7. How right is the basis of law?

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INTRODUCTION

The talk of rights, the use of terms like *ius* in Latin in the sense of right, seems to be relatively new compared to that of law. Some of the leading authors dealing with the history of law and rights claim that the concept of a right, especially a natural right, is a product of medieval legal theory, mainly in Church law. While Michel Villey suspects William Ockham to have turned the medieval view of law as an eternal and just regulation of the whole universe into a discourse on power, force and egoism,[1] Brian Tierney, Richard Tuck and others locate a semantic shift of the Latin word *ius* towards a meaning which includes not only an objective regulation of things but also rights in the glosses to the *Decretum Gratiani* of 1144, one of the most important collections of Church law that had existed so far.[2] There were also objections to this view on the historical origins of the terminological legal use of rights, claiming that there are elements of rights discourse already in those parts of Roman law which are influenced by the stoics. But if we look more closely at the relevant passages, which state that slavery is against nature,[3] we find that this does not imply any rejection of the institution of slavery as such or of anything a slave might sue his master for.

In whatever way we decide this question, again we have to admit that the talk of right is of relatively recent origin or at least it was created much later than legal orders that have been existing at least since Egyptian and

[1] Michel Villey, *La formation de la pensée juridique moderne* (Montchrestien, Paris 1968).

[2] Brian Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law* (Wm. B. Erdmans, Grand Rapids, Mich. and Cambridge 1997); Richard Tuck, *Natural Rights Theories*, Cambridge University Press, Cambridge 1979); *Decretum Gratiani*, Digitale-sammlungende, 'Münchener DigitalisierungsZe ntrum' (*Digitale-sammlungende*) http://geschichte.digitale-sammlungen.de/decretum -gratiani/kapitel/dc (30.9.2018).

[3] Justinian, *Institutiones* I 3.2., Digestae 5.4.1.

Mesopotamian times – the Hammurabi Codex was enacted more than 1,750 years before Christ. Furthermore, the term 'right' is not to be found in all legal cultures in the world; it seems that in Japanese the word for liberty – now one of the fundamental human rights – connotes something like egoism.[4] So, how can I affirm that it is the basis of law? These short and episodic references to the history of law and right already give us a hint that we have to look very carefully at the question of what it means that there is a concept or a notion of something.

There are at least four senses of the contention that there is a concept in a certain time at a certain place: the first understanding means that there are persons using the relevant terms in one or more languages in which they are communicating in the sense of this concept in a conscious and terminologically rather precise manner; the second interpretation says that people are using those words terminologically in a more or less clear sense; a third mode of understanding this affirmation is to say that people are acting in a way which we would describe or identify using this concept; finally it may fourthly be the case that we use it for a description of situations in which none of the actors knows how to use the concept but which are analogous to situations in which it is used today. What I want to show here is, first, that historically we may identify the origins of a concept of right in second sense more or less in the 12th century; second, that it is used today in large parts of the world in the first and second sense; while third, we clearly may attribute it in the fourth sense to any group of human beings where we think that those human beings, or at least the majority of them, can act intentionally. With respect to the mentioned second meaning I will fourthly try to show in what follows that rights should be seen as the basic concept for any legitimate legal structure among human beings.

This seems to be a rather exotic thesis if we consider the way in which the terms 'law' and 'right' have been used in recent times: from a systematic point of view, a right has traditionally been understood as something that is conceded to a natural or legal person by some kind of law. Normally, this is a positive legal order, maybe a contract guaranteed by this positive legal order, and many people think that you only have a right to something if you can file suit for it. But there has also been the concept of a natural right derived from natural law since the just-mentioned medieval debates,[5] which even survived

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[4] Peter Burke, '*Translation in History: Some Comments*', http://eial.tau.ac.il/index.php/eial/article/viewFile/296/267 (31.5.2018).

[5] Luis de Molina (1535–1600) even takes this understanding of *ius* as the relevant meaning of the term throughout his monumental work *De iustitia et iure*. Molina defines *ius* as 'a faculty to do or have something or to maintain it or to behave in any way such that if it is hindered without legitimate reason an injury is done to the person who has it. This way, that right, in this meaning, becomes something like a measure of

Bentham's well-known verdict as 'nonsense upon stilts'.[6] On the other hand, it is not easy to explain in what sense we should talk about universal natural law today, if there is no consensus about a divine legislator as it existed for many centuries. I will try to provide an acceptable solution to this problem within this chapter.

Not all definitions of rights refer directly either to positive legal orders or to natural law. According to Leif Wenar in the *Stanford Encyclopedia of Philosophy*, 'Rights are entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states.'[7] Still we have to ask who or what entitles whom, and in most cases this will, again, be legal orders that entitle persons or groups of persons. Nevertheless, this definition opens up the possibility that the entitlements may be moral entitlements to so-called moral rights.

To discuss this, we will first have to see what should be meant by 'right' and by 'moral' to make good sense of the concept of moral right. Second we will have to look at the relationship between law and morality in this sense. Third, we will see why a traditional presupposition towards legal systems is not generally valid any more and fourth, I will propose an explanation of the concept of law by which it becomes clear that human rights should be the legitimizing foundation of every legal system.

I. WHAT IS RIGHT, WHAT IS MORAL?

At the outset we should ask what rights are, trying to make the general definitions just given more precise. Though we cannot settle the ongoing debate between representatives of choice theory,[8] according to whom only those who

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injury: because as much as it is opposed and damaged without legitimate reason, injury is done to the one who has it' (Est facultas aliquid faciendi, sive obtinendi, aut in eo insistendi, vel aliquo modo se habenti, cui si, sine legitima causa, contraveniatur, iniuria fit eam habenti. Quo fit, ut ius in hac acceptione sit quasi censura iniuriae; quantum enim ei, sine legitima causa contravenitur & praeiudicatur, tantum fit iniuriae.) Luis de Molina, *De iustitia et iure*, first published 1593, editio novissima 1659) Tractatus II disputatio 1.1.

[6] Jeremy Bentham, 'Critique of the Doctrine of Unalienable, Natural Rights', in: *Anarchical Fallacies*, John Bowring (ed.), *The Works of Jeremy Bentham*, Vol. 2. (William Tait, Edinburgh 1843).

[7] Leif Wenar, 'Rights' (first published 19 December 2005; substantive revision 9 September 2015) https://plato.stanford.edu/entries/rights/ (1.6.2018).

[8] H.L.A. Hart, 'Legal Rights', in: H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Clarendon, Oxford 1982); Hillel Steiner, *An Essay on Rights* (Blackwell, Oxford 1994).

can claim them may have rights, and interest theorists,[9] insisting that rights are not a question of choice, but of need and interest, it is helpful to look at it. In 19th-century Germany there had been a similar debate between adherents of the power of will theory and those of interest theories.[10] Proponents of choice theory, among others, use the so-called third-party argument against their opponents: if João orders a bunch of flowers for Maria in Ronaldo's shop, then Maria will benefit from this order; however, it is not she who has the right to delivery but João.[11] Interest theorists' answer is sometimes that it would be rather strange for us to say that newborn babies cannot have a right to live. Hart seems to accept an exception from choice theory for these cases.[12] In my view it is much better to conceive the usages of the word 'right' in the way family resemblance is explained by Wittgenstein than to look for one exclusive definition. But we can figure out which intuitions are behind these two major interpretations of rights: obviously we have one view that posits freedom as the fundamental right. Hart leaves no doubt on this, beginning his paper titled 'Are there any Natural Rights?' very directly: 'I shall advance the thesis that if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free.'[13] Another approach just sees the right to live, including food security, at the centre of human rights. I do not think that these positions exclude each other. To the contrary: whoever takes another's possibility to live obviously destroys this person's freedom. Kant holds this view in his preparatory reflections to the *Metaphysics of Morals*: within his defence of the right to first occupation he argues that '… if I could acquire everything I would not limit but destroy the freedom of others'.[14]

For a better understanding of the different intuitions behind these interpretations of rights it is important to differentiate between different types of rights.

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[9] Joseph Raz, 'On the Nature of Rights', *Mind* 93 (1984), 194–214.

[10] Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, 5. Aufl. Band 1 (Verla gshandlung von Julius Buddeus, Stuttgart 1879), Buch II, Erstes Kapitel § 37, p. 92 defines right as 'eine von der Rechtsordnung (Recht im objektiven Sinne, objektives Recht) verliehene Willensmacht oder Willensherrschaft konkreten Inhalts'. Rudolf von Jhering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 3. Teil 1. Abteilung § 60, 2. Aufl. (Breitkopf und Härtel, Leipzig 1865), 311: rights are legally protected interests, 'rechtlich geschützte Interessen'.

[11] Peter Jones, *Rights* (Palgrave Macmillan, London 1994), 30 gives a similar argument.

[12] H.L.A. Hart, 'Legal Rights', in: H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Clarendon, Oxford 1982), 189.

[13] H.L.A.Hart, 'Are There Any Natural Rights?', *Philosophical Review* 64(2) (1955), 175–191.

[14] Immanuel Kant, *Kants handschriftlicher Nachlass, Vorarbeiten zur Rechtslehre*, Akademie Ausgabe XXIII, 278, 'wenn ich alles erwerben könnte, würde meine Freyheit anderer ihre nicht einschränken sondern aufheben'.

Instead of distinguishing claims, privileges, powers and liberties in Hohfeld's tradition,[15] which is used as something similar to the Aristotelian logical square by some Anglo-Saxon authors, I will simply insist on a difference between rights in general and human rights.

The difference is that a right in the general sense is conferred on a natural or juridical person by a particular legal order, a contract, a last will or something similar. This kind of right may involve extreme kinds of privileges or powers, e.g. the right to become the next king of England. There were legal reflections providing the so-called owner with a so-called right to catch a slave who was able to flee.[16] This kind of view on rights did not end in early modern times; as we know, slavery found an end in the United States only with the Civil War, and in Brazil it lasted until 1888. As the paradigm of this asymmetric kind of right in general, even though it is not the only one, we may see the right to property, for a long time one of the meanings of the term 'dominium' or 'Dominion', as e.g. in John Selden's definition: 'Dominion, which is a Right of Using, Enjoying, Alienating, and free Disposing … in such a manner that others are excluded, or at least in som sort barred from a Libertie of Use and Enjoiment.'[17]

Human rights, to the contrary, are held by all human beings in an equal manner; they have them, because and as long as they are human beings, whether they are aware of it or not. And these rights are inalienable, indispensable. Among the first references to a right, called a natural right, which is indispensable, *irrenunciabile*, is the right to those things which are necessary for survival, contrasted by William Ockham in his answer to the Papal bull *Quia vir reprobus* in his *Opus nonaginta dierum* with dominium in the full sense of property that refers only to things a claim to which can be enforced by legal action from a human court.[18] According to Brian Tierney, Ockham's political writings contain the first example of a rights-based political theory.[19] An indispensable right of human beings to that which is necessary for survival is held by Hobbes and Locke,[20] Jean-Jacques Rousseau declares that

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[15] Wesley N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal* 23(1) 1913, digital version under: http://www.hiit.fi/files/ns/Herkko/ (4.6.2018).

[16] Luis de Molina, *De iustitia et iure*, Tractatus II disp. 37.

[17] John Selden, *Of the Dominion or Ownership of the Sea*. (William Du-Gard, London 1652), 16.

[18] William Ockham, *Opus nonaginta dierum, Ockham*, in: Guilelimi Occami Opera Politica I & II (Manchester 1940; Manchester 1963), especially cap. 61, OP II, pp. 558ff.

[19] Tierney (1997) p. 193f.

[20] Thomas Hobbes, *De cive* [1642], *On the Citizen* (Cambridge Universiy Press, Cambridge 1998) 3.14; John Locke, *First Treatise on Government* [1689], *Two Treatises on Government* (Everyman, London 1995) § 42.

to renounce your freedom means to renounce being human.[21] Because of their inalienable nature and their independence from the individual capacity to enforce legal action to realize them, human rights are better met by an interest theory, while, for example, claim rights are best explained by a choice theory. Property rights may mostly be explained as claim rights, even if it may happen that e.g. a young baby owns a fortune by donation or inheritance. This indispensability together with their universality and symmetry shows that there is a fundamental difference between human rights and property rights on things beyond the necessities of life. Therefore it is a fatal error if some liberal authors and especially the Marxist tradition – under the impression of Marx' text *On the Jewish Question*: 'The practical application of man's right to liberty is man's right to private property'[22] – identify rights in general and also human rights with property rights or at least declare property rights to be the essence of any kind of rights.[23]

It should be clear that in contrast to rights conferred by single states or particular contracts, human rights are nothing that is conceded – or legitimately denied – by a state to its citizens or anyone else. As stated in the UN Declaration of Human Rights, every human being has a right to a world order that guarantees these rights. Since the legal entities constituting the legal order today are still, more or less, the nation-states, human rights represent the conditions of legitimacy not only for those states, but also for any other actor on the national and international legal stage, e.g. NGOs. In extreme cases human rights may even function as legitimations for resistance.

Nevertheless, there is a connection between human rights and the general notion of rights: it makes a real difference whether an individual is seen as a possible bearer of a right or not. This is why Annabel Brett speaks of subjective rights in the sense that all individual human beings were made possible bearers of rights during the theoretical developments in the Middle Ages and early modern times, in authors like the aforementioned Luis de Molina.[24]

How should we, however, understand morality within this debate?

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[21] Jean-Jacques Rousseau, *Du contrat social* [1762] (Gallimard, Paris 1964) I 4.

[22] Karl Marx, *Zur Judenfrage* (first published 1844, Marx-Engels-Werke I) (English version by Andy Blunden, Matthew Grant and Matthew Carmody, 2008/9) *On The Jewish Question*, https://www.marxists.org/archive/marx/works/1844/jewish-question/ (30.09.2018).

[23] E.g. Christoph Menke, *Kritik der Rechte* (Suhrkamp, Berlin 2015), 9ff., 209.

[24] Annabel Brett, *Liberty, Right and Nature* (Cambridge University Press, Cambridge 1997).

We may remember that there were debates between Rawls[25] and other liberals, on the one hand, Martha Nussbaum[26] and communitarians like Charles Taylor,[27] on the other, regarding the relation between 'the Good' and 'the Right'. The Right is something to be shared among all participants of discourse, dealing with fair distributions of goods, while the Good is a way of orientation concerning the good life according to the convictions and preferences of an individual or group. A similar distinction is made between morality and ethos in the Habermasian tradition.[28]

I mention this well-known debate because I think that we should look more closely at the phenomenon, just to understand that we have more than two types of non-legal normative orders that may cause disagreement concerning the right way to act.

Even if we set apart the pursuit of happiness, which is for many theorists, especially in ancient times, somehow connected to a virtuous life, we still have to deal with at least four different ways to decide what is morally right – all of which, according to a moderate interpretation, are potentially mutually compatible, yet run into opposition and conflict if they are understood in a radical and narrow sense. The first one is 'to follow our good traditions', to do what we always did, whoever 'we' are. That means we follow our initial intuitions ('gut feeling') about what is right and wrong without giving any other reason for it. The second is following the commands of God or 'our gods', so moral requirements are justified because they are in accordance with the will of God. A third view claims that the individual has to submit her or his flourishing to that of the group. In other words, according to an extreme interpretation of this kind of morals, we have to sacrifice everything for our family, our clan, our people, our state, etc. The fourth, and perhaps most important one, is the moral requirement to respect every person impartially as an end in itself; an idea very close to Rawls' concept of the Right or Habermas' notion of morality.[29]

What gives particular importance and dignity to universal morality is the fact that impartiality is something that is seen as somehow important in most normative contexts, at least when it comes to courts and judges, and universal

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[25] John Rawls, *Political Liberalism* (Columbia University Press, New York 1996), 173ff.

[26] Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, Cambridge, Mass. 2006).

[27] Charles Taylor, *Multiculturalism and the 'Politics of Recognition*' (Princeton University Press, Princeton, N. Jersey 1992).

[28] Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp, Frankfurt am Main 1992); Rainer Forst, *Toleranz im Konflikt: Geschichte, Gehalt und Gegenwart eines umstrittenen Begriffs* (Suhrkamp, Frankfurt am Main 2003).

[29] For a more detailed explanation of these distinctions see Matthias Kaufmann, *Anarchie Eclairée* (Harmattan, Paris 2011).

impartiality has been shown to be of essential importance in world politics. When it is lacking, international order is threatened. In a world in which, as Kant put it in 'Toward Perpetual Peace', any injury in one part of the world is felt in all others,[30] there is no justification for excluding anyone from this benefit of impartiality for reasons of colour, gender, religion, nation or whatever.

In the end, it is not really important if we interpret this universal morality in the sense of Kantian categorical imperative or with references to utilitarian principles. Both versions of morality spread out of the attempts in the late 17th and 18th centuries to determine the ultimate principle of natural law, which should be expressed in one 'crisp' or at least clear phrase, understandable by everyone and capable of determining all moral questions by way of deduction. This form of the postulate seems to be attributed to Joachim Balthasar Werner, professor of jurisprudence at Rostock, but was more or less accepted throughout Europe.[31]

II. POSITIVE LAW, NATURAL LAW AND MORALITY

Having explained how in my view we should understand the words 'right' and 'morality' I will have to turn to the concept of law to be able to show in what sense rights can be at the basis of law. The European view of law – more specifically, the concept or paradigm of law – seems to be changing once again. In a very rough and ready sense, one can recognize the notion of a universal and natural law given by God and written into the heart of human beings as one traditional paradigmatic interpretation of law;[32] or the idea of a set of rules handed down by a ruler, an assembly or by the people by its representatives as another. Although theories of natural law and legal positivist approaches have coexisted for centuries – and continue to do so – it is probably justified to state that while natural law theories dominated the Middle Ages and early modern times, varieties of legal positivism became more and more important when lawyers and legal theorists tried to escape, to oppose or to bypass the domi-

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[30] Immanuel Kant, 'Toward Perpetual Peace', in *The Cambridge Edition of the Works of Kant, Practical Philosophy*, transl. Mary Gregor (Cambridge University Press, Cambridge 1996), 333.

[31] Joachim Hruschka, 'The Greatest Happiness Principle and Other Early German Anticipations of Utilitarian Theory', *Utilitas* 3 (1991), 165ff.; Joachim Hruschka, 'Universalization and Related Principles', *ARSP* 78(3) 1992, 289ff.

[32] Francisco Suárez, *De legibus ac Deo legislatore* (First edition 1612, critica bilingue por Luciano Pereña Madrid 1971ss. in: *Corpus Hispanorum de Pace*, Vol. XI ss. (lib. I-III)) I iii 9.

nance of religious belief and the churches within society for several reasons. The crucial thesis common to different types of positivism is the idea that law and morality are strictly separated – or, at least, not necessarily connected.[33] There were also attempts to reconcile natural law and positivism: we may think of Hegel's concept of *Sittlichkeit*,[34] but also of Dworkin's approach, which takes into consideration the integrity of the entirety of rules, principles and policies as the aim of law's empire.[35]

There have been varieties of natural law theories, some of which see law as a command of God or as the effect of God's *lex aeterna* on rational beings, while others refer to the nature of man, sometimes with man as *zoon politikon* as in the Aristotelian tradition, sometimes with man as a being that, without a state, creates a state of war of everyone against everyone, per Hobbes and his followers.[36]

A third kind of natural law minimizes the anthropological premises – thus reacting to the vivacious discussions on the nature of man following the Hobbesian work – and gives an account of the principles that every legitimate legal system should integrate in accordance with the rules of reason. Paradigmatic and well-known examples of this kind of *Vernunftrecht* include Kant's *Metaphysics of Morals* and Fichte's *Foundations of Natural Law*.[37]

While legal positivism does not claim that there is but one universal system of law, it nevertheless asserts the unity of every positive legal system. This holds especially for those theories that view law as a system of generalized orders issued by an authority, as a hierarchical system of norms or as a unity of primary and secondary rules. There were even attempts made by methodological positivists to interpret the activity of judges as a mere logical deduction from authoritative texts and applied to concrete cases.[38]

What is at stake in the debate between positivists and their critics is whether there is a necessary connection between the kind of morality just described above and a legitimate legal system or whether we should defend the mentioned separation thesis or separability thesis of the positivists. While it is

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[33] A classical text in this sense is surely Hart's 'Positivism and the Separation of Law and Morals,' (originally 1958) in id. *Essays in Jurisprudence and Philosophy* (Clarendon Press, Oxford 1983); while Leslie Green in her entry 'Legal Positivism' in the *Stanford Encylopedia of Philosophy* shows a much more complicated picture, (2003) https://plato.stanford.edu/entries/legal-positivism/ (30.09.2018).

[34] Georg Friedrich Wilhelm Hegel, *Elements of the Philosophy of Right* (ed. Allen Wood) (Cambridge University Press, Cambridge 2011), 142–360.

[35] Ronald Dworkin, *Law's Empire* (Harvard University Press, Cambridge, Mass. 1986), 225ff.

[36] E.g. Matthias Kaufmann, *Recht* (De Gruyter, Berlin/Boston 2016), 2ff.

[37] *Ibid.* 14ff.

[38] *Ibid.* 21ff.

difficult to say clearly what should be understood by necessity in this case – this is one of my few disagreements with Robert Alexy – we may hold again that the mentioned morality – be it in a Kantian or utilitarian sense – spread out of the efforts to determine the principles of natural law. And we may add that those principles have also been at the base of most theories of law, positivist or not. Most of them favour the rule of law, which may be understood in a rather general way, just insisting on formal criteria such as universality, publicity, clarity, coherence, continuity,[39] or extending the list with postulates to institutions, such as independence of courts, availability of courts, or respect for principles of natural justice.[40]

Despite all the differences, there is a common intuition that as long as there is no civil war, there is always one law which decides in the end what is right and what is wrong and which dominates other laws as e.g. natural law was seen as superior to human law in the Middle Ages and early modern times. But what happens if this does not hold any more?

III. THE CHALLENGE OF LEGAL PLURALISM

No matter how we decide between the aforementioned approaches, we have to be clear how deeply rooted the intuition of unity is in all of them. Today, we are confronted with the problem and fact of legal pluralism. This means that we will, at least partially, have to give up this idea of unity and this is one of the reasons why I think that human rights should be at the basis of legal systems, especially if there are competing legal systems. Let me mention three important aspects:

First, there are a considerable number of very interesting studies, fieldwork done by legal anthropologists, showing that in many post-colonial states in Asia and Africa, alongside (and co-existing with) the state law, we have an elaborate system of traditional customary law and, sometimes, additionally a certain interpretation of the Sharia. Those traditions are, in many cases, reinvented or frankly invented by local elites when the state is unable or unwilling to deal with regional problems. There are detailed descriptions of the situation in western Sumatra and in Morocco which may be taken as examples of a number of other tokens of legal pluralism.[41]

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[39] Grant Lamond, 'The Rule of Law', in: Andrei Marmor (ed.), *The Routledge Companion to the Philosophy of Law* (Routledge, New York 2012), 495–508; Lon Fuller, *The Morality of Law* (Yale University Press, New Haven, Conn. 1969).

[40] Raz, 'On the Nature of Rights' 194–214.

[41] Franz von Benda-Beckmann and Keebet von Benda-Beckmann, 'Changing One Is Changing All: Dynamics in the Adat-Islam-State Triangle', *Journal of Legal Pluralism* 38(53–54) 2006, 239–270; Franz von Benda-Beckmann and Keebet von

Second, we have a flourishing international and transnational commercial law that is, in many cases, simply bypassing national borders.[42] We have, furthermore, the International Monetary Fund and the World Bank sometimes acting as hidden legislators, one of the most prominent critics being Joseph Stiglitz.[43] Finally, we also have international and supranational organizations such as the UN and the EU.[44]

Third, there have even been attempts to introduce shared jurisdiction in North American and European states. There was much uproar when the Archbishop of Canterbury in January 2008 proposed the introduction of Sharia in matters of family law in England; something that, rather silently, did eventually happen in September 2008. He was following the proposals made by Ayelet Shachar, professor of law at the University of Toronto, in her book *Multicultural Jurisdiction* of 2001. Shachar proposed 'shared governance' for cases of family law between the state and certain identity groups because she hoped to avoid what she called 'cultural reactivism', a closure of the whole minority group against the majority cultures, which mainly damages its weakest members, i.e. women.[45] Her hope was that an adequate 'transformative' accommodation of this shared governance should be able to change all parties to this fragile co-existence, this way diminishing their conflicts based so often on misunderstanding each other.[46]

We might try to avoid or to get rid of legal pluralism, rejecting these arguments, saying that it is always wrong and was wrong in the concrete cases to accept two parallel – or interacting – jurisdictions, because this threatens or even destroys the coherence of the legal system and the people's confidence in law. We might claim that the problems of post-colonial states or even failed states have to be seen as a transitional phenomenon. We might further think that the problems caused by transnational laws, be they commercial or otherwise, will be solved when we once have created a world republic. But I am'

Benda-Beckmann, 'Transnationalisation of Law, Globalisation and Legal Pluralism: a Legal Anthropological Perspective', in: Christoph Antons and Volkmar Gessner (eds.), *Globalization and Resistance: Law Reform in Asia Since the Crisis* (Hart Publishing, Oxford/Portland 2006), 53–80; Bertram Turner, 'Competing Global Players in Rural Morocco', *Journal of Legal Pluralism* 53/54 2006, 101–139.

42 Jan Dalhuisen, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law*, Fifth Edition (Hart Publishing, Oxford 2013).

43 Joseph Stiglitz, *Globalization and its Discontents* (W.W. Norton, New York 2002).

44 von Benda-Beckmann and von Benda-Beckmann, 'Transnationalisation of Law, Globalisation and Legal Pluralism'.

45 Ayelet Shachar, *Multicultural Jurisdictions* (Cambridge University Press, Cambridge 2001), 35ff.

46 Shachar, *Multicultural Jurisdictions*, 118ff.

afraid that things are not that easy. There are, indeed, good reasons to doubt whether it is really helpful to accept shared governance on a legal level as long as we have something like a working juridical apparatus, because there is always the threat of competition and conflict between co-existing structures of governance. Indeed, history shows us many examples in which this plurality of legal structures headed into the weakening of the political community and even into civil war.

Although I think we should avoid the creation of legal pluralism for as long as possible, I also must admit that we will not be able to get rid of it within the next few years or even decades. There is no reason why the situation in post-colonial states should become less complicated. Furthermore, we should not be overly optimistic concerning the development of a world republic, for it is rather far from being realizable and, perhaps, not as desirable as many people might want to believe: it was Immanuel Kant who wrote in his work 'Toward Perpetual Peace' that a worldwide monarchy, in his eyes, would be worse than the state of war, trying to erect peace on the graveyard of freedom and, despite all repression, finally ending in anarchy.[47] Clearly, no one wants such a monarchy today; however, in many ways, a world republic would be faced with similar problems. We need look no further than the heavy criticism the European Union has had to deal with in our days by people complaining that they feel bossed around by Brussels etc.

And, in the end, we should not forget one of the most important ways in which people have always been able to save their lives when they are persecuted by repressive regimes, i.e., the way into exile. We are facing a global crisis right now, just because so many human beings have to choose this way to escape from persecution and imprisonment for political reasons.

IV. LAW AS NEGOTIATION ON THE BASIS OF HUMAN RIGHTS

Anyway, legal pluralism is just one of the reasons why I think that human rights have to be at the foundation of any law. The other one is that today we do not have universally accepted natural law as a possible reference, nor can we accept legal rules or legal decisions simply because they are posited by someone claiming authority over us.

This is why I hold the thesis that the ruling intuition of modern law should be negotiation. This should happen in two ways: for as long as possible, law should be understood as something created within the context of a common deliberation of free and equal persons. Clearly we know that this is fictitious,

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[47] Immanuel Kant, 'Toward Perpetual Peace', 336.

but it is the Aristotelian idea of *politeia* as a mutual ruling and being ruled among free and equal persons that builds – in the sense of a regulative idea – the legitimating basis of modern democracies. As long as we have good reasons to interpret our law as a kind of regulation in this sense, we have legislation that is open to democratic discourse; and that opens a way for people who feel mistreated by the executive organ(s) to (publically) 'find' their right by means of legal action, given that we generally operate under the rule of law.[48] This is the situation where a judge should follow the idea of integrity proposed by Dworkin.[49]

But in situations of legal pluralism, this is not a realistic way of resolving issues given that a common understanding of what is legally right and wrong is lacking, or, at least, actual situations do exist where no such common view of the principles of law is present and where the discussing parties do not concede each other a 'reasonable disagreement' in a Rawlsian sense[50] because they do not even fully agree on what counts as reasonable. Disagreement on the applications of law is something that happens on a daily basis. But the situations in which we are facing legal pluralism are not those in which a few malcontents utter their points of criticism.

In cases of such fundamental disagreement between groups of a certain strength and with considerable power – be it in the political, military or economic sphere – we cannot go on and try to decide, to enforce, to dictate what law is – no matter who 'we' are in the concrete and specific situation, or, at least, we cannot do it without running the risk of social clashes or, perhaps, even civil war. So, this means, again, that we have to negotiate; however, this time in a different manner. Negotiation, in this sense, is not always carried out on a level playing field between equal partners with similar worldviews or similar explanations of how and why things happen. Instead, we may have states or international organizations, on the one hand, and religious communities, militia, NGOs, on the other. Moreover, there is not even necessarily agreement on the general criteria of rationality, of ethics and so on.

Negotiations concerning concrete problems, therefore, do not have to lead to a unanimous worldview of all participants. It is much more important to find a common procedure for dealing with the topic; one which is accepted as fair and impartial by all participants in this limited area.

To sum up in one phrase: I propose to understand law as something posited in a certain sense following the ideals of unity and integrity as long as this is realistically possible. This is, above all, the case when what is posited can be

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48 Kaufmann, *Recht*, 42ff., 65ff.
49 Dworkin, *Law's Empire*.
50 Rawls, *Political Liberalism*, 55.

seen to be legitimate because it is the result of democratic negotiations following a standardized procedure. In the other cases, more generally speaking, law is to be understood as a continuous, actual process of negotiations on a local level and the relative status quo of these processes. So, positive law is not criticized, corrected or contested with reference to natural, divine or eternal law. Instead, if we have two competing systems of rules, they are both completed according to the results that have been reached within zones of negotiation.[51]

In this general case, we are faced with the problem that a clear standard procedure as to how these negotiations should be performed is not available. To illustrate this point, let us look at an unusual example: a Mafioso extorting protection money, the so-called *pizzo*, from shopkeepers and restaurant-owners in Naples may also 'negotiate' with his victims about the sum they have to pay every month. This example is not as strange as it at first seems since the behaviour of the industrial north towards the global south was not really any better for quite some time – sometimes it was even worse.

So, we have to find ways to avoid this kind of bias via the abuse of an asymmetrical distribution of power. As a method to control state power, the concept of the rule of law had evolved rather early on and continued to be refined over the centuries. Connected to this, yet not identical, is the Kantian definition of the state of law (*rechtlicher Zustand*) as 'that relation of human beings among one another that contains the conditions under which alone everyone is able to enjoy his rights'.[52]

So the condition – or presupposition – for every negotiation involving legal questions, as mentioned above, is that it has to preserve and improve the situation of human rights for all individuals involved and concerned.

Human rights are therefore not to be understood as something derivative from any kind of law, be it national, international or transnational or even natural. Rather it is a condition for the legitimacy of any kind of legal ordering. They are norms that have been created by human beings over centuries as the theoretical basis for the criticism of 'pathological' legal orders, of terror, need and despotism – and they have a dignity of their own. In this sense human rights are at the basis of any legal system. And this more or less conceptual connection between human rights and legal systems may be understood as necessary in Alexy's sense because we may use it to describe and evaluate any legal system whatsoever, independently of the question whether its perform-

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[51] Richard Rottenburg, 'Code-Wechsel. Ein Versuch zur Umgehung der Frage; Gibt es eine oder viele Wirklichkeiten?', in: Matthias Kaufmann (ed.), *Wahn und Wirklichkeit – Multiple Realitäten* (Peter Lang, Frankfurt am Main 2003), 153–174.

[52] Immanuel Kant, *Doctrine of Rights* § 41, in: *The Cambridge Edition of the Works of Kant, Practical Philosophy*, transl. Mary Gregor (Cambridge: Cambridge University Press 1996), 450.

ers could be aware of human rights or not. It is a different question whether and how far we feel entitled to judge or condemn historical figures for such reasons. We have good reasons to be careful not to become too complacent.