justification of norms. Prof. Forst’s contention would claim that we cannot avoid talking about norms other than by referring to their justification; any differentiation between norm and justification would miss the mark of this phenomenon. On this account, my approach in talking about norms in a non-justified, non-normative manner would be conceptually misdirected. That is not apparent to me. I would argue that such a premise entails many problems. There is really no way to circumvent making distinctions between norms whose justification has been successful and those whose justification has failed. If one tries to avoid this, one has to take a stance in which certain norms are held to be real norms and others to be merely force-fed or presumptive. As a result, in describing social phenomena, one ends up normatively shaping these phenomena by either supporting them or critiquing them. To me—as much as I also do not believe in such a value-free paradigm—that seems to be a greater obstacle. On top of that, I see that when we take a look at how we cope with norms in social practice, we can clearly see that both compliance and violations of norms occur for completely different reasons—and, at times, for conflicting reasons. That means that we can coalesce around certain norms, but that the justifications for these norms often are not shared. The justification does not get discussed, it remains open—it can be contradictorily filled in or simply concealed. If we take such phenomena seriously, then it is crucial to differentiate between a norm and its justification. You do not always have to separate them. You can also concede to the norm a space in the social structure, but the justification does have to at least be conceptually isolated; otherwise, one departs from the analytical framework.

Q: Following up on that, is this a philosophical problem, or are we faced with a purely linguistic problem? Does the problem of justification hinge on the

⁴ Rainer Forst, *Wie utopisch sind Tischsitten?* [How utopian are table manners?], DIE ZEIT, Jan. 28, 2016, <http://www.zeit.de/2016/03/die-moeglichkeit-der-normen-christop-moellers>.

limits of our language? Here, I am reminded of the dispute between Jürgen Habermas and Charles Taylor concerning the viability and requirements of consensus in public discourse. Does Prof. Forst not acknowledge the necessarily incomplete task of normative practices?

With my background in jurisprudence, it is interesting for me to see what Taylor criticizes about Habermas: that Habermas insinuates a moral language which is incompletely typified in natural language since these natural languages are incapable of fully implementing or depicting the necessary rationality demands. I am interested in an analogous argument with respect to institutions. We should not try to first construct a philosophy of the morally right and then institutionally implement it. But we rather need to make clear from the outset that no norm can exist outside of its particular institutionalization and that social norms only ever appear under the cloak of institutional practices. We cannot think away the one from the other. If we were to do that, we would end up with a reconstruction that entails the ideal on one side and the friction on the other—with the friction becoming problematic both in the theory of language and in institutional theory. On my view, however, it is precisely this social practice marked as friction that enables normative practices and linguistic communication in the first place. We should not view it as a problematic side effect or accident of the actual justifying substance. We need to invert that relationship.

Q: Concentrating on action does seem to have one advantage: it is tangible. To what degree do you think it is necessary to move away from action-centered thought and to put a renewed focus on identity?

For me, it is important that norms do not necessarily operate in action. That stems primarily from my self-understanding within the legal tradition. There, we observe that actions are not something self-evident. On the contrary, particularly in criminal law, we need to expend great conceptual effort in order to define what constitutes an action. We need to distinguish between preparation—processes that were unintentional—and processes in which an agent did not have control over the outcomes because he or she was drunk or caught in organizational webs in which they participated in a given action, wherein the participation itself did not bring about the overall action or outcome of a presumed action. That is to say, actions do not constitute a basic unit in my understanding. Actions are themselves the result of normative practices which reward or sanction actions and, concomitantly, must define what exactly constitutes an action. This is viewed quite differently in the Anglo-Saxon tradition, and numerous lines of thought overlap there that may actually be less related to each other than commonly held. The analytical theory of action itself—which arises from theoretical philosophy and less so from pragmatics, but has seeped into pragmatic philosophy; a problem itself because a methodological individualism transforms into a normative individualism without any proper justification—merges with a very strong liberal, libertarian understanding in which a responsible or culpable agent must always be identified. Ultimately, we observe how the insight that social processes continue to operate without being able to assign culpability is not

particularly widespread in popular discourse. I, on the other hand, would think that we need to reverse that thought process and recognize that actions are indeed a central unit of normative practices in a world saturated with rights, but not an elementary unit. Rather, actions are also constituted, and, quite to the contrary, we have many normative practices that refer to things such as collective identity, individual identity, or to being someone as opposed to doing something. [Georg Wilhelm Friedrich] Hegel's dictum "be a person"⁵ is nothing else than an appeal to become someone who is capable of carrying out actions.

Q: Assuming we concede to this idea, what is the next step? Do we find a "better" basic unit? What alternatives are there: being, thought, or world condition?

My solution to the problem of which general term to use consisted in working on the notion of possibilities. We insinuate possible conditions in normative practices and we do not limit ourselves to employing actions or identities as objects of norms. If I designate all that with the category of possibilities, then I have a sufficiently abstract category that also improves my ability to grasp differences and historical developments more accurately while also not reducing the plethora of normative practices too narrowly to certain models.

Q: One of the great strengths of the book is its breadth of applications to numerous disciplines. Your intermezzo on normativity and aesthetics stands out in particular. To what degree do you ascribe a constitutive role to art and literature in conceptualizing and imagining normativity?

In the book, there were really two strains of thought that really intrigued me regarding art and art aesthetics—and their relationship certainly merits deeper reflection. On the one hand, we have the question of whether art is actually a normative project. We have a rather powerful tradition that says "no, art is inconsequential"; not in the sense that nothing happens in art, but in the sense that art pursues no precise normative claims. Art has become autonomous, which entails a differentiation between art and social normative claims. And yet, art is invested with lots of hope and numerous expectations. Art is seen as highly desirable. How can this be reconciled with the autonomy of art? This is the first question of major concern. The second, and quite different, question concerns the degree to which we can gain insights from the theory of art for the pragmatic representation of norms. This has to do with the fact that there is a specific commonality between art and norms—namely, their "afacticity." That is, the fact that [norms] precisely cannot be reduced to a status quo—to a reality—but that they strive to open up alternative worlds. In such afactual worlds, the fact that we are caught up in a certain condition of the world is only of secondary interest. This cannot disprove or nullify the norm at hand and also cannot undermine the

⁵ GEORG WILHELM FRIEDRICH HEGEL, NATURRECHT UND STAATSWISSENSCHAFTEN IN GRUNDRISSE; GRUNDLINIEN DER PHILOSOPHIE DES RECHTS ¶ 36 [NATURAL LAW AND THE SCIENCE OF THE STATE; ELEMENTS OF THE PHILOSOPHY OF RIGHT] (1821).

claims of aesthetic depiction. Quite to the contrary, aesthetic theory has much to say about how to cope with this problem. It has theories of fiction. It has a very sophisticated, if rather complex, ontology in which differentiations are drawn between various forms of art. But it accounts for the chain that begins with notation and leads to performance in numerous art forms. All of this is of great importance for norms, as well, and aesthetic theory is well suited to ask how that works—whereas legal theory largely neglects the representational aspect.

Q: Early on in the book you state, “many practical problems center on the question of representability.”⁶ Could one generally claim that one of the central challenges for normative discourse is its aesthetic representation? Is aesthetic representation often sidelined under the guise of a presumably neutral language? Can we also consider the more practical side of art as having a constitutive effect on social theory?

Since norms refer to afactual worlds, their representation is subject to particular difficulties. Norms are not fictions; they also are not untrue, but they also are not real in the same sense that facts are. Notably, norms can be broken without this affecting the status of the norm. But how are we to depict a norm in light of a social practice that permanently deviates from that very norm? Towards that end, we need mechanisms of envisioning and recalling—mechanisms that do not simply leave the content of the norm untouched, but cannot be separated from it. In answering the question of how this can be achieved, aesthetic categories can help.

Q: To what degree can literary criticism yield insights into originalism and functionalism in constitutional law? Originalism is a topic that has reemerged in the United States after Justice Antonin Scalia’s death. In literary criticism, talk of originalism is a bit of a taboo, so how might a comparison between literary artefacts and constitutions be helpful? How might we need to further differentiate between such artefacts?

I think that a lot can be gained from literary criticism, even moving in the direction I mentioned earlier—for example, from the theory of fiction. It is also always interesting to approach legal texts with instruments from literary criticism. However, I do not believe that one should hope to solve great theoretical problems in this manner. That is, I do not believe that we can solve the American question of originalism by taking recourse to literary criticism and saying, “Here, we’ve disproven originalism!” A central question is whether that can be done with such contrasting kinds of texts. And we can also see that literary criticism, as part of a large historicizing project, is actually interested in the context of works’ origins. In this sense, they are part of a more broadly conceived originalist project. In one sense, new historicism is precisely such a more broadly conceived originalist project. To me, the debate about originalism seems to be posing the wrong question. There is no way around going back to a text that does

⁶ MÖLLERS, *supra* note 1, at 15.

not stem from our present. And we cannot get around treating it as part of the present. There is no escaping the dilemma, and this dilemma cannot be solved with one or the other response to it.

Q: In your reflections on the concept of utopia, you differentiate between aesthetic normativity and social normativity, and how the former has the privilege of “dwelling in ambiguity.”⁷ Utopias are distinguished by not having to restrict themselves to the possible. Such characteristics may come across as deficient to many, but to what degree might we need particularly these forms of representation and imagination?

I suspect that works of art, as well as literary works, do not have a hard normative core, but rather thrive from lacking the immediate urge for realization. Utopias, on the other hand, have a normative claim in the sense that they strive for realization. What is conceptually unique about utopias is that, on the one hand, they bring about this push for realization and, on the other hand, they seem to suggest the opposite—the impossibility of realizing possibilities. We employ both utopias and other forms of social norms for coping with our uncertainty regarding possibilities. We do not know what is possible; we make use of certain instruments in order to operate with this uncertainty and to try to overcome a presumed realm of possibilities. But in the case of utopia, it remains conceptually difficult because there is a contradiction in the relation between realization impetus—orientation in a certain direction—and claiming that one cannot know this direction. The utopia seems to get lost at the expense of either the practical political or the genuine utopian.

Q: Can normativity look backwards? Here, I am thinking of the nostalgia that feeds into slogans like “make America great again” and the American fascination with the Founding Fathers and the Constitution. Wherein lies the danger of looking back?

In my model, norms are always initially future-oriented. I think this is conceptually necessary. It does not make sense to affirm possibilities if the possibility has already passed and is in the past. Two options for dealing with norms should be differentiated from that, though. They are, on the one hand, a historicizing tendency and, on the other hand, a retrospective tendency that says, “I’m going to take this norm and see what it means for past conditions.” It seems sensible to me to combine the two approaches. Retrospection can only be sensible if one historicizes it and understands the norm as one that lies in the past but was understood as future-oriented within that same past. For example, the claim that minorities were discriminated against in early modern Europe is certainly true, but, at the same time, it is not very descriptive if couched within unhistorical conceptuality. Such a claim is only interesting when we locate practices and semantics from the past that correspond to our concepts of discrimination and minority.

⁷ *Id.* at 268.

Q: As a legal scholar with great affinity for the literary, do you have any reflections on Heinrich von Kleist's *Michael Kohlhaas*?⁸

The question about *Michael Kohlhaas* always leaves me conflicted. I actually find Kleist's *Der zerbrochne Krug*⁹ to be the more interesting text because it portrays numerous levels of normative practices with great clarity: the transition from the pre-modern to the modern, the costs of formalization of legal procedures, and the fact that the impetus for a process cannot be solved by a legal procedure. After all, at the end of the *Der zerbrochne Krug*, when all problems are solved and all seem content, we realize that the jug is still broken and that this brokenness cannot be solved through any kind of procedure. The work brings about a sobering and skillful form that highlights what formalized procedures can and cannot achieve. In contrast, I cannot really appreciate the moralistic overdetermination of *Michael Kohlhaas*—just as little as I can empathize with the character. The whole conflict between justice and order shows, I believe, nothing that is specifically premodern. The work could just as well stem from the twentieth century.

Q: Regarding St. Paul, you mention him being of systematic interest for the book, but you ultimately write quite little about him. How is he a central figure in thinking about normativity, and how is it difficult to approach him? Might one claim that certain religious traditions actually serve as good examples of a more holistic normativity, where normativity is explicitly articulated in terms of actions, world conditions, and even thought itself?

I begin with St. Paul early on in the book and do not really come back to him—that is true. That is because my point was a more general one. What particularly interests me with regard to Christianity is that it is precisely not a reservoir of moral action imperatives, but rather that it opens up a different access point. It provides an access point in which one has to free oneself of moral action imperatives in order to be able to follow the normative program of Christianity. That means that hard theology of grace—as embodied by St. Augustine and stemming from St. Paul—for example, is not attached to action, but really highlights the otherworldliness of the normative. Both themes are central for my book. Norms are not fixated on action and must be understood as a self-distancing from social convention. For this reason, I always lament that Christianity, in particular, is held up as a canon of moral action imperatives.

Q: Coming back to the theme of justification and language, in recent years, Jürgen Habermas has made a case for a translation proviso for religious language in official public discourse. Charles Taylor, on the other hand, insists that such a view of a presumably neutral language is problematic.

⁸ HEINRICH VON KLEIST, *MICHAEL KOHLHAAS* (Melville House Books 2005) (1810).

⁹ HEINRICH VON KLEIST, *DER ZERBROCHNE KRUG* [THE BROKEN JUG] (Bernd Hamacher ed., Reclams Universal-Bibliothek 2011) (1811).

From a legal perspective, how do you view a demand for a presumably neutral language in multiculturally shaped states?

Well, this notion of translation is not convincing to me. I do not really know what is supposed to be translated into what, nor do I know where the original is located. It is as if one could magically subtract a rational substratum from any given religious utterance that can then be reintroduced into discourse. I do not think that it works that way, and I think it is the same argument we discussed earlier with regard to linguistic and institutional neutrality. The religious utterance only exists as such, and if we try to translate it, it is no longer the religious utterance. Religious dogmas are not monolithic and unchangeable. Religion can interpret itself anew, but it remains religion and not a translation of religion. If that were the case, we would be treating religious discourse differently than we do other discourses in our democracies. We expect of anyone, whether conservative or socialist, to make themselves comprehensible, but we do not subject them to any special obligation of translation—even though one could ponder whether political preferences are any more rationale than religious convictions. Not only have we had horrible experiences with numerous such ideologies in politics, but also the crux of the matter with democratic politics is that, initially, we introduce all kinds of incommensurable, untranslated viewpoints into the process. Whether that works or not is another question, and it works precisely when others can “do something with it.” Whether this “doing something with it” can be seen as comprehension in a strong Habermasian sense is doubtful itself. It could also be misunderstanding or miscomprehension. Even misapprehension can lead to the formation of coalitions and democratic decision-making. That might even be the case more often than not. That is why this whole notion that we can reduce the political process to a rational substratum, and the special treatment of some discourses over and against other discourses and irrationalisms in democratic discourse—in this context, the particularly bad mistreatment of religion—is not justified.

Q: One final thought comes to mind in terms of expanding examples of normativity. What about normativity in sports? Is it comparable to language?

I am particularly interested in soccer, because you can observe how people try to unify different rule cultures. During the European Championships, you can see how referees from different sports cultures lay the rules out slightly differently. Of course, there are attempts to make them more uniform, but it does not always work. And what is funny is that we come to accept this as both teams are treated in the same manner—a manner that is still located within regulations, even though it might have nothing to do with how the rules were initially meant to be. This is all very interesting, and it could become part of an empirical research project that looks much more closely at rules conventions and describes just what is going on there.