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Ethics and Law

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Ethik und Recht

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Editor

Silas Morgan

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Introduction

These proceedings from the 2016 Societas Ethica annual conference follows the format of the 2015 proceedings. It contains three parts: (1) the welcome and thematic introduction from Dr. Hille Haker, the president of the Societas Ethica, (2) the keynote lectures, in some cases the full lectures, and in others, the abstracts, and finally (3) the abstracts from the short paper sessions.

Thank you to all contributors and participants of the 2016 Societas Ethica annual conference, particularly to the President of Societas Ethica, Dr. Hille Haker, and the board members of the Societas Ethica.

Silas Morgan
Minneapolis, MN (USA)

Welcome by the president of Societas Ethica

Hille Haker, Loyola University Chicago (USA)

Welcome to Bad Boll, welcome to the conference that is hosted as a cooperation between the Evangelische Akademie Bad Boll and Societas Ethica! My name is Hille Haker, and I serve as the President of Societas Ethica. Herr Wolfgang Mayer-Ernst is our partner from Bad Boll, and I want to thank him and his secretary Conny Matscheko, and the director of Bad Boll and Societas Ethica member Juergen Huebner for partnering with us.

When the General Assembly decided to have a conference on the theme of Ethics and Law a couple of years ago, we could not know how actual and urgent it would become to discuss, once again, the perennial question that binds ethics and law together. What we see today, some argue, is a shift in the international order, caused by several factors: we are confronted with the normative order of global capitalism and a globalized financial market system that has set up its own legal – one might even say: para-legal – norms, due to the naiveté or intentional political non-regulation. Furthermore, it is caused by the proclamation of the war against terror – and who would deny the terrorist acts, committed predominantly in the name of religion, and the terror that paralyzes neighborhoods, cities, and whole countries – resulting in political responses that risk to threaten not only civic rights on a national level but also legitimize so-called exceptional measures of security and surveillance within the public sphere, arrests and targeted killings, and questionable procedures of criminal justice. And the return of authoritative regimes and/or leaders who mock human rights and do not shy away from regional wars, the era of peace has come to an end. The millions of refugees and displaced persons, denied any right in their own states and objects of generosity – or disrespect – rather than subjects of international justice, are caught in the middle of this complex web of international relations. To ask at this moment what the relationship of ethics and law can mean, must not turn into an academic affair that is not affected by the overall situation in which it is raised.

My description so far has been, to say the least, incomplete. It conceals the fact that the post-second world war order was never peaceful; it has almost no place for the historical effects of colonialization, the tolerance of authoritarian states as long as it seemed advantageous, and the multiple internal problems of nation states and/or federations. As Societas Ethica is situated in Europe, we are well aware of the lack of legitimization and democracy in the European Union. Its inability over the last years to live up to its own ethical standards have resulted in the rhetorical utilization of the moral language, as a sophistic play of words – ethics, it often seems, is either the most-ridiculed word or completely ‘other’ to the political system within the European Union that is mostly driven by economic and national interests. No Charter of Human Rights and European Values, no Treaty, and certainly not the tragedies of drowning refugees has prevented national and nationalistic movements to reemerge. This is one of the contexts, I believe, that we will need to discuss.

We have asked our keynote speakers to offer us several different perspectives to our theme, however. We will start with the complexity of transitional justice; the problem of the political

theory of recognition, human rights, and rights of children. We have received multiple responses to our call for papers, and we are happy to offer so many spots in the parallel sections. For me personally, it is almost a happy irony that we will make the excursion this year to Tübingen. It is a happy coincidence that there is my Alma Mater, the University of Tübingen, often called the university of Schelling, Hölderlin – and Hegel. It is a happy irony for Societas Ethica to go there – and go there in 2016 – because they started off as theologians; 2 became philosophers, the third, no less a philosopher, a writer and poet. They changed the way we think the enlightened modernity profoundly but I sometimes think we are today, with the so-called return of religion in the public sphere that is more precisely a return of religion in the public discourse, in a better position to read them again and learn from them the deep meaning of human freedom and human rights. While the German Idealists were pretty frustrated with the Protestant theology they were supposed to study in Tübingen, today both Protestant and Catholic theology faculties are well known for their radical re-interpretations of the tradition over the last 150 years of scholarship. As you know, one of the most important theologians of the 20th century, Jürgen Moltmann, will join us on Sunday morning – and he did not hesitate for one second when I spoke to him last year, then at the age of 89. We also invited Jürgen Habermas who like almost nobody in German philosophy has promoted work on the relation of ethics and law, never shying away from what I have called the situated responses, which Habermas sometimes calls ‘interventions’. His health did not allow him to come to our conference – but he told me in his response letter that he welcomes Societas Ethica taking up the theme, and wishes us every success.

We have been able to offer junior scholars a reduced conference fee, not the least because we received funding for it by Bishop Gebhard Fürst of the Catholic Diocese of Rottenburg-Stuttgart. We are also grateful for the Protestant Church of Germany from whom we received funding for this conference.

Societas Ethica brings together philosophers and theologians who both research in ethics is apt. We will strive, as always, to overcome the alienation and non-communication that characterizes so often our two disciplines. You, the speakers, will present your work that stems from both thought traditions, examines historical arguments as well as contemporary contexts. We, the participants, will discuss and debate your theses, and together, I hope, we will learn from each other.

With this, let me start the conference with an introduction of our first speaker, Klaus Günther. Professor Günther will speak on the topic of Transitional Justice. Thank you very much for accepting our invitation, especially in the middle of August.

No Transitional Justice without Attribution of Criminal Responsibility

Klaus Günther

Translated from the German by *Aaron Shoichet*

1. In the phase following the end of an unjust regime, the critical question almost always arises whether the protagonists of this regime, the government and the top members of the military and security service – or also those at the very bottom end of the chain of command, or who, as eagerly obedient volunteers, were more or less willing to carry out their orders and abused, raped, tortured or murdered their victims – ought to be held criminally responsible. In view of grave violations on the scale of a genocide or a crime against humanity, this question may not be, at least not *de lege ferenda*, as urgent today as it was after 1945. With international criminal law and the international criminal court, the punishment of such crimes has become legally applicable internationally. Yet the question remains critical in view of the numerous other crimes a regime commits towards its own population. The objection that such criminal procedures would violate the human right to protection from retroactive criminalization and punishment of a behavior that was permitted or required under the unjust regime, loses its persuasive power in view of the increasing trend towards international positivism of human rights and their universal global recognition – whether this objection ever had persuasive power when it comes to retroactive punishment of self-privileging, state-reinforcing criminality. More convincing is the objection of the threat to peace that this would pose: the punishment and criminal prosecution of those who belonged to the past unjust regime, who supported it or in some way profited from it, and who now fear not merely the loss of their privileges and advantages, but also, and even more so, all the disadvantages that accompany a public criminal procedure and the threat of punishment. One cannot dismiss out of hand the claim that, in the transition phase, amnesty and forgetting may be the appropriate means to avoid new social conflicts that risk destabilizing the newly erected liberal-constitutional order.

2. Meanwhile an insight has gained favor that the choice between punishment or amnesty is possibly amiss, or at least it obfuscates the view of other possible and less risky ways of coming to terms with past injustice. Fixating on the act of punishing, of consciously and intentionally inflicting an evil because of a wrong, as well the accompanying fixation on the purposes of the punishment, fails to recognize that for most of those involved, the victims and their relatives more than anyone, it is frequently about something other than experiencing how their tormentors suffer the evil of a punishment. Even if the factual needs for compensation cannot be denied, this is not a legitimate aim of public punishment. And in view of the different subjective shape of these needs, they can hardly be objectified in the form of punishment that follows the principle of equality. It is possible that the need for compensation and the corresponding evil of punishment express – albeit in a distorted manner – what could be reached, perhaps much more efficiently, by means of a different path and in a different manner. In phases of collective transition much more than with individual everyday crimes in societies based on the rule of law, the need for a clarification of the facts, of the committed crimes, of the circumstances and of

those involved, as well as the public determination of injustice and guilt that follows, is often greater than the need for their punishment. It is possible that thereby the recognition as victim of an unjust regime is already reached and that the punishment does not add anything more than a conventional symbolic reinforcement.

Furthermore, the prospect of being an accused in a criminal procedure prompts those affected, purely out of need for self-protection, either to flee or to resort to measures to suppress evidence and, when these do not help, to pursue strategies to neutralize the extent of injustice of the crimes or to deny one's own involvement or individual responsibility. Corresponding to this is the (human) right of the accused, as a subject of the procedure, to not have to contribute to his or her self-incrimination (*nemo tenetur se ipse accusare*). This is especially the case under constitutional procedural conditions, the observance of which is indispensable in the transition phase because of their exemplary effect on the legal consciousness of the population. In this case the accused cannot be denied the possibility of bringing to bear for him or herself all the rights of procedure that he or she is entitled to, right up to the limit of what is permissible. The aim of the constitutional criminal procedure to investigate into the truth of the accused deed must not triumph over the right to fair procedure. The individual motive to avert or minimize an imminent punishment has here in law its legitimate place in remaining silent. For this reason, in many transition states like South Africa or some countries in Latin America, alternative procedures have been developed and practiced, which pull the accused out from the conflict zone between clarifying the truth and avoiding an evil of the punishment. So-called truth commissions are, or at least purport to be, directed towards opening the way – for the victims and their relatives and the public together with the accused – to clarifying the historical events and of releasing the accused, who is at the same the main “witness,” from the threat of punishment, or at least of lessening this threat that prevents him or her from cooperating.

3. These examples of alternative procedures are justified with the insight that clarifying the historical wrong for all those directly and indirectly involved and affected is more important than the punishment of the perpetrators. This includes, however, the public determination of the wrong, which relies on clarifying the events, as well as the justified attribution to the persons responsible, including a judgment on the nature and scope of the accountability. The reasons for this are principally normative in nature. They may be disclosed negatively from the probable consequences that would arise from neglecting to establish the facts, the wrong and the ascription of responsibility. Three case configurations in particular can be observed where public clarification is neglected:

(a) A possible consequence for the victims and their relatives is the propensity, known from psychological trauma research, to attribute to oneself what one has suffered as the consequence of one's own wrongdoing, that is, to look for the guilt in oneself. Pain, suffering, or the loss of relatives appears then as one's own mistakes, as the consequence of one's own naivety, ignorance, stupidity, which one could have possibly avoided. Also fatal is the constant doubt whether it would not have indeed been better to have accepted the unjust regime, to have believed in its legitimacy, to have gone along with or even played a part in one's crimes in order to protect oneself and those closest. To the extent that during and after the transition phase no public collective narrative develops, which identifies the crimes of the regime for what they are, that is, as a wrong, the victims are left only with the possibility of processing what was suffered individually each in his or her own biography. The more serious the traumatization, however, the

less successful this is. There is an accordingly high risk of the victims being left with feelings of guilt, self-doubt and loss of self-confidence, as well as mistrust towards others. In the public sphere, those affected are perceived for the most part as failures, notoriously as unsatisfied troublemakers that cannot, and do not want to, come to terms with their fate.

(b) Instead of recognizing the crimes publicly as a wrong that needs to be answered for, a collective narrative that interprets the crimes as misfortune or fate, against which ultimately no one could do anything, has been favored especially in the past. A common feature of such a narrative is the extensive neutralization of individual responsibility of the perpetrators. The authors of this narrative often fully concede that the crimes were wrong, but these crimes are presented at the same time as unfortunate and unavoidable measures against even greater dangers (the argumentation model of the “lesser evil”). Responsibility is shifted to hostile collectives (other nations and governments, ethnicities, minorities, ideologically blinded forces and powers etc.), forces presiding over humans, or to other perceived states of emergency and necessities that supposedly left the perpetrators with no other choice. Whoever interprets history as a playing field of a higher, divine providence, as a religious Last Judgment, as a fight of survival imposed by nature between nations, peoples, ethnicities or races, that is, as a necessary fight between progressive and regressive classes through a law-governed course of history, which necessitates on the other side unusual measures to combat the ideological enemy (“cold war”) – to him or her the single crimes appear at most as unfortunate events. They are measures necessary in a state of emergency to avert dangers that cannot be averted by other means, or as (mostly preventive) actions of defense against, for their part, unlawful attacks from external and internal enemies. For the victims this means either one of two things: either they must, as with the first option, ask themselves whether they did not, in this struggle of fate and survival, behave badly or stand on the wrong side, or else they must interpret their own trauma as bad luck and misfortune, which no one can do anything about, and the consequences of which they must overcome by themselves in their own life history. If politics is fate, then the victims are merely victims of fate and not the victims of politically (and legally) responsible persons. Also here the only escape remaining is to come to terms retrospectively with the fact that something happened to someone, and which simply happened in the past, and that is that. In the transition phase this can result in the widespread attitude of mistrust, resignation and helplessness in the face of political decision processes.

(c) Parallel to the first two consequences just mentioned are transition phases in which a failure to provide public clarification of a past wrong is often also characterized by claims of injustice and ascriptions of responsibility taking place, as it were, in the private sphere of those directly or indirectly affected. Failure to provide clarification cannot prevent the victim and his or her relatives, those systematically disadvantaged and discriminated against, from becoming active themselves in order to take the investigation of truth – which means then primarily “their” truth – into their own hands. The less these spontaneous and, as it were, wild ascriptions can face public critique and inter-subjective rational argumentation – either because the past is collectively hushed up or because public utterances about past crimes are not heard, contested in their truthfulness, or because they are systematically suppressed or rejected under threats – and the more often the authors are slandered, their credibility questioned and they themselves not recognized as serious participants in a public discourse about the past, the greater is the danger that the widespread ascriptions that developed hidden away assume irrational traits. Thus

conspiracy theories develop: secret knowledge about hostile agents, minorities, elites, groups with secret identities and their own malicious political agenda, supposedly operating in a clandestine manner and which are not held responsible for the past crimes. Moreover, it is claimed of them that they are now and would continue into the future to follow undetected their evil intentions, so that one must remain watchful and mistrusting. If such conspiracy theories along with the “outstanding accounts” that often accompany them are handed down to the next generations, this can become a long-term source of new conflicts and sudden collective aggressions, especially if, in transition phases, economic and social problems among the population must be overcome. Collective narratives of this kind remain in the memory a long time. They shape mentalities and attitudes over decades or even centuries (“hereditary enmity”), and are invoked again and again when externalizing clarifications and scapegoats are sought for current social burdens. Then often only a minor provocation is sufficient to trigger wars, extreme acts of violence or pogroms.

4. By contrast, a public determination of the past wrong as well as the justified ascription of responsibility in formalized and fair procedures, works in at least three different directions: One, the victims and their relatives are not required to interpret the crimes suffered as their own mistakes, but rather as mistakes for which others are responsible. Correspondingly, the perpetrators can no longer neutralize their crimes with the argument that the victims were themselves guilty. For society this means that it too is not collectively responsible for the crimes. Two, the victim must no longer quarrel with his or her fate, interpret and cope with his or her injuries as misfortune, bad luck or destiny, as an unavoidable catastrophe in uncontrollable upheavals of history. Rather, these injuries are recognized as a publicly determined injustice that someone is responsible for. Thus the perpetrators are deprived of the chance to neutralize their crimes by means of quasi reasons for justification and apology in the way described above in thesis 3b, and to seek instead public recognition from the citizens in society. Finally, with the public determination of injustice and guilt, it is made clear to victims and perpetrators, and normatively reinforced, that society does not share in these asserted justifications, that it recognizes as such the injustice manifest in the crimes, and does not tolerate but rather rejects it. Without this rejection, society would share in the (unjust) convictions that found expression in the past crimes, that is, society would accept them also for its own normative order instead of marking them as “shared wrongs” in solidarity with the victims. The claims to validity of the crimes for the norms of the unjust regime require public opposition – and this all the more so, and more thoroughly, with state-reinforced crime than with everyday offences. What is opposed is not merely the assertion of validity made implicitly by the perpetrators, but also the asserted legitimacy of their normative source. What is negated is not merely the norm that is in violation of human rights, but also the claim of legitimation of the authority to be able to impart legal validity to the norm, and that means to make the norm binding. The determination of the wrong must be complemented by the determination of guilt, because otherwise the neutralization that is widespread precisely in cases of government criminality of not having been able to act differently as a perpetrator and therefore of not having been able to do anything for his or her offense, must equally be rejected by society. Opposing this assertion that aims at an excuse or the elimination of guilt is necessary in order to make clear how much freedom was available to the individual and to what extent the wrong is the result of a lack of individual motivation to avoid it. Only in this way can it be guaranteed, moreover, that communicating the objection to the

asserted validity of the norm that conflicts with human rights is also performatively directed specifically to the one responsible for this assertion of validity; that is, it is directed to the one who has committed him or herself publicly to the assertion in committing the crime. (And also only in this way is it possible to unsettle the rest of the population in its trust in the validity of norms conforming to human rights).

5. Especially the last-mentioned necessity is controversial – the necessity of establishing alongside the injustice also the guilt and responsibility of the persons involved – and it seems questionable in view of the close link between guilt and punishment. For the victims, due to their weakened or missing self-confidence as a result of the suffered crimes, it is necessary to be told that it is not they or nobody who is responsible for the suffered injustice, but rather identifiable persons, which includes a clarification of the degree and scope of the accountability. But the determination of guilt belongs to the public clarification of past crimes in transition phases for another reason. This reason does not lie immediately at the center of criminal attribution and determination of guilt, but rather in the presuppositions of collective political autonomy, as it assumes shape in *democratic* constitutional states.

6. The three negative consequences described in thesis 3 of failing to provide a clarification have the following in common: They all presuppose a strong motive for the citizens to remain politically passive in the transition phase and, after the consolidation of the democratic constitutional state, to withdraw from the public sphere, to not participate in shaping the political opinion and will, to observe their basic and human rights only with reservation or exclusively with a view to personal economic interest. In more extreme cases this may even mean, beyond the usual and necessary degree of mistrust in democracies towards political institutions, associating with conspiracy theories and their political ideology, which often aims at the abolishment of the democratic constitutional state. If such attitudes are also widespread in modern democracies, which enjoy a long tradition of robust political autonomy and stable democratic institutions along with the respect for human rights, then there is, in contrast to transition states with a history of injustice, a striking difference. In the latter, political (self) marginalization wholeheartedly seizes the citizenship status – the holders of this status cannot form a self-conception, according to which they are conferred an ability and a power which makes them into the responsible authors of their own legal and constitutional order. Effectively deprived of power through mistrust, fear, traumatization and loss of self-confidence, they are not capable of fulfilling the citizenship status; they shy away from raising their voices in the process of shaping public opinion and the will. As traumatized victims of a political fate, of a mistake with catastrophic consequences arising from their own fault, being at the mercy of overly powerful elites who have appropriated the prerogative of interpretation of past crimes, they trust, during and after the transition phase, neither their voice nor the persuasive power of the reasons they have brought forward. It is pretty much irrelevant whether they are excluded from the democratic public sphere or whether they withdraw from it on their own accord – the factual exclusion is in both cases the same. If this supposition is accurate, that the failure to determine injustice and guilt in view of a collective past of injustice has such effects of civil deprivation of power, then no self-conception, which is the basis of the democratic public sphere and politically autonomous legislation, can develop.

7. Citizenship status in a democratic constitutional state designates an ability that belongs to the person as legal person. It expands his or her natural ability to act into a legal ability, inseparably tied to the person, to shape and change law. In this way Georg Jellinek had defined the subject-public law in contrast to subjective private law. Admittedly for Jellinek the ability was still dependent on a decree of the state, where its civil significance is given clearest expression – in the *status activus* or civitas (*Zivität*) in exercising political rights. Erhard Denninger is to be credited with having expanded Jellinek's status theory with the *status constituens*, which makes the citizens as holders of political rights, especially of the right to freedom of expression, into agents of the state constitution, because it is their task and basic right to generate the state and its legal order in the first place and also to further develop it in an ongoing process in the dynamic interpretation of its constitution. Only then do they understand themselves in the sense of the idea of political autonomy not merely as addressees but also as authors of their laws, that is, as co-legislators.

8. Corresponding to the legal ability, as it is pronounced in the *status constituens*, is a historical political experience from which the consciousness of a factual political ability originates. This first breathes life into the legal ability by generating not merely the motives of its use, but also and especially the self-confidence that is acknowledged between subjects to not fail from the outset or to be rejected in the use of the legal ability. Without a consciousness of ability, the citizen cannot acquire the performative power that he or she requires in order to actually make use of his or her rights. In transition states, this is the not so seldom experience of a self-initiated and induced revolution, of a successful elimination of an authoritarian unjust regime. In the case of a peaceful revolution, this is the experience of the continuously growing political power, under the effect of which the power of the unjust regime, which is based on violence, disintegrates. This is not merely the experience of the individual political power to act, but also and especially the experience of the communicative power that arises from the cooperative action of individual agents, as Hannah Arendt described it in reference to the example of the American Revolution. It is this experience of communicative power, which consists in raising one's own voice in a public auditorium among equals, alongside the experience of power that results from the convincing capacity of one's own arguments in the face of equals. The successful critique and elimination of an authoritarian regime as well as the generation of a new democratic constitutional state, whose constitution and legal order is generated by the communicative cooperative action of equal persons, deciding to form an association of free and equal legal fellow citizens, makes available to the agents involved an individual consciousness as well as a commonly shared consciousness of their own capacity.

Christian Meier has employed "consciousness of ability"¹ (*Könnens-Bewusstsein*) as one of the key concepts for the understanding of that singular historical process, which led in ancient Athens to the emergence of a radical democracy. Without such a consciousness of ability, the legal ability, the *status constituens*, which is realized especially (but not exclusively) in the political rights of participation, would remain ineffectual.

¹ Christian Meier. *The Greek Discovery of Politics*. Translated by David McLintock. Cambridge, Massachusetts: Harvard University Press, 1990.

9. If the public determination both of injustice and guilt in view of the crimes committed to the victims of an unjust regime is denied to the victims, and if this induces the consequences described above of (self-) exclusion, then this experience does not allow a consciousness of ability to arise in the first place, or else it immediately destroys anew the consciousness that is germinating in the revolutionary phase of transition. The same citizenship status that remains – for the victims marginalized in this way – a pale garment that is much too big for them, which they cannot fill and which they carelessly discard as soon as a new ideology or conspiracy theory reveals to them the secret causes of their fate. In this respect, the public clarification of the collective past of injustice is a functional precondition for the citizens to form a collective political self-conception, who understand themselves at the same time as addressees and authors of their laws.

10. The relation between the *status constituens* and the consciousness of ability, which fills it out with the criminal reprocessing of collective injustice, extends beyond, however, the functionality substantiated in thesis 9. The consciousness of ability is not merely a necessary condition for the *status constituens*, procuring for the holders of the legal competence for political autonomous legislation also the factual capacity of filling it out. Rather, the legal competence for co-legislation includes beyond that, the *accountability* of the co-legislators for their action, which is constitutive and legislative for a legal community in general. Co-legislators are not merely capable of legislating constitutions and laws in the legal sense, but are also responsible for its execution. They are not merely the “we” that legislates for itself a constitution (and thereby constitutes itself as a composed “we”); rather, the constitution that is given from a “we” for this “we” is also “their” or, from the internal perspective of the one making the constitution, “our” constitution. This accountability accompanies conceptually the legal ability as the power to be able to posit, change and end legal relations. It is the flipside of the legal capacity to act: Legal ability and legal accountability condition and complement each other at the same time. To whomever posits, shapes and changes law are also attributed the consequences that this brings with it. Whoever wants to posit, shape and change law also wants to have the changes that are thus brought about attributed to him or her.

Now the accountability for the consequences of the use of the competence, which is inherent to the legal competence, is based analogously on a consciousness of ability like the legal competence itself. We not only give ourselves credit for the competence because we have access to the corresponding consciousness of ability, but we also make ourselves responsible for the consequences of the use of this competence, because we have a consciousness of ability. Without a factual ability, without the capacity for action and attribution, we would have neither competences nor accountabilities. The legal ability of the *status constituens*, the civic role of the co-legislator, thus necessarily includes a reciprocal understanding as persons who are capable of action and attribution, that is, who are responsible. Without this reciprocal understanding, the right to co-legislation could not at all in fact be exercised. Now, in the procedures of a politically autonomous self-legislation, the co-legislators are empowered and responsible authors of their laws. But they legislate themselves their laws with a view to their future role as *norm addressees*. Since they are, with regard to their capacity for action and attribution, nonetheless in the role of the author the same person as they are in the role of the norm addressee, they must maintain their self-conception as responsibly acting persons in both roles. They thus legislate for themselves

their laws with a view to their role as responsible addressees capable of action and attribution. Whoever is co-legislator has no alternative but to see him or herself in the role of the norm addressee as a responsible legal person. And it would be a contradiction, with the competence as co-legislator, to make use of and claim a capacity for action and attribution, which one would want to contest in the role of a norm addressee. The accountability of all co-legislators for their legislation is reflected, as it were, in the accountability of the norm addressee. The one cannot be had without the other. Only when this relation is made explicit can one see that the co-legislators themselves also define the nature and scope of their accountability. The demands they place upon themselves in the role of norm addressees in view of observing norms under certain internal and external circumstances, that is, their willingness and capacity to observe norms they expect of each other, cannot be given in advance, but rather must be determined autonomously. The concept of criminal guilt, along with its negative conditions for exonerating one from criminal responsibility, for pardoning, and for unreasonable expectations of behavior in accordance with the norm – along with the unavoidable lack of knowledge of injustice – articulates the self-conception of democratically autonomous citizens under given historical conditions.

11. If there is, alongside the functional also this internal relation between the self-conception of citizenship and general legal and specific criminal accountability for the observance of norms, then this sheds new light on the initial question concerning the function and meaning of the determination of injustice and guilt for *transitional justice*. Expressed in the extreme: Citizens of a democracy, which understand themselves as co-authors of their legal order, perceive also their own history and with this their own past of injustice from the perspective of the consciousness of ability: *seeing like a democracy*. An interpretation of history as fate, bad luck, providence, as a struggle of higher powers, as realization of the secret plan of a conspired elite, as unrelenting necessity or result of decisions with no alternative, contradicts diametrically this self-conception. Whoever makes history in exercising a legal capacity with a consciousness of ability – to him or her, history cannot appear as pure fate or as a passive work that is to be tolerated, of ruling powers that cannot be criticized and controlled.

12. Does it now follow from this, however, that the democratically autonomous view, which is already shaped by the consciousness of ability, of one's own history with its past of injustice, must necessarily lead to a situation in which only individualized agents can be found, acting individuals who are responsible for everything? Must it lead to a situation in which there are no longer any excuses on hand, and agents cannot bring to bear any exonerating circumstances against the reproach of guilt? Then the attempt put forth here would end in a paradox: If politically autonomous legislation and the legal capacity for action and attribution correspond with one another by means of the legal ability and the factual consciousness of ability, then this applies *precisely not* to such societies in the present and the past in which there was no democratic but rather an authoritarian legislation. Indeed, in authoritarian legislation the ability and the factual consciousness of ability lay with the single person of the dictator or the small leading elite, but not with the addressees of legislation, with the population. Here an ongoing exchange of roles between the author and the addressee of legislation was not possible. No one, then, could be made responsible for the committed crimes under such conditions, or else the

democratic view of the past of injustice leads to a distorted and false picture of the legal and real possibilities of action in a dictatorship. And is it not indeed a hallmark of authoritarian regimes that they make their victims responsible for everything in order to thereby justify the crimes committed against them?

These objections would only apply, however, if the concept of a responsible legal person – the flipside of the competent legal person – which the citizens reciprocally ascribe to each other both in the role of co-authors of legislation and in the role of norm addressees, would include such an absolute accountability without excuses. But that is not the case. Between both extremes, of a person who is responsible for *everything* and a person who is responsible for *nothing* (and is thereby, in fact, no person at all), democratic constitutional states tread the path towards developing a complex web of criteria for excluding excuses and guilt. Each can convince him or herself, by the constant exchange of roles between the author and the addressee of the laws, that the capacity for action and attribution is dependent on conditions that take into consideration one's internal and external nature and also the social circumstances. Yet this experience – which itself constantly changes with the historical, social, economic and technological dynamics of change – has a completely different meaning for autonomous citizens as it does for rulers and subjects of a dictatorship. It results, namely, from a *freely practiced* consciousness of ability, which, in the trust of accommodating relations of success and of not being rejected, can also, from case to case, fail in these relations. They are experiences that result from the *activity* of the consciousness of ability on the inter-subjectively recognized basis of the legal ability. This kind of experience initiates learning processes of the possibilities and boundaries, margins and constraints, and oppositions and failures of the ability. Yet they lead neither to a consciousness of ability that absolutizes itself, nor to its fatalistic abandonment, but rather to its learning self-modification. With these experiences, the co-legislators legislate their own laws, and with these experiences they define, in a way that changes and learns, the nature and scope of the expected average willingness and capacity to observe norms – that is, they define the legal and responsible capacity of a legal person. In this way they put themselves in their role as norm addressees under the given conditions of internal and external nature, as well as under the possibilities and boundaries of life and action given in each case. Only they can develop in general the high degree of sensitivity for exonerating circumstances required for a publicly justified determination of guilt – not in order to understand and forgive everything, but rather to preserve, affirm and reinforce the constitutive concept of a legal person who is capable at once of acting and taking responsibility. An absolute accountability for everything, and likewise a fatalistic resignation, would lead *ad absurdum*.

For this self-conception as legal and factually competent, and thus also as responsible legal persons, it is necessary that a democratically constituted process of reworking past collective crimes with the determination of injustice and guilt also clarifies the nature and scope of individual accountability – and in fact with a *heightened* sensitivity to the incriminating circumstances of a dictatorship under which the agents acted. This sensitivity towards the perpetrators can also reasonably be expected of the victims, precisely because the (re)production of their own capacity to act and the (re)acquisition of an authentic consciousness of ability comes down to not only being relieved from the imputation of their own accountability, in that they experience *that* someone else is responsible for it, but also in experiencing to *what degree* of accountability the perpetrators acted. Not only the perpetrators but also the victims learn that the determination of criminal guilt under conditions of political autonomy is not based on a concept

of limitless, absolute accountability, that this is not the concept of a legal person to which responsibility is ascribed under incriminating as well as exonerating circumstances.

When the conjectures presented here are not false, then ultimately punishment in the sense of an intentionally inflicted evil is dispensable. It is sufficient that there be a public determination of a wrong that has been answered for – and this can, as Flavia Püschel has shown, be reached even with a declaratory action under civil law instead of with a criminal procedure.

The Morality of EU Constitution

Klemen Jacklic

The traditional (monist) constitution of democracy assumes a sovereign, a nation-state people who monopolize a given territory and establish over it a state under their own sovereign rule. Such a sovereign state democracy is indeed set up by and for the sovereign as its ultimate author and addressee. In Europe, by contrast, neither a Nation-state people, nor the European people as a whole, could any longer realistically be described as the holder of sovereignty. Instead, they both coexist as ultimately self-standing authorities over their partly overlapping territories and spheres of jurisdiction. Inherent to this pluralist, as opposed to monist, constitution is a challenge between both authorities that, if properly construed, could lead them dialectically through mutual refinement and into generating an inclusive pluralist constitutional formation that, in terms of its moral superiority, the traditional model could not reach. Instead of monopolizing its territory in the hands of a single group of people, such a morally superior constitution opens the possibility of democratic inclusion that was unavailable before, while not endangering the goods achieved thus far. In various ways, implications of such a moral constitution translate into constitutional law and policy, including that of immigration.

Asymmetrical Recognition; A-Legality and the Problem of Inclusion and Exclusion*

Hans Lindahl*

I. Introduction

Plurality has already been subordinated to unity when one asks how constitutionalism could regulate the process whereby minority groups raise claims to cultural recognition. For the reference to a group as a minority group in quest of cultural recognition takes for granted that, although not (yet) fully recognized as such, the group is nonetheless already part of a collective under a shared constitution. Despite its insistence on diversity, unity is the alpha and the omega of a politics of constitutional recognition: its “alpha,” in the form of a pre-given unity in the absence of which minority demands of constitutional recognition would not be intelligible as such; its “omega,” in the form of a more inclusive political unity that emerges, if things go well, from struggles for constitutional recognition.

My aim in this essay is to critically scrutinize this interpretation of the tension—if “tension” is at all the proper term—between legal unity and political plurality that emerges with group claims to cultural distinctness. My approach deliberately takes a step back from the contemporary framing of the “multiculturalism debate.” Instead of taking this frame for granted, and engaging in the vast discussion about different forms of minority recognition and minority-rights, whether extant or desirable, I will probe one of the frame’s key features: reciprocity. My leading question is this: to what extent does the normative idea of reciprocity in the form of mutual recognition between equal—but different—groups under a single constitution succeed in reconciling political plurality and legal unity in the face of strong group claims to cultural distinctness? If it doesn’t, and so I will argue, is there another interpretation of recognition which could be brought into play when dealing with such claims?

This essay falls into three parts. Section II peruses the models of politico-legal reciprocity at the basis of what Charles Taylor calls a “politics of equal dignity” and a “politics of difference,” with special attention to what might be dubbed a “genealogy” of politico-legal reciprocity. Section III carries forward the analysis of reciprocity by exploring the Canadian Supreme Court’s well-known *Quebec Secession Reference*. In particular, it examines the reasoning whereby a constitutional court, when granting recognition to group claims to cultural distinctness, takes for granted that such claims are only legitimate if they are constitutional claims, hence the manifestation of a prior, more fundamental political reciprocity. Section IV

* This paper abridges and expands on earlier published material of the author, in particular: Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013); and Hans Lindahl, “Constitutionalism and the Recognition of A-Legality,” in Fabio Ciarraelli and Ferdinando Menga (eds.), *L’epoca dei populismi. Diritt e Conflitti/The Age of Populism. Rights and Conflicts*, special issue of *Teoria e critica della regolazione sociale* 2 (2015), 46-67.

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concludes by exploring whether and how constitutionalism could deal with group claims to distinctness, cultural or otherwise, that resist inclusion within a circle of politico-legal reciprocity: a-legality. Dealing with such claims, or so I argue, requires a form of political negotiation that partially suspends the normal constitutional regimentation of reciprocity—“collective self-restraint,” as I will call it. Collective self-restraint is an ingredient feature of recognition as the recognition of a-legality.

II. Liberalism and the Genealogy of Reciprocity

In his well-known essay on the politics of recognition, Charles Taylor sketches out two forms of liberalism. For the one, there is the liberalism that focuses on a “politics of equal dignity,” in which “what is established is meant to be universally the same, an identical basket of rights and immunities”; for the other, there is the liberalism that promotes a “politics of difference,” in which “what we are asked to recognize is the unique identity of this individual or group, their distinctness from everyone else.”² Walzer, in his commentary to Taylor’s essay, refers to these two forms of recognition in liberal politics as, respectively, “Liberalism 1” and “Liberalism 2.”³ Whereas authors such as Rawls and Habermas are, arguably, champions of Liberalism 1, the votaries of Liberalism 2 include theorists such as Taylor, Kymlicka and Tully. Instead of taking sides in this debate, what interests me is identifying and critically scrutinizing what *joins* the parties in strife, i.e. the shared presupposition that remains beyond the pale of discussion, such that both camps can view themselves as different manifestations of liberalism. This shared presupposition is the normative principle of *reciprocity*. The differences between these authors concern how reciprocity should be conceptualized and how it can be institutionalized; but liberalism, whatever its modulations, is propelled by the idea that a polity is well-ordered to the extent that it actualizes relations of political and legal reciprocity among its citizens.

The idea that reciprocity is constitutive for politics and law holds explicit and undisputed sway in Liberalism 1. Consider to this effect Jürgen Habermas’s defence of Liberalism 1 by way of a discourse theory of practical reason. The opening passage of his essay, “Struggles for Recognition in the Democratic Constitutional State,” neatly ties together the concept of a modern constitution and the principle of reciprocity:

Modern constitutions owe their existence to a conception found in modern natural law according to which citizens come together voluntarily to form a legal community of free and equal consociates. The constitution puts into effect precisely those rights that those individuals must grant one another if they want to order their life together legitimately by means of positive law.⁴

Habermas is concerned to show, against Taylor’s vindication of a politics of recognition oriented to the constitutional protection of distinct communities, that a “universalistic” understanding of modern constitutions is up to the normative task of protecting the individuals that are the subjects of rights, while also accommodating the struggles for recognition in which the articulation of collective identities takes place. The specifics of his debate with Taylor need not detain us. What

² Charles Taylor, “The Politics of Recognition” in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 38.

³ Michael Walzer, “Comment” in Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition*, note 1 above, 99.

⁴ Jürgen Habermas, “Struggles for Recognition in the Democratic Constitutional State,” in Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition*, note 1 above, 107.

interests me in Habermas's interpretation of reciprocity, as was already the case in my perusal of Rawls, is whether and how he deals with what might be called a "genealogy" of reciprocity.

Habermas's aforementioned essay barely discusses this issue. It is only broached obliquely and in passing, when he asserts that "a constitution can be thought of as an historical project that each generation of citizens continues to pursue."⁵ He goes ahead to argue that the "struggle over the interpretation and satisfaction of historically unredeemed claims is a struggle for legitimate rights in which collective actors are once again involved, combating a lack of respect for their dignity."⁶ See here a compact formulation of the equiprimordiality of constitutionalism and democracy: the struggle for recognition concerning collective experiences of violated integrity takes place *within* a constitutional cadre and *remains* within it, to the extent that the struggle, if it is to be legitimate, aims to transform the constitution. Group demands of cultural recognition must be formulated as *constitutional claims*, that is, as claims seeking to realize the promise of politico-legal reciprocity lodged in the constitution.

In a later essay, Habermas articulates more fully what he means by referring to the constitution as "an historical project." By delving into this issue, Habermas attempts to defuse an objection that threatens to bring to naught his thesis about the equiprimordiality of democracy and the rule of law. Michelman has shown with respect to the enactment of a polity's first constitution that, in Habermas's words, "[t]he constitutional assembly cannot itself vouch for the legitimacy of the rules according to which it was constituted. The chain never terminates, and the democratic process is caught in a circular self-constitution that leads to an infinite regress."⁷ Although Habermas acknowledges the gravity of the problem by referring to the foundation of a constitutional democracy as a "groundless discursive self-constitution," he argues that it is possible to break out of this circularity provided one focuses on the "future-oriented character, or openness, of the democratic constitution."⁸ In brief,

whoever bases her judgment today on the normative expectation of complete inclusion and mutual recognition, as well as on the expectation of equal opportunities for utilizing equal rights, must assume that she can find these standards by reasonably appropriating the constitution and its history of interpretation.⁹

But this surely begs the question: the problem is not merely how to achieve a greater inclusiveness to accommodate those who are subject to a form of exclusion at the foundation of the polity to which they belong. The more fundamental problem is rather that, more or less against their will, a variable range of individuals and groups may have been *included* in the first place; that, despite their opposition, they are deemed to *belong* to the polity. Why should they or those who later rally to their cause at all "have the *task* of actualizing the still-untapped normative substance of the system of rights laid down in the original document of the constitution"?¹⁰ Why should they at all have to view themselves as "participants [who] must be able to recognize the project as *the same* throughout history and to judge it from *the same* perspective"?¹¹ Here, then, is the fraught political dilemma confronting those individuals or

⁵ *Ibid.*

⁶ *Ibid.*, 108.

⁷ Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?," in *Political Theory* 29 (2001), 766-781.

⁸ *Ibid.*, 774.

⁹ *Ibid.*, 775.

¹⁰ *Ibid.*, 774 (emphasis added).

¹¹ *Ibid.*, 775.

groups who were included in the collective against their will, a dilemma we will encounter repeatedly in the following Section when considering the Québécois separatists and members of aboriginal peoples in Canada. On the one hand, they can raise a constitutional claim that, if successful, allows them to obtain political and legal recognition for their cultural distinctness. But if they set foot down this path, they effectively identify themselves as participants in a project with which they do not want to be associated, hence as a minority group engaged in relations of reciprocity within a broader community. On the other, if they oppose their inclusion, refusing to appeal to the constitution's "still-untapped" normative possibilities of inclusiveness, they expose themselves to the charge that their acts of contestation need not be accepted as such or even listened to because they are not, to borrow and emphasize Habermas's phrase, "*reasonably* appropriating the constitution and its history of interpretation." So if they choose this second path, their acts of resistance are vulnerable to censure for being non-reciprocal acts, acts that fall prey to a performative contradiction—the cardinal sin of reason. This dilemma surfaces time and again, during the later career of the polity, with respect to all those members of groups who view their inclusion in the polity as, well, the continuation of a prior annexation.

So, the problem is that the procedural rules of liberal democracies, as articulated and justified by Habermas, presuppose prior acts of inclusion and exclusion that resist legitimation within the constitutional order these acts contribute to creating. The acts of seizing the initiative to found a constitution and reciprocal rights under a constitution are themselves non-reciprocal acts.

What about the "politics of difference" at the heart of Liberalism 2? Here again, reciprocity is the characteristic feature of a "politics of difference," albeit that reciprocity unfolds through a process different to that in a "politics of equal dignity." The basic model of this form of recognition is provided by Hegel's famous discussion of the dialectic of the master and the slave. As Taylor puts it, "[t]he struggle for recognition can find only one satisfactory solution, and that is a regime of reciprocal recognition among equals."¹² Importantly, Taylor notes that even though there are significant differences between Rousseau's and Hegel's approaches to recognition and reciprocity, Hegel concurs with Rousseau's insight that a regime of reciprocal recognition takes place within "a society with a common purpose."¹³ This point is important because what is at stake is the *dialectical* structure of recognition: if the struggle for recognition is sparked by the negativity which accompanies a situation experienced as one of inequality, that is, as the absence of mutual recognition, this struggle takes place against the background of *a more fundamental reciprocity that the parties must already have acknowledged*, even if only implicitly, if they are at all to engage in a struggle the stake of which is reaching mutual recognition. Honneth makes this point deftly:

[I]f the social meaning of the conflict can only be adequately understood by ascribing to both parties knowledge of their dependence on the other, then the antagonized subjects cannot be conceived as isolated beings acting only egocentrically. Rather, in their own action orientation, both subjects have already positively taken the other into account, before they become engaged in hostilities. Both must, in fact, already have accepted the

¹² Taylor, "A Politics of Recognition," note 1 above, 50.

other in advance as a partner to interaction upon whom they are willing to allow their own activity to be dependent.¹⁴

To be sure, Honneth's analysis in this passage focuses on the mutual dependence between two individuals, rather than on the more general structure of social conflict mediated by law. No less importantly, it has been noted that Honneth's theory of recognition requires considerable expansion to account for the recognition of cultural minorities in modern democratic states, as his account focuses primarily on formal recognition between individuals.¹⁵ But what interests me here is the basic structure of interdependence articulated in the final sentence of this citation, which can be extrapolated and generalized without great difficulty by a theory of constitutionalism that seeks to give normative, conceptual and institutional shape to a "politics of difference" sensitive to group claims to distinctness. Indeed, such a theory of constitutionalism postulates (i) a prior set of values, interests and purposes that must be assumed as shared by all political actors, and that any group that strives to gain cultural recognition must embrace if its claim is to enjoy the patina of legitimacy; (ii) a shared procedural framework, set out in the constitution, which governs the terms in which the struggle takes place and is settled; and (iii) a redefinition of the content of (i), if all goes well, as a result of constitutional struggle in conformity with (ii).¹⁶

Notice that the aim of the struggle for recognition, in this understanding of a "politics of difference," is to seek the constitutional affirmation of cultural distinctness within a broader collective. At stake is not relinquishing the group's identity but rather showing, first, how and why it ought to be affirmed in its *particularity* in relation to the general values, interests and purposes of the collective, and, second, why such particularity is the expression of equality, rather than of inequality. Hence if a group's claim to identity is to be taken seriously by the other groups that partake of the collective, then it must appeal to—and aim to transform the meaning of—the values, interests and purposes the group *already* shares with those groups. The group must be able to present its identity as a particular manifestation of a general, more capacious collective identity. Thus the struggle for cultural recognition, on this reading of a "politics of difference," has the form of a dialectic of the general and the particular, such that an initial situation of non-reciprocity—where non-reciprocity denotes a yet-to-be-recognized claim to particularity—yields to a novel state of reciprocity or mutual recognition between equal—but different—groups. Legitimate struggles for differentiation are, in this understanding of a politics of difference, struggles for *internal* differentiation, regardless of whether what is at stake is "accommodation-rights" or "self-government rights."¹⁷

¹⁴ Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, trans J Anderson (Cambridge, Polity Press, 1995), 45.

¹⁵ See Bart van Leeuwen, "A Formal Recognition of Social Attachments: Expanding Axel Honneth's Theory of Recognition" in *Inquiry*, 2 (2007), 180-205. See also the chapter on multiculturalism in Will Kymlicka, *Contemporary Political Philosophy* (Oxford: Oxford University Press, 2002) 327-376. Significantly, Honneth's recent works, *Freedom's Right: The Social Foundations of Democratic Life* (Cambridge: Polity Press, 2014), and *The I in We: Studies in the Theory of Recognition* (Cambridge: Polity Press, 2012), also fail to address head on claims to cultural distinctness by social groups.

¹⁶ See, for example, James Tully, "Struggles over Recognition and Distribution," in *Constellations* 7 (2000), 469-482.

¹⁷ Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001), 152-176.

Although the theory of constitutionalism that emerges from this dialectical reading of the principle of reciprocity is powerful and persuasive in a number of ways, a nagging question remains: Can it elude the problem that the emergence of political reciprocity is never simply the outcome of reciprocity? Can it simply be taken for granted that group claims to cultural distinctness must, as Honneth claims, “in fact, already have accepted the other [groups] in advance as [partners] to interaction upon whom they are willing to allow their own activity to be dependent”? In view of plumbing the implications of these questions I will now turn to examine what has been widely acclaimed as one of the most striking and daring judicial examples of a recognition-based theory of constitutionalism: the Canadian Supreme Court’s *Quebec Secession Reference*.¹⁸

III. “Reconcil[ing] unity and diversity”

The Court’s reference has been the object of extended attention, and it is by no means my intention here to review that literature. Instead, I will cull only those aspects of the Court’s reasoning that are germane to the theme of reciprocity and its genealogy. My analysis proceeds in three steps. Initially, it canvasses the Court’s defense of the principle of reciprocity as concerns the negotiation of constitutional amendments. Subsequently, it critically explores the genealogy of the Canadian federation, and therewith of politico-legal reciprocity, as sketched by the Court. Finally, it returns to consider how the genealogical problems circumvented by the Court reappear in its vindication of reciprocity, and the implications that follow thereof for its argument as a whole.

A. A Unilateral Right to Secession?

The central question the Court was called on to consider in this reference was “whether Quebec has a right to *unilateral* secession.” (§149) The Court rejects such a right. Although the Court does not say so explicitly, it effectively contends that a putative right to unilateral secession is an oxymoron. To invoke a *right*, whatever its nature, is to presuppose relations of political and legal reciprocity with those who must honor the right, or so the Court argues; yet the very idea of *unilateral* secession is incompatible with the reciprocity that must have been presupposed in the act of claiming a *right* to secession. These are, to be sure, but the bare bones of the argument, and it pays to examine in somewhat greater detail how the Court fleshes out its position.

In what amounts to an invocation of the equiprimordiality of constitutionalism and democracy, the Court kicks off its reasoning by asserting that “in our constitutional tradition, legality and legitimacy are linked.” (§33) Indeed, the Court argues that there is a constitutive circularity—in the positive sense of the term—governing the relation between constitutionalism and democracy. The first arc of the circularity concerns the constitution as the framework for political deliberation:

[d]emocracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and

¹⁸ The Canadian Supreme Court’s reference, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. Citations refer, in the main text, to the sections of the Reference. The Reference is available at: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do> (accessed on 1 July 2015).

implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. (§67)

And it adds: “Constitutionalism facilitates—indeed, makes possible—a democratic political system by creating an orderly framework within which people may make political decisions.” (§78) Conversely, and this is the second arc of the circularity, the constitution does not merely regulate political decision-making; it is also, at least in some cases, itself the object of political decision-making. “A system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle.” (§78) In line with this general principle it asserts that “constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.” (§76)

The equiprimordiality between constitutionalism and democracy retains all its vigor in a federal structure of government. For the one, and this is the first arc,

[t]he Constitution binds all governments, both federal and provincial, including the executive branch . . . They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source. (§72)

So, a resounding yea to federalism in the form of a system of government that “enable[s] citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level”! (§66) But—and this should greatly temper the enthusiasm of legal pluralists—the Court makes no bones about the fact that federalism, so conceived, is a way of institutionalizing a *single* legal order: “there is . . . one law for all.” (§71) Its guarantor, that is, the guarantor of plurality *within* legal unity, is, predictably, the Supreme Court itself. For the other, and here is the second arc, initiatives by any of the provinces to secede or otherwise transform the terms of Confederation “would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes . . .” (§88) And in a decisive passage the Court argues that a province that would claim a *right* to secede or to modify the terms of Confederation, without discharging its obligation to negotiate with the other interested parties as established by the Constitution, effectively engages in a performative contradiction. Indeed, a province that invokes a unilateral right both affirms and denies a “reciprocal obligation.” In the Court’s parlance,

[r]efusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would put at serious risk the legitimacy of that party’s assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values . . . (§95)

B. Seizing the “initiative”

Obviously, the equiprimordiality of constitutionalism and democracy presupposes the foundation of Canada as a federal state. That all parties to the federal state are bound by the “reciprocal obligation” to both negotiate *under* the constitution and *about* their constitutional arrangements requires that a constitution has been put in place, to begin with. What, to use its own phrasing, are “the principles that underlie the legitimacy of the Constitution itself”? (§75)

These are “democracy and self-government,” that is, the principle of popular sovereignty: “the Constitution is the expression of the sovereignty of the people of Canada.” (§85) Importantly, the Court argues, popular sovereignty does not mean that a province can appeal to this principle to secede unilaterally from the federation. For, it avers,

[c]onstitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are “binding” not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism) . . . (§76)

That majority, to which the representatives of Quebec agreed when negotiating Confederation, is the majority of the Canadian people. In the result the Court asserts that the foundational acts of constitution-making amount to an agreement, whereby its parties commit to acting together into the future in view of promoting their joint interest. The nature of that agreement lies beyond doubt: “the vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces.” (§96) So legal reciprocity between the parties to the Canadian federation, as institutionalized in the Constitution, does no more than give legal form to a more primordial form of reciprocity, namely, the political reciprocity which arose as a result of the agreement at the origin of Confederation. Because the agreement was one in which *interested* parties participated, and because Confederation was subsequently extended to *all* interested parties, none of the provinces can secede unilaterally without breaching the rights of those “linguistic and cultural minorities, including aboriginal peoples, . . . who look to the Constitution of Canada for the protection of their rights.” (§96) The Court later reiterates this point when emphasizing the importance of the constitutional rights of aboriginal peoples living in the province of Quebec, in the event of a unilateral secession by the province.

But *was* there an original agreement which gave rise to Confederation, and which provides a “sound basis” for “reciprocal obligations” under the Constitution? The Court’s answer to this question is, in fact, the linchpin of *Quebec*: “Confederation was an initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada. It was not initiated by Imperial *fiat*.” (§34) To be sure, protracted negotiations were necessary between those representatives before they could compact Confederation. But the agreement whereby the delegates enacted the Confederation was itself a representational act. As such, it was an *authorized* initiative and, by extension, an *authorized* agreement, or so the Court alleges. Consequently, the initiative to found a Confederation was a *legal* initiative, not a *fiat*—Imperial or otherwise—that would have contaminated the legality and legitimacy of the acts leading to Confederation under a constitution. No less importantly, although the delegates were deemed to represent a *differentiated* unity when founding the federation, they represented, first and foremost, a differentiated *unity*—a “unified country,” to repeat the Court’s turn of phrase. This double reality of diversity within a more fundamental unity subtends the Constitution; the latter, if imperfectly, represents that reality.

Federalism was a legal response to the *underlying* political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity. (§43; emphasis added)

Hence the Court's reconstruction of the foundation of the Canadian federation *presupposes* the "underlying" mutuality and unity of "the people then living in the colonies scattered across part of what is now Canada" as the basis of the "reciprocal obligations" which their representatives laid down in the Constitution. Paradoxically, the Court holds that the foundation of the Canadian federation through the enactment of its first constitution actually comes second; indeed, the act of constitution-making that galvanizes legal reciprocity refers back to a prior—the first—foundational moment of political reciprocity, which the Court presupposes without justifying. What the Court has to say about why the framers did not explicitly incorporate these principles into the *Constitution Act, 1867*, also holds for the Court itself: "the representative and democratic nature of our political institutions was simply assumed." (§62)

In short, by arguing that the initiative to found the Canadian federation was taken by representatives of "the people then living in the colonies scattered across part of what is now Canada," the Court can elude—and elide—a thorny problem confronting Liberalism 1 and Liberalism 2: the emergence of politico-legal reciprocity itself. The problem is intimated when the Court acknowledges—as acknowledge it must—that the Canadian federation was born from an *initiative*. In effect, can we at all make sense of an "initiative" without introducing an element of unilaterality into the respective act? To a lesser or greater extent, the initiative to found a polity is always seized. Can it be seriously argued—not least in light of the acts of conquest that remain beyond the compass of the Court's historical reconstruction—that the initiative to found the Canadian federation is merely a representational act, an act mandated by a manifold of individuals who, as Honneth puts it, "have accepted the other[s] in advance as [partners] to interaction upon whom they are willing to allow their own activity to be dependent"?

C. Three Problems

If not, then at least three problems undermine the rest of the Court's argument. First, if the Court argues that there is no unilateral right to secession, because this amounts to an oxymoron, can this argument not be turned against the Canadian Constitution itself? Indeed, do rights and "reciprocal obligations" under the Constitution not lead back to a foundational act which, to the extent that it is unilateral, is incapable of generating rights and "reciprocal obligations"?

This problem crops up in the Court's consideration of the principle of effectivity and *de facto* secession. The Court acknowledges that the province of Quebec could in fact secede from the Canadian federation, and that it might be able to invoke the principle of effectivity in international law when seeking recognition for itself as an independent polity. But, the Court hastens to add, this does not mean that unilateral secession enjoys the status of a legal right.

The principle of effectivity operates very differently. It proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane. Our law has long recognized that through a combination of acquiescence and prescription, an illegal act may at some later point be accorded some form of legal status. In the law of property, for example, it is well known that a squatter on land may ultimately become the owner if the true owner sleeps on his or her right to repossess the land. In this way, a change in the factual circumstances may subsequently be reflected in a change of legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. (§146)

Notice how those individuals and groups included against their will in the Confederation can turn the Court's argument against it. In effect, to the extent that the Court, in its historical reconstruction, asserts that the initiative to found the Canadian federation was a representational act, does it not gloss over what they view as the *unilaterality* of this act, hence that their having become members of the federation is "a matter of empirical fact" rather than of right? Yet more pointedly, does not the Court's qualification of the initiative as authorized entail, from their point of view, a "subsequent condonation of an initially illegal act [whereby the Court] retroactively creates a legal right to engage in the act in the first place"?

The second difficulty is a corollary of the first: can the Court simply brush off as "unsound" (§75) the argument that "the same popular sovereignty that originally led to the present Constitution must . . . also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone"? (§75) Can the Court really claim that "our national existence [is] seamless in so many aspects"? (§96) It is significant, in this respect, that the Court invokes the constitutional rights enjoyed by the aboriginal peoples living in the province of Quebec. By calling attention to their rights, the Court seeks to undermine the argument that "the people" of Quebec is a homogeneous group that engages in an act of self-determination. In other words, it contests that such an act could be the legal expression of a prior, more fundamental political reciprocity. And it was indeed the case that secession from Canada was rejected by many among the members of the aboriginal peoples living in the province of Quebec, who invoked rights granted them under the Canadian Constitution when opposing unilateral secession. The question, however, is whether the Court itself does not engage in the kind of inclusive claim with respect to aboriginals that it aims to debunk as illegitimate when advanced by the would-be Québécois separatists:

Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982*, included in s. 35 explicit protection for existing aboriginal and treaty rights . . . The "promise" of s. 35 . . . recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. (§82)

In effect, the first sentence seems to beg the question: Canada emerges as a federal polity when the aboriginal peoples and other groups *become* minorities therein. Not only is the exercise of power under the single constitution of Canada bound to honor the long tradition of respect for minorities but, conversely, constitutional powers are duty bound to (respectfully) treat aboriginal peoples as *minorities* with a view to ensuring that "there is . . . one law for all." This is the political upshot of a recognition-based theory of constitutionalism, which views differentiation as *internal* differentiation. The dialectic of particularity and generality animating a Canadian "politics of difference" has, as its dark side, another, considerably less benevolent meaning: recognizing the *particularity* of aboriginal peoples as distinct minority groups serves to celebrate and consolidate the *generality* of the Canadian federation of which they are deemed to partake.

For those members of aboriginal peoples that view the foundation of the Canadian federation as a unilateral act of occupation, as the annexation of their ancestral lands, the, oh so gracious and munificent, constitutional acknowledgment of their peoples' "contribution to the building of Canada" is no doubt a particularly invidious way of both securing and concealing alien rule. Indeed, the political and legal reciprocity that a Canadian "politics of recognition" has on offer is what they shun. For them, *recognition is domination*.

The third difficulty concerns, finally, the Court's own authority to issue a reference about the unilateral secession of Quebec. What interests me here is the Court's appraisal of the three circumstances, at international law, that justify unilateral secession. The first concerns peoples under colonial rule, which the Court dismisses out of hand: "the right of colonial peoples to exercise their right to self-determination by breaking away from "imperial" power is now undisputed, but is irrelevant to this Reference." (§132) Yet the Court itself obliquely—and no doubt inadvertently—calls into question its summary dismissal of "imperial" power when it extols the continuity of the rule of law so important to the federation's success in reconciling diversity with unity. Is not the continuity leading from the British Empire to the emergence of the Canadian federation precisely what the separatists both expose and seek to disassociate themselves from? And while many members of the aboriginal peoples in Quebec would strenuously oppose secession, does this mean that they have ceased to view the Canadian federation and its recognition of their status as a culturally distinct minority group as a continuation of "imperial power"? Most fundamentally: does not the Court effectively become both party and judge to the conflict?

The second circumstance in which unilateral secession is justified "is where a people is subject to alien subjugation, domination or exploitation outside a colonial context," i.e. to alien rule. (§133) Remarkably, the Court contents itself with simply citing the passages of the *Declaration on Friendly Relations* which contain the apposite circumstance. The reason for this is that, as is surely patent to all who can see, Quebec is part of the Canadian federation, hence that by definition it is *not* subject to alien rule—nor a fortiori to, say, "foreign military occupation." But, from the perspective of would-be Québécois separatists, this is surely to beg the question: the people of Quebec aspires to secede unilaterally from Canada because it views itself as subject to alien rule. From their perspective, it is not necessarily specious or frivolous to assert that the bases of the Canadian armed forces stationed in Quebec constitute "foreign military occupation." Again the troubling question emerges: does not the Court's claim that it can deliver an authoritative judgment about a right to self-determination render it party and judge at the same time?

The third circumstance arises "where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development." (§138) This circumstance received short shrift from the Court, which argued that it was "manifestly" not at hand with respect to Quebec. Moreover, the Court notes, Quebecers have enjoyed ample and repeated participation in the government of Canada. By participating in the national government, they not only represent the people of Quebec but represent it as part of the people of Canada. Yet what the would-be separatists impugn is not that their representatives should be more assertive in defending the interests of Quebec in the national government but rather that they are their representatives *at all*: not in our name. Have the dice not already been loaded when the Court affirms that constitutional practice grants the people of Quebec a meaningful exercise of their *internal* right to self-determination, i.e. a right within the Canadian federation?

In short, the Québécois denunciation of recognition under the Canadian constitution evinces a concept of difference that resists neutralization and pacification through the "politics of difference" advocated by a theory of constitutional recognition. At stake is a difference—a claim to group distinctness, cultural or otherwise—that is not merely a manifestation of particularity within a more encompassing generality, whether realized or realizable, but rather a form of difference that obdurately resists inclusion in a given circle of politico-legal reciprocity: *a-legality*.

III. Asymmetrical Recognition

As I use the expression, a-legality is a technical term regarding those kinds of behavior which register as legal or illegal within a legal order (whence the “legality” of a-legality), while at the same time challenging *both* terms of this master distinction (whence the “a” of a-legality). A-legality is not merely a privative manifestation of legality, i.e. disorder, for this would amount to collapsing a-legality into illegality. Instead, the “a” of a-legality points to difference in the sense of *another* possible legality that is more or less incompatible with the order which is challenged. Unless behavior could register in one way or another as legal or illegal to an order, there would be no challenge to that order; it would simply be irrelevant to the law and could not even be ignored by it. But there can be no challenge either if behavior can be given a place in a legal order by simply qualifying it as legal or illegal, i.e. if it is orderable without further ado. Insofar as legal orders structure reality as being either legal or illegal, ordered or disordered, a-legality concerns a feature of reality that resists ordering by a given legal system. The a-legal is both orderable, in the sense of what lends itself to qualification by a legal order as legal or illegal, and *unorderable* because it raises a normative claim that cannot be accommodated on either side of the master distinction with which legal orders operate.

As such, a-legality points to a radical sense of plurality, of political plurality which cannot be integrated into the unity of one legal order because there is a normative claim that eludes what a given legal order can qualify, hence which remains inaccessible to it. In my use of the expression, a-legality is the juridical manifestation of what Edmund Husserl calls strangeness, which he describes as follows: “accessibility in its genuine inaccessibility, in the mode of incomprehensibility.”¹⁹ A strong sense of legal pluralism entails that there can be no (il)legality without a-legality.

Be that as it may, the foregoing analysis suggests that it is necessary to reconsider the kinds of problems that confront constitutionalism when engaging with group claims to distinctness, cultural or otherwise. In effect, there is broad agreement in the literature that the task of a theory of constitutionalism, in the face of such claims, is to secure the political and legal conditions for *non-assimilative inclusion*. In other words, it is generally assumed that the vocation of constitutionalism, when dealing with group claims to (cultural) distinctness, is to promote political “stability” in a way that steers clear of the Scylla of “exclusion” and the Charybdis of “assimilation.”²⁰ To the extent that assimilation is a form of exclusion—the exclusion of what the members of a group value as rendering it distinct—non-assimilative inclusion amounts to non-exclusive inclusiveness, that is, inclusive inclusiveness—“hyper inclusiveness,” as one might also put it.

There is a great deal to be said for the desideratum of inclusiveness, and I by no means aim to deprecate or minimize its importance. Instead, the main thrust of this essay has been to show that, whatever their merits, liberal theories of constitutionalism confront a fundamental difficulty when attempting to deal with group claims to (cultural) distinctness. Indeed, they are impervious to situations in which *inclusion is the problem signaled by those claims, not its solution*. To reiterate an earlier insight, liberal theories of constitutionalism deal with such claims

¹⁹ Edmund Husserl, *Zur Phänomenologie der Intersubjektivität*, edited by Iso Kern (The Hague: Martinus Nijhoff, 1973), 631.

²⁰ Laden correctly identifies exclusion, assimilation, and stability as the three key issues of a politics of identity in the framework of liberal constitutionalism. See Anthony Laden, *Reasonably Radical: Deliberative Liberalism and the Politics of Identity* (Ithaca, NY: Cornell University Press, 2001), chapters 6-8.

as *normative* claims to the extent that the latter can be viewed as claims to (cultural) particularity within (political) generality. As a votary of “deep diversity” puts it, liberal theories of constitutionalism postulate “that all members of the society will have one identity that they share, and that can thus be the basis of their unification into a single (albeit diverse and heterogeneous) society.”²¹ While my purpose is not to defenestrate unity—which is the twin sister of inclusiveness—I do want to oppose the monism of liberal constitutionalism by highlighting the ambiguity of both desiderata. For, on a liberal reading of constitutionalism, if the majority of the collective is prepared to grant full constitutional recognition to a group’s cultural particularity, thereby securing the continued unity and stability of the polity, then further insistence by this minority group that it wants out forfeits all *normative* significance and can be appropriated, by the majority, as “anarchy” (Laden).

A-legality is not particularity, however. The a-legal, as exemplified by the claims of the Québécois secessionists, denotes a form of distinctness that is recalcitrant to inclusion within a given circle of politico-legal reciprocity. In other words, a-legality concerns the *singular*. Notice that the singular is *not* the particular. In effect, particularity, in the framework of theories of mutual recognition, stands in a dialectical relation to generality. Horkheimer and Adorno point to this notion of singularity (albeit inconsistently) in a fragment of *The Dialectic of Enlightenment*, without, however, drawing the normative implications thereof for a theory of recognition:

General concepts, formed by individual sciences either on the basis of abstraction or axiomatically, constitute the material of interpretation (*Darstellung*) as much as names for the singular (*Einzelnes*). The struggle against general concepts is senseless. But this does not determine how things stand with the dignity of the general. What is common to many singularities, or what always returns in the singular, need not be more stable, eternal, deeper than the particular (*das Besondere*). The scale of genera is not the same as that of meaningfulness.²²

Singularity is what registers in a legal order as either legal or illegal, hence in this sense as a particular instance of the general legal rule, yet which raises a normative challenge which definitively eludes incorporation into the legal order, not even when the legal order, in a dialectical move of generalization, transforms itself by redrawing the distinction between legality and illegality. Although I cannot develop this idea here, I submit that a-legality and the experience of singularity with which legal orders are confronted points to an interpretation of the

²¹ *Ibid*, 169.

²² Max Horkheimer and Theodor W. Adorno, *Dialektik der Aufklärung: Philosophische Fragmente* (Frankfurt: Fischer Verlag, 1969), 231. They add, immediately after this citation: “That was precisely the error of the Eleatic philosophers and all those who followed them, beginning with Plato and Aristotle.” I would add: “and ending with Honneth and Habermas.” It is not surprising, in this context, that Habermas has such difficulties in making ethical sense of Levinas’s phenomenology of the human face and its appeal of what is irreducibly singular. According to Habermas, “[e]ach must be able to recognize him- or herself in all that wears a human face. To keep this sense of humanity alive and to clarify it (...) is certainly a task from which philosophers should not feel themselves wholly excused, even at risk of having the dubious role of a “purveyor of meaning” attributed to them.” I would retort: each can *and cannot* recognize him- or herself in all that wears a human face. It is in this way that I would draw on the Levinasian theme of the “face”—a face, incidentally, which is not only the face of the human but also of other sentient, and perhaps even non-sentient, beings—to make sense of a non-relational obligation to preserve the strange as a constitutive feature of the ethical dimension of law. See Jürgen Habermas, *Postmetaphysical Thinking: Philosophical Essays*, translated by William Mark Hogengarten (Cambridge, MA: The MIT Press, 1992), .

ethical dimension in law which bursts the conceptual framework available to either universalism or particularism, cosmopolitanism or communitarianism.

From this alternative perspective, “reconciling unity with diversity” and promoting non-assimilative inclusiveness does not exhaust the theory and practice of constitutionalism, for there are group claims to (cultural) distinctness which cannot be accommodated in their own terms within the unity of a politico-legal order. In the same way that the initiatives that give rise to a polity, differentiating it from what become its others, can never be fully included within its legal order, so also there are subsequent claims to difference that resist inclusion within this order—on principle, and not merely in fact. As such, these claims are the manifestation of irreconcilable—and in this sense radical—difference. The stalemate that arises between, on the one hand, the Canadian rebuke that the Quebecer secessionists fall prey to a performative contradiction, and, on the other, the Québécois objection that Canadians beg the question when they demand that Québec present its claim as a constitutional claim, is exemplary for the strong form of *political plurality* proper to radical difference. What goes under the name of “secessionist” movements is but one instance of radical difference, although perhaps it would be more correct to say that radical difference confronts every polity with multifarious figures of secessionist aspirations, whether tumultuous or halcyon, heeded or ignored.

So the fundamental and most general question that arises as a result of our critical scrutiny of *Quebec* and recognition-based theories of constitutionalism is the following: how—if at all—can constitutionalism deal with a-legality? Can constitutionalism respond to radical difference in a way that does not reduce it to a claim concerning *internal* differentiation? Is there a way of responding to a-legality that does not collapse the recognition of difference into *constitutional* recognition? These questions are particularly pressing as concerns secession because the nascent polity perforce emerges through acts that are *themselves* more or less unilateral, thereby reproducing, at least latently, the problem of unwanted inclusion that spawned secession in the first place. This was clearly the case with those aboriginal peoples who rejected becoming part of an independent Quebec.

I don’t think there is any way for constitutionalism to respond *directly* to a-legality, that is, to deal with radical claims to cultural distinctness in a way that entirely circumvents demands of reciprocity. Yet it seems to me that the more or less unilateral origin of polities both spawns the possibility of a-legality *and* offers the key to how constitutionalism might be able to deal with it. For if the more or less unilateral inception of a polity catches up with it in the form of group claims to unilateral secession, is it not possible for the polity to respond, when the concrete circumstances so demand, by a novel unilateral act which suspends, *albeit partially*, the constitutional regimentation of reciprocity with a view to initiating political negotiations with those who want out? The suspension of the constitutional regimentation of reciprocity would mean, in such cases, that the negotiation of exit would not be subordinated to the rules governing constitutional amendment, including rules about the majority that must assent to secession by a minority group. For these rules, and the reference to “majority” and “minority” groups, presuppose the reciprocity under a constitution that is rejected by one of the negotiating parties.

This is precisely what the Canadian Court did in the final part of its Reference. Although it responded to the secessionist challenge by declaring that an act of unilateral secession would be unconstitutional, it also introduced two initiatives that can be viewed as responses to a-legality. The first was the assertion that, in the course of negotiations pursuant to the secession, “there would be no conclusions predetermined by law on any issue.” (§151) Secondly, and congruent with the first initiative, “to the extent issues addressed in the course of negotiation are

political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.” (§153) As a result, the Court effectively *suspended* the constitution and legal reciprocity as concerns the content and the control of political negotiations about secession.

These initiatives are exemplary, I think, for an interpretation of the recognition of a-legality that takes us beyond the aporias encountered by the model of mutual recognition that informs liberal theories of constitutionalism. I would like to conclude this paper by highlighting some of the central features of this alternative interpretation of recognition, leaving a full development thereof for another occasion.

Notice, to start with, that rather than rejecting reciprocity out of hand, the task of a theory of recognition must be to expose its shadow side, which never abandons legal ordering as the process of instituting relations of reciprocity. Indeed, my reservations about an *exclusively* reciprocity-driven interpretation of constitutionalism boils down to this: every legal order claims to be binding, hence objective, by dint of having instituted or being capable of instituting relations of reciprocity between the members of the collective; but this claim has a blind spot that cannot be suspended by reciprocity. To the contrary: this blind spot is the condition of possibility of reciprocity.

Theories of *mutual* recognition are, in my view, incapable of either adequately conceptualizing or dealing with this blind spot. Nor, as a result, can they deal with a-legality and the experience of singularity to which it gives rise. But this does not entail that we must discard the concept of *recognition*, lock, stock and barrel. Instead, what is required is to emphasize the *asymmetrical* character of recognition. Theories of mutual recognition, as we have seen, assume that recognition involves including the other in ever more general relations of politico-legal reciprocity because boundaries include what they exclude. Hence, struggles for recognition aim to transform misrecognition of the other into the other’s recognition by way of a dialectic between the general and the particular, leading to an ever more inclusive “we.” Like theories of mutual recognition, the alternative I am proposing takes its point of departure in a struggle for recognition, whereby a collective must respond to claims that its legal order violates the identity of the other. Yet by emphasizing the asymmetrical character of this struggle, a more complex reconstruction thereof is possible: the other’s *challenge* is asymmetrical because it is not merely a claim to inclusion in relations of politico-legal reciprocity as a way of redressing the violation of its identity; the *response* of the polity is asymmetrical because it frames the challenge of the other in ways that render it amenable to a response in the terms of (transformed) politico-legal reciprocity available to the polity. Acts of recognition not only include what they exclude but also exclude what they include. Hence, recognition of the other, through (transformed) relations of politico-legal reciprocity, is also always, to a lesser or greater extent, a *mis*recognition of the other, precisely *because* the other is included in (transformed) relations of reciprocity.²³

How, then, ought a collective to deal with a-legality? In particular, how concretely ought a legal order to respond to the normative challenge raised by the singular if, as we have seen, it definitively eludes the changing scope of a general (constitutional) rule? If, as I am arguing, every legal collective has a blind spot that is constitutive for the possibility of constitutional reciprocity, then collectives ought to recognize that they have a normative blind spot which they can neither fully justify nor remove, and they ought to take this into account when responding to

²³ For a systematic discussion of this idea see Thomas Bedorf, *Verkennende Anerkennung: Über Identität und Politik* (Berlin: Suhrkamp, 2010) and Alexander García Düttmann, *Zwischen den Kulturen: Spannungen im Kampf um Anerkennung* (Frankfurt am Main: Suhrkamp, 1997).

a-legality. The normative content of this “ought” is, I submit, *collective self-restraint*. Most generally, collective self-restraint introduces a certain forbearance in qualifying acts as legal or illegal, constitutional or unconstitutional, such that the first-person plural perspective of a collective is not rendered absolute in the face of a-legality.

What I have in mind both draws on and subverts Carl Schmitt’s analysis of exceptional measures. For Schmitt, an “exception is what cannot be subsumed; it defines the general codification.”²⁴ As such, the exception calls forth an exceptional measure. A measure (*Maßnahme*) is not merely an amendment of a norm, in particular a constitutional norm; instead, it is a violation (*Durchbrechung*) of a legal norm in a specific sense of the term:

a statutory violation of the constitution does not alter the constitutional norm. Rather, it constitutes an individual order that deviates from the norm in a single instance while preserving the general validity of the norm in other cases . . . Such statutory violations of the constitution are in essence measures, not norms. Hence, they are not laws in the Rechtsstaat sense of the word . . .²⁵

I would like to defend the idea that the legal recognition of singularity, of what resists inclusion by way of a dialectic of the particular and the general, has the form of an exceptional measure. This is an *indirect* form of recognition, one that suspends or violates a (constitutional) norm, thereby recognizing something *as* something which definitively eludes the rule of law and its attendant forms of constitutional recognition. Notice that this is not an argument against the rule of law. My point is, instead, that if a constitution is the master rule that establishes how relations of reciprocity ought to be instituted in a collective, then the unconditional defense of the rule of law ends up concealing and suppressing the normative blind spot of a legal collective. Indeed, the *Quebec Secession Reference* shows beyond peradventure that the price to be paid for the constitutional empowerment of the members of a collective is a radical disempowerment in the form of a range of practical possibilities which are rendered impossible with the realm of practical possibilities opened up by that constitution. Constitutions empower *and* disempower.²⁶ For this reason, whereas liberal constitutionalism equates “lawlessness” with “arbitrariness,” I submit that lawlessness, in the form of an exceptional measure that responds to a-legality, is a way of countering the irreducible residue of arbitrariness which dwells in every constitution. More pointedly and perhaps paradoxically, lawlessness, when it takes on the form of collective self-restraint in the face of a-legality, is an integral part of the *authority* of law, not its negation. Indeed, collective self-restraint, in the form of the suspension or violation of constitutional norms, is the kind of responsibility by which a legal collective can take responsibility, albeit indirectly, for the non-reciprocal origin of constitutional reciprocity. Recognition, in my reading, is not merely an act of collective self-recognition, whereby the other is recognized as one of *us*, but also an act of collective self-restraint, by way of measures that seek to sustain rather than destroy the other as irreducibly *other*.

²⁴ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, MA: The MIT Press, 1985), 13 (translation altered).

²⁵ Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Seitzer (Durham, NC: Duke University Press, 2008), 154.

²⁶ See Hans Lindahl, “Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change,” in *Constellations* 22 (2015) 2, 1963-174.

Vulnerable Agency: Children’s Rights and the Law

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As scholars increasingly argue, we must no longer consider vulnerability and agency as opposed or mutually exclusive. We must also not imply that they attach to agents in the abstract, considered in themselves alone. Rather, vulnerability and agency are mutually entailing qualities of being human that are essentially interpersonal and that take on shape and reality only in concrete cultural and historical context and social relations; they are also the conditions of political personhood or citizenship, with the implication that persons of all ages and abilities are full, political subjects with full, agential human rights whose capacities must be promoted and whose vulnerabilities deserve protection. Given that liberal Enlightenment versions of political agency and rights have implied the rationality of the isolated, invulnerable, mature subject, and have conceived of others as subject only to “protection,” this new vision of the person destroys the liberal model of agency on which law, representation, and even international relations has been based. This at least partly explains the mismatch between current international labor standards—often enforced in treaties and trading relations—and the situations of children in poor countries. It also illuminates the systematic failure of “the liberal system” to protect the rights and welfare of persons whom the liberal system has declared “non-agents”: for protection without recognition of full agency and rights silences and excludes, especially when it comes without the resources actual protection demands. The paper approaches these arguments inductively, through the case of the Bolivian child labor law passed in 2014.

My History/Story with Kelly Gissendaner on Death row²⁷

Jürgen Moltmann

Translated from German by Jan Jans

After having been on death row for 18 years, on 30 September 2015 Kelly Gissendaner, was put to death by the State of Georgia in the USA, executed by lethal injection. During her execution, she was singing the hymn “Amazing grace...”

I will first tell you my history/story with her, next I will express my thoughts on guilt and penance/atonement, and at the end I will say something about the mystical spirituality of prison inmates.

1. Pen-palship with the death row inmate

I got to know Kelly Gissendaner by chance or providence, which is very much the same, in the year 2005. I gave lectures in Charlottesville, Va, and came across Jenny McBride in Charles Marsh’s Bonhoeffer House. She had just written an excellent dissertation on Bonhoeffer and was asking my advice about what to do after so many years of academics. My advice was: Go to the “Open Door Community” in Atlanta and work for a year with jobless and homeless people and with prisoners. I knew this Christian community since many years and was friends with the founders Murphy Davis and Ed Loring. Every time I went to Atlanta to lecture at Cancler School of Theology, Emory University, I also visited “the other America” at Ponce de Leon Street. Here, Jenny McBride entered the theological program for inmates of the seminaries and faculties in Atlanta. In addition to prison chaplains, there is a theological program for inmates, mostly in Biblical Studies and Pastoral Care. This serves the development of a Church behind barbed wire. Jenny McBride taught Bonhoeffer and Moltmann in a women’s prison. Kelly (Gissendaner) wrote a seminar paper on the ethics of Bonhoeffer and Jenny (McBride) sent it to me for assessment. I found it astonishingly good, comparable with a proseminar (undergrad) paper in Tübingen. Then Kelly asked if she could write to me, and I received her first letter. With this, a pen-palship began on theological themes and personal faith experiences. We have not been writing on her “case”: confessions belong to confession, not to letters. And for this, the prison chaplain was more appropriate than me in faraway Germany. I admired Kelly’s strong trust in God with such a stone of guilt on her shoulders. Apparently, she had fomented her friend to kill her husband. My interest was to educate her as a theological and pastoral care worker for her fellow prisoners. And indeed, she transformed from a bitter and self-centered human being to a compassionate and caring mother figure for her fellow inmates. She was called “Mother Kelly” and took care of prisoners suffering from nervous breakdowns and who were suicidal.

In October 2011, I was invited to speak at the Graduation Ceremony in Arrendale Women’s Prison. Ten inmates had finished the course work successfully and received a certificate just as in an American college. For the first time, I saw an American prison from the inside: no inhuman

²⁷ The German original has “Toteskandidatin”, a word for which there is no direct English equivalent. A literal translation would be “candidate for death”.

signs but no human signs either. The prison was surrounded by barbed wire of 3 meter high (about 10 ft) and guarded by watchtowers and dog lanes. In order to prevent friendships, the inmates are only allowed to shake hands for 30 seconds; during the night, they are counted twice; over the weekend, there is no hot meal; etc. Because it was a State Prison, the graduation ceremony began with “trooping the colors” and the US national anthem. Next I spoke about “the Church behind barbed wire” as I had experienced it as a prisoner of war in 1945-1948. And after this, Kelly Gissendaner spoke about what theology meant to her.

“From the start of the theology class I felt this hunger. Never have I had a hunger like this. I became hungry for theology. ... My reality is that I am the only female now on Georgia’s death row. Theology is about growing in truth. ... I have placed my hope in the God I know now, the God whose promises are made know to me in the whole story of the life, the death and the resurrection of Jesus Christ. ...

I implore you not to allow prison to rob you of your dream and vision nor your dignity or self-worth. ... Know that suffering can be redeemed. There is only one who can bring a clean thing out of something unclean, or turn tragedy into a triumph, and a loser into a winner-. When this miracle occurs ... our life is not wasted”.

For her theological examination, Kelly wrote a pious book, *The Journey of Hope in Faith*. She gave a copy to me when we were able after to ceremony to speak with each other for two hours in a room without door handles. She was allowed to have books in her death cell and so I sent her my English translations. And she made comments on what she did or did not understand. I have received about 30 letters from her. And of course, it was not just about theology ; also personal questions were raised about the destiny of her three children and the spirituality of convicts and especially those on death row.

Then came the end – or the beginning -. In December 2014, she was informed about the date of her execution: 25 February 2015, at 7.00 pm. I wrote her some words of consolation and sent her one of my handkerchiefs with the words: “And when the tears are coming, take my handkerchief”. She responded that this was the most heartfelt thing she had received during her 18 years in prison. Then came February 2015. The Board of Pardons and Paroles had ruled “clemency denied” because the family of the murdered man had demanded retribution and retributive justice. The children asked to at least let them their mother after they had already lost their father. The fellow inmates in Arrendale Prison testified that she was a person transformed and testified on the care which Kelly had given broadly. Even the prison wards made a petition on her behalf. All of this was in vain: rightly, the US Bible Belt has been named as “death-belt” and the state of Georgia emulates the State of Texas in the number of executions.

I myself was disappointed because I had hoped for her. Each day, I had prayed for her. I wrote a letter of consolation to prepare her spiritually for death and on February 25, I lighted a candle and prayed for her. The surprise came next morning. Overnight, there had been a snow storm in the state. She could not be transported to the men’s prison in Jackson where the facilities for execution are located. The execution was postponed to Monday, March 1. Again, I lighted a candle and prayed for Kelly. The next morning, I received the message that the execution had been postponed to an undetermined time: the lethal injection had been contaminated. Kelly wrote: “O God is so good, so good”. Twice she had received a so-called last meal – Hamburger with Coca Cola – and she had been waiting for her death in chains for four hours.

After this, an offensive of indignation began to change her death penalty into “life sentence”. My name was used to bring this case into the public forum and the *New York Times* published a good article: “A deathrow-inmate finds common grounds with theologians”. The *Süddeutsche Zeitung* put out the whole story on page 3 under the title “Die slowly” (*Stirb langsam*). Eben the *Schwäbische Tagblatt* [in Tübingen, Prof. Moltmann’s home) ran this story. In the USA, all the bishops and clergy protested in Atlanta. Pope Francis travelled through Mexico and the USA and spoke out against the death penalty; the Nuntius in Washington intervened at the very final day. On the Internet, a front of thousands was building against this execution. Also, the US criminal justice system was highlighted. In the southern states, women are more severely punished than men: in the case of Kelly she got the death sentence as being the so-called “instigator” - but the factual murdered will be released in 6 years, being sentenced to only 25 years. This may well go back to Eve, the seductress of that poor man Adam. The judge, who at that time sentenced Kelly Gissendaner, expressed openly his doubts about the past judgment. But the Board of Pardons and Parole merely heard all of these interventions and upheld 7 against 2 the judgment: “clemency denied”. They also did hear the children, but had the execution carried out one hour later. The children were not able to say good-bye to their mother. On 30 September 2015 at 11pm, Kelly Gissendaner was executed. During the execution she was singing out of the freedom of her faith:

“Amazing grace, how sweet the sound,
that saved a wretch like me.
I once was lost but now am found,
was blind but now I see”.

At the second verse, her voice failed; the deadly poison took effect.

At 10 October 2015, the United Church of Christ in Atlanta held a religious service “Celebrating the Life of Kelly Renee Gissendaner” at 47 green balloons were lifted, one for each year of her life.

“Kelly was a mother, a counselor, a student of theology, and most of all, a child of God. Like all of us, she was in the words of Martin Luther, both a sinner and a saint”.

2. Guilt and atonement

Newspapers usely entitled Kelly Gissendaner as “murderess”. Was she a murderess or did she instigate a murder? Does the murder of her husband 18 years ago belong to her being or to her having?

If the murder is part of her being [habitualized being], then since that moment she is always and everywhere a ‘murderess’. This act characterizes her whole person. Everybody has to treat her as a “murderess”. Everybody has to expect more murders from her, if she really is a “murderess”. A human whose being is characterized by murder, cannot be different from committing “murder”. The death penalty frees society from a “murderer” and frees him/herself from further crimes. A person who is a “murderer” must disappear, being made harmless and non-existent.

However, not every act of stealing is an act of kleptomania, and likewise, a murder is not necessarily a case of a continuous desire for murder. Therefore, a murder that someone has committed or has brought about does not belong to his/her being, but to his/her history. This is a part of his/her acts, which she has to carry with him/herself. However, one could object that once a person has been involved in a murder, this is now a real possibility for this person. The normal inhibition for killing has once been suspended - and could it not happen again? Such a person is in a special way in danger and can become dangerous again. Often, however, such a person is raising a special repugnance against this possibility which has become real: this should never happen again to me. In this way, the inhibition to kill becomes especially strong.

The weighty act stands in between having and being; this history characterizes the person because this person has made or lived through this history. This is the chance of conversion, which has also been named penance and which by Dostojewski in *Raskolnikoff* is named as “Resurrection and new life”.

In the confessio oris, the guilty one steps into the light of truth: s/he confesses him/herself guilty, s/he accuses him/herself. I am guilty. I am a murderer. This is what happened. It was me. S/he is not looking for pretexts or excuses in the particular circumstances in these events. S/he reveals him/herself. This means that any kind of dignity and self-esteem is getting lost – objectively. I accuse myself. At the same time, however, this person is going across him/herself and s/he becomes the subject of the accusation and the confession of guilt.

This is the situation in which the wording “Your sins have been forgiven” changes the whole person. S/he must live with the guilt, but it is a guilt forgiven by God. The guilty one is released from his/her guilt. The act retreats back from his/her being into the act. What is evil should not be removed from people who are good in themselves. This would mean an excuse. The guilty one has to be liberated from his/her guilt. By forgiveness, s/he dies from the claims of guilt and s/he is born anew in a new life. This is what during the Middle Ages was called contritio cordis, but it is not just remorse, it is also resurrection. The whore Sonja is reading the story of the resurrection of the deceased Lazarus to Raskolnikoff and goes with him to Siberia in order to resurrect with him in a new life. Kelly Gissendaner has confessed her guilt before the court. For many years, she has agonized with her own history until she did not recognize herself anymore in the way she had acted in the past. She wrote to the family of her husband and regretted her being a partner in crime. According to friends and old acquaintances, Kelly Gissendaner became a fully new and profoundly faithful person on death row. The Americans speak about a spiritual transformation: “Inmates who were placed on suicide [suicidal] [which] were often put near her because she was able to speak to them about faith and the sacredness of life”. In this way, in her lack of freedom she accomplished the third condition of reversal, the satisfactio operum.

My rejection of the death penalty goes back to experiences of the Nazi dictatorship. For anything or nothing, people were murdered by the death penalty. The German *Wehrmacht* put to death 21.000 soldiers; that is the number of two divisions. A democracy should not compete with a dictatorship in the number of executions. My reasons for the rejection are:

1. Since Jesus suffered from the Roman death penalty and was being resurrected by God, the death penalty is no longer a Christian option. Christ died “for the sins of the world”. We condemn the sin but love the sinner, because this is our Christian experience of God.
2. A democracy is “the government of the people, by the people and for the people” (A. Lincoln). The people are called to the commandment: “Thou shall not kill”. This also applies to the sovereignty of the people.
3. People can change. Nobody has to stay for the whole life a “murderer”, or “thief”, or “criminal”. In trusting God, for all and always there is hope for a new beginning of life, whatever how young or old she or he is.

3. The mystical spirituality of prisoners/inmates

The monk’s cell and the prison’s cell have a lot in common, and what is lived and experienced there, looks very much the same. After secularization in Europe, many abandoned monasteries were transformed into state prisons. One can see this at old prisons. What does happen there with human beings? What caught my eye is the external similarity with the mystical spirituality that came into being when I was asking myself which spirituality or which spiritual life convicts are developing in order to survive and find God.

When a person on death row – I am speaking about the USA – is brought to the prison, all personal belongings are taken from him/her. S/he received the prison uniform. S/he is isolated from all personal contacts and becomes lonely. S/he is robbed of his/her name, s/he becomes a number which is printed on the back. S/he is forced into life- long celibacy. In solitary confinement, s/he is convicted to silence, nobody speaks to him/her. Friendships in prison are prohibited. The prisoners are not allowed to shake hands for more than 30 seconds. The prisoners is no longer the master of his/her own life, s/he is subjected to the discipline of the prison. In the loneliness of the cell, s/he is thrown only onto God or the demons of his/her soul. The Korean poet Kim Chi-Ha, who spend 10 years in solitary confinement, told me: “After 5 years, one is becoming to get crazy – then the walls are moving”.

The mystical way always was a way of the soul remote from the world, in loneliness and in silence, in the stripping of all things and in the absence of all humane relationships. In the emptying out of all earthly things and the inner emptying of all spiritual things, the soul is looking for God and encounters “the dark night of the soul”. This has been described by John of the Cross, and the evangelical/protestant mystic Gerhard Tersteegen has described this “inward Christianity” in an inviting way: “Close down the doors of your senses/and look for God deep inside”.

Before the mystics, the martyrs stand, with whom the mystics are trying to identify. And before the martyrs stands the abandoned Christ of Gethsemane and the dying one on Golgotha. Erik Paterson pointed out the connection between the apostle and the martyr. What they have in common, is “the suffering of Christ”, in which the presence of the resurrected Christ is experienced. I have pointed out earlier this connection between mysticism and martyrdom in order to remove mysticism out of the modern touch of esoterism. Today, I am asking myself about the spirituality of deathrow inmates and those prisoners who are subjected to this mystical

discipline involuntarily. I lived in Nancy, France, in an abandoned Carmelite cloister and was pointed out the bars which were lowered behind the Carmelite sisters, never to be raised again. The spirituality which I have come to know from Kelly Gissendaner, a straightforward woman, exists first of all in external discipline:

1. Set fixed time for prayer by day and night and keep those.
2. Set in your cell fixed times for physical exercise; eutonic exercises are important for the soul.
3. Learn many Psalms and songs by heart and recite them for yourself or sing them.
4. Read daily a passage of the Bible.

Next, in the inner experience: give yourself and your inner history out of your own hand and have trust in God; he will visit you in your prison cell. Christ will set up his home in you cell and the Spirit of Life will conquer your thoughts of death.

Short Paper Abstracts

Ehe- und Familienrecht, moralische Diskurse und Gerechtigkeitskonzepte

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Die Entwicklung der deutschen Rechtsprechung im Ehe- und Familienrecht zeigt, dass sich das Ehe- und Familienrecht weg von identitätslogischen Bestimmungen und hin zum Vergleich von sozialen Verhältnissen führt.

Auf der Ebene der Moral und Ethik handelt es sich um den folgenden Wandel: Argumentationen darüber, was Familie ist und die sich aus einer (bestimmten) *Sexualmoral* ableitet, zentriert in der Bestimmung der Zeugung eines Kindes, wird ersetzt über eine Fürsorge-, Bindungs- und Verantwortungsethik. Diesem ethischen Ansatz folgen zunehmend auch Repräsentanten der evangelischen Kirche in Deutschland. Doch diese ethische Sichtweise scheint nicht ausreichend. Deren Intention, naturidentitätslogische Sichtweisen zu überwinden, verweist dennoch in die richtige Richtung.

So verweist die deutsche Rechtsentwicklung in eine deutlich andere Richtung. Hier wird wie gesagt *zunehmend* das eine Verhältnis – die Ehe – mit einem anderen Verhältnis verglichen – der eingetragenen Lebenspartnerschaft. Der Vergleichspunkt ist dabei nicht länger die praktizierte Sexualität der Partner und die „natürlichen“ Bedingungen für die Zeugung eines Kindes. Naturargumentationen werden *hingegen* ersetzt durch die Kriterien der praktizierten (paar-elterlichen) Sozialität.

Ein (familiales) Verhältnis mit einem anderen vergleichen? Dass das deutsche Recht heute diese Möglichkeit überhaupt zur Verfügung hat, hat eine historische Voraussetzung: die vielumstrittene rechtliche Konstruktion der eingetragenen Lebenspartnerschaft. Allein schon diese rechtliche Verifizierung einer gelebten menschlichen Praxis, die rechtlich betrachtet keinen Mangel verkörpert, das das Recht als Recht betrifft, muss zum Überdenken von moralischen Vorstellungen führen, soll Rechtstaatlichkeit nicht als Abnorm zum Moralischen, sondern als normativitätsstiftend für Moralisches verstanden werden.

Ein Verhältnis mit einem anderen vergleichen als Überwindung von Naturidentitätslogiken: Also Aufgabe des Rechts? Sogar Einspruch des Rechts (und der Rechtstaatlichkeit) gegen falsche, wenigstens unzureichende moralische Vorstellungen?

Was ethische Konzepte betrifft, so landet man beim antiken Verständnis von *mores* und *ethicos* eines Platon und vielleicht sogar eines Aristoteles bei der Kritik an Identitätslogiken. Gerade Platon argumentiert gegen eine jegliche Naturvorstellung, Aristoteles hält dies zwar nur bedingt durch. Dennoch, Gerechtigkeit kann als wesentliche kritische ethische Größe gegenüber Naturidentitätsargumentationen stark gemacht werden. Indem das Konzept der Gerechtigkeit entsprechend profiliert wird, wozu die Entwicklung der deutschen Rechtsprechung aufgegriffen werden kann, können beide in einem hermeneutischen Zirkel weiterentwickelt werden. Zu profilieren ist, wie eine solche Konstellation geschärft werden kann, so dass Ethikdiskurse,

Gerechtigkeitsdiskurse und Rechtsdiskurse einer gemeinsamen metatheoretischen Diskussion folgen können.

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Legitimacy, Authority, Reasons, and International Norms

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International Law presents national legal system with new challenges, towards both its authority and legitimacy. Yet these questions are not as straight-forward as might first appear, especially in light of the specific particularities which the international legal order exhibits. First of all, in Hartian terms, the international community seems to have "law, but not a legal system"¹; it portrays/contains legitimate binding obligations, yet we cannot exactly understand/study it in the same way we understand/study national systems. Within states we are used to this "luxury" - this unity and systemization - which the rule of recognition allows for us². We are used to taking everything which is officially designated as "law" in an "all or nothing" basis; we are used to recognizing valid law through someone's "say so", through its "source" and its "pedigree" within the unbroken chain of rules - to the basic rule (of recognition).

In lack of an international rule of recognition (and an international authority to accompany it) international law, inescapably, lacks this systemization, this descriptive unity which we use to understand domestic legal norms³; this presents obstacles to its understanding and, yet, new opportunities. This "all or nothing" basis disappears, and international law becomes abstract international norms/obligations or at least "sets" of them. This allows for more flexibility and *choice*, which is not possible within states. In Razian terms (using his legitimate authority conception) authoritative norms preempt even when not reflected/deliberated upon a correct balance of legitimate reasons⁴. This brings us to the second peculiarity of international law.

The Razian legitimate authority conception exhibits clearly the vertical relationship between authority and subject; the directives are created and applied vertically to (independently of) the subject - even if they are decided according to reasons which apply to subjects independently of the authority which decides upon them. Within the international community this vertical relationship collapses into a horizontal one; since, according to the traditional Westphalian conception of international law, states are both the (main) legislators and subjects. Although, through this "state consent" model the legality of international norms (at least domestically) inevitably depends upon the discretion of state officials; yet its "legitimacy" might not.

International norms, if legitimate, will stand for years to come and will be inherited by both the subjects of state authority, future authorities and generations to come. It is exactly this fact which raises anew the question of legitimacy of legal norms, this time from the international context - which in turn legitimizes the national one. As such, we cannot base the legitimacy of international norms using reasons which apply to passing/temporary authorities/governments. The reasons

¹ M.Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A Hart", (2011)

² Hart, H. L. A. *The Concept of Law*. Oxford: Clarendon, 1961. Print; Chapter X

³ This was also recognized in Eric Posner, "Do States Have a Moral Obligation to Obey International Law?," 55 *Stanford Law Review* 1901 (2003)

⁴ Raz, Joseph. *The Morality of Freedom*. Oxford: Clarendon, 1986

which legitimize international norms must run deeper than that. From this perspective, it seems fruitful to examine anew the relationship of authority between officials and subjects⁵.

The state is an unavoidable actor within the international scheme, yet any (legitimate) authority it holds internationally it must still derive from the subjects which it represents, or the reasons which apply to them independently; perhaps we can work out the legitimacy of international norms through the existing relationship of authority which exists within the state. Raz's service conception provides a very useful instrument to understand this relationship through; the reasons which legitimize domestic norms could be the same reasons which legitimize international norms; and when state officials are correctly recognizing or refusing to recognize international norms, they could be argued as responding to moral obligations they owe their own subjects, primarily, and subjects of the international community in general.

Raz's service conception cannot be recreated internationally by forgetting the existing domestic relationship⁶. As such the existing national model needs to be extended to account for international norms⁷. Under this extension it seems possible to suggest that there is a moral obligation to follow (an) international norm(s) under three headings. When: 1) they contain directives which are reflected upon a correct balance of (dependent) reasons ; 2) reliance upon certain international norms, mechanisms and schemes equip state authorities better to respond to reasons which exist within the state; and 3) it falls within the obligation to support "just institutions" (which subject hold individually and, as such, is inherited by state authorities).

From this perspective, although international norms do indeed require some sort of state recognition in order to obtain legality, this recognition can only be a product of deliberation. Yet this deliberation, since it is done through a representative capacity, and upon dependent reasons requires the representative state authorities to act within a morally (and in extension politically) correct manner. This correct manner, might certainly be difficult to define, but it includes at minimum dependent reasons. This dictates that any state consent or denial must be a reasoned one, justified upon reasons which apply independently to subjects, real people. This approach does not prescribe results, but a certain type of deliberation within state-actors; a meaningful conversation and debate using dependent reasons; transparency. The further question is in what manner such actions can and ought to be organized in. .

⁵ Kumm attempts something similar from a constitutionalist perspective, see Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", *European Journal of International Law*, 2004

⁶ Tasioulas in ch. 2 of their book does exactly this. See Besson and Tasioulas, "The Philosophy of International Law" (2010) Oxford

⁷ Besson in her article extended Raz's conception in a more fruitful manner in Besson, S., "The Authority of International Law – Lifting the State Veil", *Sydney Law Review* [Vol. 31:343 2009]

Ethical Aberrations and Dystopian Justice: Reflections on Law and Morality in India

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There is a strong consensus among scholars and commentators on Indian affairs that the justice system in India is on the verge of collapse. Judges of the Supreme Court have also bemoaned the parlous plight of the judiciary and warned that it could lead to chaos. Scant respect for the rule of law is a ubiquitous phenomenon. The only time the law acquires sanctity is when one is trying to vindicate one's rights. On all other occasions, it is viewed as an impediment that must be circumvented. Violating the law and dodging the consequences, though legal transgressions, evoke social admiration. Defying the law is a low risk-high return activity; one that enhances one's social standing and begets recognition. The upshot is that virtually nothing is sacrosanct in India. Almost everything can be manipulated, fudged, misrepresented or made to disappear. School transcripts, land records, official documents, affidavits, court papers, legally established procedures, constitutionally guaranteed rights – nothing matters. Normlessness rules. India, as Galbraith once remarked, is 'a functioning anarchy.'

The grave anomalies of the justice system have garnered significant scholarly attention. Academics have critiqued endemic delays, caste based nepotism, lack of access to the courts, the prohibitive cost of litigation, the chicanery of lawyers, the pervasive skullduggery of the system, and language barriers. They have explained how these baneful trends add up to a dystopian dispensation. Others have zeroed in on more serious defects such as the lax enforcement of court orders, the corruption of the judges, prosecutorial misconduct, tampering of evidence and the intimidation of witnesses.

In the recent decades, the administration of justice has developed more anomic and aberrant features which could catalyze the subversion of the entire system. Vigilantism is rearing its ugly head everywhere. Vigilante justice is perceived as quick, fair, and prompt. Likewise, kangaroo courts, mostly caste based entities like the *Khap panchayats*, have sprung up to purvey medieval 'justice' whose touchstone is fealty to ascribed identities like caste, clan, and ethnicity. The mainstream courts are helpless. They are backlogged by millions of cases, hamstrung by a severe shortage of judges, and rendered ineffective by a recalcitrant state which perfunctorily upholds the law. Besides, the courts are plagued by judicial activism and inconsistent rulings, often driven by the ideological predilections of the judges.

Going beyond the apparent lacunae of law enforcement, I argue as follows. First, an inchoate justice system in a postcolonial country like India marked by severe inequality, social cleavages, sclerotic institutions, a soft state, low levels of human development and literacy, a society caught in a painful, uneven transition from feudalism to capitalism is bound to be blighted by its grotesque milieu.

Second, the incongruities of the system spring fundamentally from the profound disjuncture between the prevalent malformed social mores, twisted morality, and deviant ethical compass of the people and the demands of an inclusive, egalitarian system. As Durkheim stated: ‘Where mores are sufficient, laws are unnecessary; where mores are insufficient, laws are unenforceable.’ Several features of mainstream Hinduism, the religion of the majority of Indians - such as a rigid, stultifying system of caste based stratification, the notion of Karma, religiously sanctioned discrimination, in-built biases against women, minorities, and the lower castes – militate against the evolution of nuanced sensibilities of fairness, equity, and social inclusion. For centuries, India practiced untouchability and social exclusion based on the accident of birth. The idea that people get just desserts based on their deeds in previous births has burrowed deep into the Indian consciousness. What India lacks is a culture of equity and freedom from the vice-like grip of injunctions against social solidarity. This explains the yawning trust deficit in contemporary India which manifests in a mad scramble for resources, power, and privileges.

Third, I posit that resolving the absurdities of the justice system requires a systematic interrogation of the philosophical, moral, and social underpinnings of its culture and religion. Just as critical is fostering the ethos of wholesome ethical standards which segue into the imperatives of a modern, democratic society. Among other things, it involves reinstating affirmative communitarian values such as social accord and non-discrimination. Furthermore, the notion that the law is a moral enterprise, one that is committed to human flourishing must be strongly underscored (Araujo, 2014).

Fourth, following Shapiro’s *Planning Theory of Law*, I maintain that building the edifice of law involves two types of activities: social planning and instituting legal norms (Shapiro, 2011). The objective of this project is ‘to remedy the moral deficiencies of the circumstances of legality’ and to create legal norms that are part of ‘a shared plan’ of justice (Plunkett, 2013). India has a robust plan in the form of a progressive Constitution. Two things require urgent intervention: first, the Indian state has to evolve a common ethical consensus regarding the values enshrined in the Constitution; and, second, it must actuate this agreement through solid institutional mechanisms. This mammoth undertaking is the unfinished part of the noble task of nation-building in India.

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Borders, Culture, and Belonging

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In this paper I offer a perspective on the ethical choices presented by the current difficulties facing Europe, particularly in relation to what has been described as border anxiety. The unprecedented movement of people has attracted two main responses. A core issue for both is the Schengen principle of open borders, at first popular, but now under question, and opinion is split between those who believe that the sheer weight of numbers of would-be migrants requires the reintroduction of strictly controlled frontiers, and those who demand a prompt and sympathetic response to the plight of refugees from war-torn countries. Supporters of these two conflicting positions are reluctant to compromise. The latter regard the moral commitment to help migrants, who might need food, housing, or medical care, as a human rights issue and, as such, an overriding responsibility of more fortunate countries. The former point to the practical problems resulting from unchecked immigration and consequent population increase in host countries. While accepting that decisions made here are not morally neutral, they argue that ethics also requires that sympathy for some must be balanced by recognition of the needs and existing rights of others. These two positions, however, do not constitute the sum of the moral debate which must take account of matters of culture and identity, partiality and preference, and also of some rather more arcane questions about the ethics of ownership, the notion of belonging, and the legitimacy of preferring your 'own', whether at a global, national, or personal level. These are matters that are essentially bound up with the question of who 'belongs' to a country and they raise further challenges involving both multiculturalism and religion. In doing so, they re-open an older and more familiar philosophical debate in which a duty to help those for whom you have special responsibility, or with whom you have a special relationship, is set against principles of equality and non-discrimination. The complexity of this debate and its internal paradoxes throw light on some contemporary concerns about the threat the current situation may pose to Europe's own historic culture and identity..

The Call for Proximity: Towards a Phenomenology of Human Rights

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The concept of human rights is increasingly accepted around the globe, and yet the question of their justification remains open. In liberal political theory, human rights are based on the dignity and autonomy of the subject, that is, the capacity to decide upon morally acceptable laws for oneself. In the posterity of Kant, “the categorical imperative would be the ultimate principle of the rights of man” as “reason yielding to reason” (Levinas 1998, 157).

According to the French philosopher Emmanuel Levinas, such a reliance on reason and knowledge must be questioned. For Levinas, morality based on reason does not capture the “childish virtue” of goodness, which is anarchical and prior to all abstraction. Such irreducible goodness is unthinkable without the irreducible alterity of the other. I am responsible for the other, I cannot do any good but for her. Sensibility towards the other precedes any formal universality. I experience human rights as “a right of the other man above all”, as “goodness for the first one who happens to come along” (158). It is not the rational sameness of the other that gives her a human right, but her irreducible alterity that allows for and, in fact, commands an ethical obligation to respect her right as a human being.

For Levinas as well as for Kant, human rights are essentially related to peace. As the argument goes in Kant’s “Perpetual Peace”, if the rights of man are respected on all levels, peace will follow necessarily. In his essay on “Peace and Proximity”, Levinas agrees that there is an intrinsic relation between peace and ethics. However, he questions the Kantian notion of peace. According to Levinas, peace cannot only be a common adherence to a universal principle. He calls this “the bourgeois peace of the man who is at home behind closed doors, rejecting that which, being exterior, negates him” (136).

Instead, he insists that my relation to the uncontrollable exteriority gives me my obligation as an ethical subject. The other, infinitely Other and close at the same time, calls for my proximity. Proximity is, then, not only a geographical but an ethical concept. It states the very paradox of an inexplicable and nevertheless infinite responsibility. “Proximity as the impossible assumption of difference, impossible definition, impossible integration. Proximity as impossible appearance. But proximity!” (138)

While Levinas criticizes Kant with respect to the abstract universality of reason, his account of a pre-political and alterity-based account of human rights needs to give an answer to the requirement of universality. If human rights are not valid for everyone and everywhere, they give up their essential characteristic. This tension is inherent in Levinas’ account of human rights. Yet, if the notion of universality is understood not as a general form, but becomes itself part of an ethical obligation, Levinas’ account does not fall behind the concept of universality. Rather, it can be read as the attempt to reverse universality into an ethical and not a formal notion. What I ought to do is

always yet to be determined by the ethical command of the other. The proximity of the other bears a concrete “‘difficult universality’ of the face-to-face” (Cohen 2007), which exists prior to the formal and abstract universality of reason. In this understanding, human rights are essentially precarious, but it is exactly this precariousness, this weakness of the other, which commands me to subscribe unconditionally to her right and commands me to be the guarantor of their universality. In this paper, Levinas’ ethics of alterity will be presented as a questioning of the widely assumed reading of Kantian ethics according to which Kant is the spokesperson of the modern autonomous subject. In a first part, Levinas’ account of anarchy and substitution is developed against the foil of a Kantian understanding of autonomy. According to Levinas, ethics cannot be founded on a principle but on an anarchical connection to the good, which is prior to reason. In a second part, the question of universality in Levinas’ alterity-based account of human rights will be addressed. The other demands to grant her right and I constantly need to universalize my responsibility in response to the other’s call.

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The “I” as a Symbol and a Philosophical Reflection on the Rejection

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The paper aims at providing a new reading of the contemporary ontology as a re-interpretation of the existential condition of the I.

According to Levinas in front of the I there is the Face. The relationship is not symmetric but asymmetric, it is the responsibility of the I to take care of the Other. The Face to Face is where the philosophical discourse starts. In other words, if I am a being I am one of the other persons, but I am in the first instance the I, who lives in This world. The Face in front of me reminds me of an ethical imperative and a discourse on justice, namely to take care of the Other, the Other insofar as Other, as a being and not as the other person. For this reason, the Other is not simply a means, but it is part of the reality, which becomes intelligible through this dual relationship.

It is no more the philosophical question on the ontology of the being insofar as a being, but it is the encounter of the Other that forms the ontology for the questioning of the I. In other words, the Face reminds me of my ethical and moral obligation to not ignore the Other. To help him. To sustain him. To not let him alone. It is not the categorical imperative of Kant as a distinction of subject and object, and it is not the reunion of both of them into the Absolute or Idea of Hegel the starting point of the contemporary philosophy. The Face and the relationship between me, the I and the Face shapes the dialogic argumentation of the contemporary ontology. Nonetheless, the dual relationship between the I and the Face of the Other is so powerful that also a Negation of the Other is still a recognition of its existence. Nonetheless, this particular encounter can be interrupted by experiencing the destruction of the Other, of this particular being through his Rejection. Indeed, the paper is showing as the Rejection of the Other is not merely a Negation, but represents the new condition to start a philosophical discourse.

In this light, the destruction of the Other by its Rejection shifts the discourse on the same disappearance of the I. Since that Rejection This world is no more intelligible. There is no more a Face in front of the I, it has been rejected and the philosophical discourse has been shifted to a superior stage or feeling as sympathy or compassion (from ancient Greek *συμπάθεια* – to share the feeling with..., or Latin *cum patior* – I suffer with). Nonetheless, these words are not used with the same meaning of Schopenhauer where the compassion is the love as a justification of the observance of a moral rule, as opposed to the Kantian categorical imperative of the moral law, which is inside each being (the starry sky above and the moral law within). Therefore, at a first stage the compassion or the sympathy is the only possible status that the I can perceive in front of the disappearance of the Other by virtue of its destruction or Rejection. It is the only perceivable feeling of the intangible disappearance of the Other due to its Rejection.

Only in this way the I, that particular I can start to reflect and to share the pathos of the Other. Indeed, the sharing of the pathos is more than an ethical imperative or recognition/negation of the Face. The same Rejection can be identified in many other circumstances of the reality today such as the possible Rejection of Muslims in America, the Rejection of Syrian refugees, the Rejection

of asylum seekers in UK, the Rejection of applicants in job interviews due to the current financial crisis and crisis of employment, the Rejection of the legality of same sex unions etc.

In other words, it is possible to speak about the Other today only through a re-thinking of the ontology of the I because of this universal Rejection. When the Other has been destructed because of its Rejection, this status can take many forms such as the humiliation, the abandon or even its murdering, then the I starts to discover himself as a symbol (from ancient Greek the prefix σὺμ – together, with the ancient Greek verb βάλλω – to put, literally it means to join together, to fasten together). It can be argued, therefore, that the Rejection of the Other is currently the new condition for an ontological re-configuration of the I as a being in terms of a Symbol. In this light, the perceivable feeling of the intangible produced by the sympathy or compassion can allow the I to become a Symbol and to restore justice and morality.

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The Law and the Creation of Interreligious Space: The Gifts and Challenges of France's Laïcité in the Work of Building Bridges Across Boundaries of Religio-Cultural Difference in the European Union

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Ratified in 1905 under the Third Republic, France's law of Separation of the Churches and the State codified three principles: the neutrality of the State regarding religion, the freedom of religious exercise, and the establishment of public powers regarding the Church. While some in France who identify themselves as practitioners of a religious tradition point to what they view as governmental overreach regarding the state's regulation of religion under laïcité, others whose work focusses on forging deeper alliances among diverse religious and secular communities praise its advantages. Still others argue that the law defining laïcité is applied unevenly, and in some cases is used to affirm the hegemony of normative French religio-cultural traditions.

As the European Union grapples with the long-term implications of the current influx of immigrants from non-Christian cultures, the need for practical tools to promote cooperation and diffuse increasing tensions across boundaries of difference is becoming more apparent. This is particularly true regarding the current state of relations among French Jews, Christians, Muslims and Atheists – relations which have deteriorated not only in the wake of the attacks of November 2015 and on the offices of Charlie Hebdo, but also with the rise of nationalist sentiments whose proponents call into question the legitimacy of the European Union itself.

In light of these developments, this paper will pose the following three core questions. What could be the role of laïcité in promoting moral claims that could inform a new lived out ethic of engaged religious pluralism, one that equally honors the contributions to both French and greater European life and culture of Judaism, Christianity, Islam and Atheism? At the same time, to what degree have transnational ethical discourses – both explicitly religious and profoundly secular - already served to create the groundwork for an ethic of interreligious community which could be effectively applied in the context of the EU? In addition, how might the ethos of the law of laïcité, which equally privileges the importance of secular public space and religious private space, potentially contribute to a 21st century European ethic of sustainable religious and cultural pluralism beyond the boundaries of France?

This paper emerges from my ongoing work in Paris, where I am in the process of writing a book and refining a program I created for students from my university, whose aim is to examine Abrahamic Paris and interreligious engagement through the lens of four living communities: Union Libéral Israélite de France (Copernic Synagogue), Église Saint-Merry and its Centre Pastoral Halles-Beaubourg, La Grande Mosquée de Paris, and a constellation of Atheist thinkers and activists who are making significant contributions to building bridges among communities of diverse religious and secular identities. The questions my research and program invites our students and those who act as our teachers in Paris to consider include the following: How have the historical circumstances and narratives that have influenced

Judaism, Christianity, Islam and Atheism in France served to inform the way these traditions are understood and practiced in 21st century Paris? What are the requirements for building ethical, sustainable bridges among individuals and communities associated with Judaism, Christianity, Islam and Atheism in the French context, and what are the positive roles laïcité can play in achieving this goal? What unique insights regarding the requirements of building such bridges do those with religious and secular identities connected to Judaism, Christianity, Islam and Atheism have to offer, and in what regard are these insights drawn directly from the moral claims associated with these four traditions? How does a legal commitment to secular culture and secular space such as those found in modern France help and hinder such work? These questions are framed by the assertion that the challenges faced by the people of Paris are emblematic of the circumstances many other EU countries are currently facing or will likely face in the near future.

To this end, this paper's intention is to present both an ethical reflection and a report from the field, while inviting others to ask how similar circumstances are being addressed in their own countries and whether or not an adaptation of laïcité could prove useful in their respective contexts. At the same time, I want to address the observations of Pankaj Mishra, the Indian intellectual whose reflections on secular Europe's encounter with religion, the "Other" and Islam in particular necessitate what he describes as the "need for a new Enlightenment," one which features a new commitment to rigorous ethical self-criticism. While Mishra's reflections are ostensibly framed in the aftermath of the Charlie Hebdo attacks, they provide a compelling meta-narrative – one which goes well beyond the headlines, while interrogating popular assumptions about the role and efficacy of normative theological and secular intellectual frameworks for building community across boundaries of difference.

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Sexual Violence and Communities of Trauma on American College Campuses: Challenges and Possibilities for Christian Ethics

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The silence surrounding sexual violence on college campuses is a theological and public health issue that impacts the entire community. Drawing upon interdisciplinary sources from theological ethics, forensic nursing and psychology, this paper will take a closer look at the “knotted” relationship between mental health and sexual violence as it appears at religiously-affiliated colleges in the United States. Implications for Christian ethics will be explored.

In 2011, the Obama-Biden administration highlighted the issue of sexual assault on college campuses with an expanded version of Title IX (1972). While this bi-partisan effort brought necessary attention to a social problem and public health issue that is often disregarded and shrouded in silence and shame, its implementation presents practical and theoretical challenges for many religiously-affiliated institutions of higher education. Donna Freitas explains:

Questions arise about how to handle victims and alleged perpetrators, how to involve (or not) the police, and how and when to educate students around sexual assault. At religiously-affiliated colleges these questions can be even more complicated, especially if the institution is heavily invested in proving to itself and the public that sex doesn’t happen on its campus. (2015, 256-7). Religiously-affiliated schools for reasons ranging from concerns over enrollment to discomfort discussing sexuality and gender among faculty and administration.

Yet, college students are not talking either. Despite its presence, sexual assault is seriously underreported. This is often due to pressure from peers, embarrassment, self-blame, fear of others finding out, lack of support from the university and health services, and other factors. Irrespective of reporting, sexual assault can have lasting health consequences, many of which manifest in mental health issues. This cycle of violence-silence-violence (and lack of care) has consequences not only for victim-survivors, but also for the entire community. As I will argue, this cycle creates communities marked by fear, mistrust, and betrayal. Drawing upon interdisciplinary sources, this paper will begin to identify both the challenges this issue presents and the possibilities for healing.

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The Ethics of Democratic Conflict and the Transgression of Politico-Legal Boundaries. A Phenomenological Itinerary from Antagonism to Natality and A-Legality

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Keywords: ethics of democratic conflict, politico-legal boundaries, Waldenfels, Mouffe, Schmitt, Arendt, Lindahl.

Holding onto the paradigmatic distinction proposed by the German phenomenologist Bernhard Waldenfels between a radical and an absolute form of political contingency, this paper seeks to show its structural relevance and the unsettling consequences of its oversight especially when searching for an adequate model for seizing the transgression of politico-legal orders in a democracy-based ethical perspective.

In line with this basic assumption, through an analysis deploying a thorough confrontation with Chantal Mouffe's influential political theory, I will argue that an apt form of radical democratic contingency, conflict and challenge cannot be seized in her agonistic design of politics based on the appropriation of Schmitt's absolutistic model of antagonism, but rather in a configuration of politico-legal transgression which looks much closer at alternative forms which can thoroughly express extremely enhanced articulations of conflict and transformative impulses without having to decay into exorbitant figurations. As I will show in the last section of the paper a good candidate for such a scope can be traced by combining two trajectories of political alteration, one inspired by Hannah Arendt's notion of natality, the other drawing on Hans Lindahl's insights on a-legality. Given this general trajectory, the paper will more specifically fall into three parts.

The first concentrates on what is to be capitalized by drawing on Mouffe's perspective. I will show here that Mouffe raises a major point that should be vigorously defended. It consists in her insistence on the fact that a radical democratic design of conflict demands eschewing an exodus from the extant polity and an absolute leap out of the modern institutional paradigm, proposals which have been insistently advocated by some currently influential theorists in the field of political activism (Hardt/Negri, Virno). For Mouffe, securing the possibility of radical democratic conflict requires looking more closely at what the modern democratic discourse already has on offer. Modern democracy entails, so Mouffe argues, the discovery of contingency and, consequently, the acceptance of plurality and conflict as its undeniable co-implication. As a result, the first part of my analysis, in convergence with Mouffe, will make explicit how the modern political paradigm is best able to frame the intimate connection between democracy and conflict in a radical form.

In the second part of my analysis, I will, however, diverge from Mouffe when examining in a deeper phenomenological way the sort of conflict that a democratic space and ethics explicitly demand. My disagreement will take the form of a critique drawing exactly on the aforementioned distinction between a radical and absolute design of contingency and conflict. I will argue that, in

order to adequately unfold the kind of conflict required by the contingency proper to democracy, one cannot follow her strategy of anchoring the configuration of agonistic conflict to Schmitt's design of antagonism. The point I will raise is that Schmitt's theory only accommodates an absolutistic configuration of conflict, thereby remaining irreducibly inadmissible for any radically contingency-based and jointly democratic understanding thereof. As a consequence, by keeping these two paradigmatically opposite forms of conflict connected, Mouffe, far from deepening the articulation of a democratic ethic of conflict, falls prey accentuating exactly the above illustrated ambivalence, by delivering a political discourse climaxing into two irreconcilable poles: one adhering to the condition of radical contingency proper to democracy, the other adhering to the Schmittian absolutistic design of politics.

A significant implication deriving from this alliance will be drawn in the third part of my analysis. In this concluding section I will show to which extent Mouffe's antagonistic-based model of agonistic conflict jeopardizes the delineation of a genuine appraisal of an ethic of transformative democratic conflict or democratic transgression of politico-legal boundaries. The point I will defend is that Mouffe, by placing exclusive weight to the moment of antagonism for the purpose of endorsing the ineradicability of conflict, not only transgresses the effective articulation of democratic conflict as such, but also misses the potentialities inherent in agonism itself. In fact, agonism, once freed from the bonds of antagonism, is best able to take up very promising and vibrant forms for democratic life – forms which can thoroughly express enhanced articulations of conflict and transformative impulses to politico-legal orders without having to decay into anti-democratic degenerations. As I will indicate, a good candidate for outlining such a form of heightened agonism can be traced by combining two trajectories of political alteration, one inspired by Arendt's notion of plurality and natality, the other drawing on Lindahl's phenomenological insights on the dynamic of a-legality.

Conclusively, by recurring to these dimensions of agonism free from the paradigmatic ballast of antagonism, an appropriate view of an ethic of a radically plural democratic space emerges. This configuration of conflict accommodates for politico-legal orders true and proper transformative mechanisms, on the one hand, and grants them a minimal condition of democratic articulation, on the other.

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Right to Life Includes Right to Die a Dignified Death: Public Opinion About Euthanasia In India

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The moral and ethical justifiability of euthanasia has been a highly debatable issue for the past few decades. The debate as to whether right to life includes the right to die a dignified death has infiltrated the boundaries of India as well. Even though the exact statistics on the number of euthanasia requests is not readily available, there have been numerous instances in India that have come up in news reports where people have demanded euthanasia (Satija, 2015; Mishra, 2015; HT Times, 2015). Public consciousness about euthanasia reached the pinnacle with the Aruna Shanbaug incident in 1973. Shanbaug, a nurse at KEM Hospital, Mumbai went into a persistent vegetative state when a sweeper sexually assaulted her. Even though the court in a landmark decision in 2011 went on to legalize passive euthanasia in certain instances, the judgement has been taken up for review by a Constitutional bench after a three judge bench (Common Cause vs Union of India, 2014) of the apex court held that the Shanbaug case was decided on the basis of an incorrect reading of the constitutional bench decision in Gian Kaur v. State of Punjab (Gian Kaur vs State of Punjab, 1996).

In 2008, a couple from Uttar Pradesh – Jeet Narayan and Prabhavati, sent a euthanasia plea to the President for four of their sons who were suffering from muscular dystrophy and paralysis (Deccan Herald, 2008). The main reason cited by the parents was their inability to pay such huge expenses for the medical treatment of their sons. In a developing country like India where a lot of people fall below the poverty line, expenses for healthcare come out as a major burden for poor families and this has made euthanasia requests very common.

An empirical study on understanding public opinion in India is administered. Based on literature review, a self-administered survey is formulated. The survey is administered on n= 7314 respondents from almost 15 states in India. The aim of the research is to assess the public attitude in India towards Euthanasia, the specific reasons and circumstances for which Euthanasia is favored or opposed. It is found that 59% of the total sample favored Euthanasia in some form: Passive Euthanasia, Active Euthanasia or Physician Assisted Euthanasia. The research gives an insight on varied reasons behind supporting Euthanasia: Vegetative State, Incurable disease, 90% paralysis, Affordability, Consent of the family. On the other hand, 41% of the respondents in the study do not support legalizing Euthanasia. The purpose of opposing Euthanasia is further examined which include Morality, Not a natural course of life, Social stigma attached to Euthanasia, Religious Sentiment, Social Stigma and Psychological impact on the family. It was also found that younger respondents, within the age limit of 18-30 years old were more likely to support dying with dignity than becoming dependent on the family, friends or relatives. The level of support among various subpopulations and understanding the perception, socio- psychological and attitudinal correlates of euthanasia in India.

It has been seen that countries that have legalized euthanasia are now facing the problem of too many people applying for euthanasia and terminating their lives (Battin, Heide, Ganzini, Wal and

Philipsen, 2007). There is also the fear of exploitation of the old and the poor people. Poor people who are dependent on their family or are considered to be an economic burden on the family will be forced to undergo euthanasia in case euthanasia is legalised. Furthermore, religion plays a very significant role in deciding the society's perception towards legalizing euthanasia (Suarez-Almazor, Newman, Hanson and Bruera, (2002). In a nation like India where the most followed religions are Hinduism and Islam, there is large-scale opposition to the idea of taking one's own life. The study delves into understanding position of Euthanasia among Indian respondents who belong to different religions: Hindu, Muslim, Christian, Sikh, Jain, and Buddhist along with their religious inclination. The moral argument of this research is to assess if it morally justified letting somebody die a slow and ugly death than to help him escape such misery. An effort is made to understand status of Euthanasia and the public opinion in Indian context. Based on our findings, we aim to offer a proposal for legislators and decision makers by examining current law of euthanasia in India.

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The Heard, the Lived, the Negotiated and the Enforced: Normative Reflections on Undercurrents in South Asian Judicial Systems

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The present paper examines the dynamics of undercurrents that are decisive both in formulating and implementing legal rules in the South Asian context, identifies possible intersystemic interactions that might generate crosscurrents, vindicates the problem of normative vacuum presently existing in judicial systems, and justifies the necessity of normative adjudication procedure. The major undercurrents discussed are: 1) the heard, which denotes oral and written traditions that involve sruti, smriti, and sabda, 2) the lived that signifies traditionally followed unique patterns of living that significantly determine the identity of a specific society, 3) politically negotiated policies that claim democratic justifications, and 4) legally enforced rules that guide judicial systems. South Asian democratic societies, which are collectivist in nature, are much swayed by these undercurrents and judicial systems are not resistant to this force. Given that legal rules are largely derived from oral and written traditions that represent the idea of good conceived by the dominant group, it is hard to presume that the rules will safeguard everyone's interests. Likewise, a major share of the laws that are enforced is the offshoot of political negotiations which may not necessarily take any recourse to truth contents and normative justifications. Some of these laws might introduce prescriptions that are counterintuitive and morally blameworthy. Keeping the generic and holistic frame aside, at times the laws adopt an intrusive strategy which dictates on almost all matters such as what one should eat, what to wear, and what faith one should follow. The paper takes this problem quite seriously in analyzing the normative concerns over disputed judicial rules that are recently enacted. Furthermore, paying attention to ethnic, political, and religious foundations of law and morality, the paper discusses three modes of interaction, such as, competition, coercion and collaboration (Wallace, 1966), and identifies the emergence of judicial and ethnic activism when collaboration is absent. Among other things, the paper argues that a major reason for pendency of legal suits and poor performance of judiciary is the unavailability of a collaborative environment, and it inevitably causes a huge cost. Performance of judiciary may be measured in consideration to its (1) independence, (2) efficiency, viz. explicitly referring to unreasonable delays and case backlogs (3) accessibility, (4) accountability, and (5) effectiveness, i.e. the degree to which both legislation and judicial decisions are actually enforced (Staats et al, 2005) and, as the paper vindicates, these virtues take us to normative considerations. Finally, the paper suggests that the turn to substantive normative foundations appears to be the only available means to improve performance of judicial systems and to ensure fairness in enforcing justice.

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(In)visible through the veil: re-thinking the secular and the religious subject

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The image of a silent Muslim woman under the shroud of a burqa has been one of the most recurrent during the ongoing Western ‘war for democracy’. The veil which, since the colonization period, has been a powerful symbol associated with the ‘backwardness’ of Muslim culture, is still one of the most debated issues when thinking about religious freedom. However, while in the last two centuries the meaning of the veil as a ‘sign of’ Muslim women’s oppression remained unchanged in Western culture, in Muslim majority societies veiling is an immanent and performative ever-changing phenomenon which takes different meanings, colors and forms in different cultural and historical contexts. I argue that it is exactly the operation of collapsing differences among Muslim women through the reading of veiling as a monolithic symbol of something intrinsically ‘other’ that nowadays reproduces neo-colonial thought.

This paper argues that western semiotic ideology, which give to images and signs a fixed meaning arbitrarily defined by social convention or by law, does not take into consideration the “affective and embodied practices through which a subject comes to relate to a particular sign”(Mahmood 2009, 841–2) and naturalizes and define the religious subject as an individual who simply submits him/herself to a set of recommendations based on general beliefs: in other words, secularism conceives religion as a simple belief, and so as a matter of personal choice. This understanding is strictly linked to the place of religions within the secular state and to the role of the law in regulating religious practices, such as the veil, in the public space. In this sense, secularism is not understood as the mere separation between temporal and spiritual power, but as the re-conceptualization of religious sensitivities and religious practices in the modern world (Mahmood 2009; Asad 2003): thus, while secular thought has come to define concepts of state, economy, religion and law, it simultaneously create a specific law and religious subject.

I consider this issue through the lenses of the passionate debate that the European legal decisions over the practice of veiling have developed in the last years which rely on the assumption that veiling is ‘irreconcilable with the principle of gender equality’ and thus ‘incompatible with Western democratic values’.

I draw on Mahmood’s study (2005) of ‘pious women’ to argue that non-liberal traditions have developed different understanding of religion and bodily practices: if, on the one hand, secular rationality defines religion (and religious signs/practices) as a ‘private matter’, then on the other ‘pietists women’ disclose a performative/affective understanding of (religious) bodily practices. Mahmood’s analysis is of particular interest as it reveals that what is often ignored is the way in which liberal thought defines and universalizes a specific Christian/liberal/secular rational based on very specific concepts of religion and, along with it, of women’s agency and freedom. I argue that these universal(ist) concepts are expressed in the juridical regulation of women’s bodies which reveals the inadequacy of western universal(ist) discourse over the notion of bodily practice, and

women's freedom and agency within non-liberal pluralistic contexts: by taking into consideration only a very liberal/secular understanding of religious practices and women's freedom and agency, not only European judges exclude different concepts of freedom and agency and different forms of 'humanity' (Esmeir 2012), but they also bring private sentiments into the public sphere. In the case, by defining the veil as a fixed 'religious symbol' in contrast with liberal values of gender equality, the secular state defines the proper place of religion and religious practices in the 'modern world'.

Thus, it is not through the analysis of women's freedom, but through the symbology conferred on the practice of veiling that the gender dimension of the problem can be unfolded. Drawing on Goodrich's study of the power of images (1995), and Asad's analysis of the secular (2006), I argue that the definition of veiling as a fixed 'symbol' in contrast with democratic values allows for an exercise of sovereignty aimed at maintaining the unity and homogeneity of a people: through the juridical regulation of symbols and images in the public sphere, the sovereign state gives to religious practices their proper place within secularized democracies. In this sense, as Mancini argues (2014), the regulation of (Muslim) women's attire can only 'defend' a very specific kind of democracy which is based on a form of 'substantial homogeneity', as the one described by Schmitt. It is in the name of an 'imagined' European homogeneity that "secularized religion and secularism are used in order to exclude the other and protect the culturally homogenous character of European societies that is perceived – and even explicitly described – as threatened by pluralism and globalization" (Mancini 2008, 2666).

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Different Paths to Justice

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We have the last decades seen many examples of claims for justice and reconciliation after war, oppression, racial discrimination and colonial trespasses. Even when peace is restored, the soars of previous injustices are still open and there is a need for both rectification and reconciliation. In South Africa a process of truth and reconciliation started after the end of apartheid, in former Yugoslavia the international Criminal Tribunal for the former Yugoslavia (ICTY) was established with the aim of prosecuting war criminals, in Argentina court trials against those responsible for atrocities and human rights violations during the military regime has so far led to the imprisonment of at least 600 persons, in South Korea a Truth and Reconciliation Commission has investigated war crimes during Japanese occupation and human rights violations in post-war South Korea, in Britain the government in 2013 publically apologised and rectified for human rights violations in the combat against the Mau Mau-movement in Kenya in the 1950s, and in 2013 the heads of the Caribbean states claimed rectification for slavery and the slave trade from the former slave-trading nations, just to mention a few examples.

In my presentation I first make some terminological clarifications. I then present some reasons for why rectification after war and injustices is important. In the next part I discuss some requirements for rectification and whether there is a cut-off date and finally reflect on the relation between rectification and reconciliation. How rectification and reconciliation are achieved are influenced by contextual factors, such as traditional ways to process justice and reconciliation. For example are the procedures of Rwandan Gacaca courts different from the ICTY, and the procedures for reconciliation practiced in Mozambique after the civil war in the 1980s goes back to local traditions of reconciliation. This fact raises the question of what is contextual and what is universal with respect to rectificatory justice and reconciliation.

In the discussion on historical justice the terms “rectificatory justice”, “corrective justice”, “reparatory justice”, “compensatory justice” and “restorative justice” are often used in the same or at least similar meanings. Further, in some cases of historical justice, like for example former Yugoslavia and Argentina, justice is done through court trials, i.e. “retributive justice”. The aim of this part is to clarify the meaning of the different terms used in the discussion.

What then is required for rectification? To start with, we have a situation when someone is harmed. According to Renée Hill, “compensatory justice” means that a harm is compensated, and the injured party is “made whole” implying that he or she is “...as well as before the transgression occurred” (Hill 2002, p. 398). No apology is needed. Hill’s perspective is strictly legal. If we look at rectification from a moral point of view Hill’s suggestion is too narrow. The previous harm was perhaps abusive, and resulted in lasting tensions and distrust between victims and perpetrators. To overcome the tensions something more than compensation is required. Rectification also requires that the perpetrator acknowledges and apologizes for the harm done.

Why then is acknowledgement and apology required for rectification? An apology is a performative; something happens when someone apologizes. When a perpetrator acknowledges and apologizes a past injustice, the victim is assured that the perpetrator is aware of what he or she has done, that he/she regrets it and is prepared to change his/her behaviour. Often acknowledgment and apology seems to be more important for victims than compensation. In the case of political rectification, acknowledgement might include truth commissions, memorials etc.

How is rectificatory justice related to retributive justice? Both rectificatory and retributive justice are back-ward looking in the sense that they refer to some previous harm. Rectificatory justice refers to a state of affairs; a previous harm is rectified. Retributive justice, on the other hand, refers to a person or group that deserves to be punished due to some harms committed. Retributive justice then means that a perpetrator is taken to court and penalized according to national or international law. However, there is often a link between retributive justice and rectificatory justice. Retribution is normally connected to some kind of rectificatory duties. For example, a perpetrator who is convicted can be obliged to compensate the victim.

Finally, I discuss the relation between justice and reconciliation. How are different forms of justice related to reconciliation? If both justice and reconciliation are valuable and final aims; what do they require and how are they related? Is perhaps retribution an obstacle to reconciliation or does reconciliation instead require that perpetrators are put on trial?

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Die ethische Praxis der Buße als Prüfstein für rechtliche Innovation

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Keywords: soziale Innovation, Buße, Rechtsentwicklung, Öffentlichkeit, Umkehr, Urteil, Bekenntnis, Krise, Sühne, Reue, Gewalt

Neben technischen Innovation ist seit einigen Jahren die soziale Innovation Gegenstand soziologischer Forschung (Howaldt 2014). Daneben gibt es Versuche zu sozialer Erneuerung und zu Reformen, die nicht die gewünschte Wirkung erzielen (zur Kritik des Reformprozesses „Kirche der Freiheit“ vgl. Karle 2010). In diesem Beitrag wird die ethische Praxis der Buße als Prüfstein vorgestellt, um soziale Innovationen auf ihre Wirksamkeit und Nachhaltigkeit hin zu überprüfen.

Das Potential der Buße zu rechtlicher Innovation hat die mediävistische Rechtsgeschichte herausgearbeitet (Trusen 1997). Im 4. Laterankonzil von 1215 entstand die Prozessform des Inquisitionsprozesses mit den wesentlichen Kennzeichen der Instruktions- und der Officialmaxime als rechtliche Innovation gegenüber dem frühmittelalterlichen Akkusationsverfahren. Kirchenrechtliche Untersuchungen (*inquisitiones*) von Amts wegen (*ex officio*) mit dem Ziel, durch Beweise die Wahrheit zu ermitteln, traten bei der Urteilsfindung an die Stelle des Leumundes und der Zahl der Parteigänger für eine Rechtsposition.

Die juristische Orientierung an einer objektiven Wahrheit geht an der Wende zum 2. Jtsd. aus der kirchlichen Bußpraxis hervor. Die spätere Kritik am Inquisitionsprozess bezieht sich auf die Praxis der Beweisführung mittels peinlicher Frage und Folter. Erst die Reformationszeit führt zu grundlegenden Änderungen: 1. Der Ewige Landfrieden 1495 richtet ein reichsweites Gerichtswesen mit Berufungsinstanzen ein, welches das kanonische Nebeneinander von *forum internum* und *forum externum* (Goering 2004) aufhebt. 2. Die grausamen Methoden mittelalterlicher Beweisführung werden erst Anfang des 17. Jhs. durch den Nachweis abgeschafft, dass Folter nicht der Wahrheitsfindung dient. Diese Einsicht wartet auch im 21. Jh. noch auf ihre Durchsetzung in manchen Verhörräumen.

Für die Rechtstheorie ergibt sich daraus die Schlussfolgerung, dass Strafrecht und -vollzug nicht allein der Herstellung und Aufrechterhaltung von öffentlicher Sicherheit und Ordnung dienen, sondern dass ihnen auch eine Aufgabe für die Möglichkeit zur Buße der Delinquenten innewohnt.

Die Buße ist jedoch nicht nur ein privates Phänomen. Auch ein post-säkularer Liberalismus kann nicht mehr exklusiv mit Religionen umgehen, sondern deren Perspektiven sind Teil des öffentlichen Aushandlungsprozesses liberaler Demokratien (Honnacker 2015). Die Umkehr (*metanoia*), von der die biblische Botschaft spricht, ist ein öffentliches Phänomen und kein Aushandlungsprozess zwischen Delinquent und Gefängnisverwaltung. Das Rechtsverfahren zielt auf die Veröffentlichung einer bisher verborgenen Schuld.

Öffentliche Verfahren haben zu gewährleisten, dass verborgenes Unrecht in angemessener Weise, insbesondere unter Wahrung des Schutzes der Persönlichkeitsrechte oder der öffentlichen

Sicherheit, bekannt werden. Dieser Begriff von Öffentlichkeit orientiert sich an der Aufgabe der Wahrheitsfindung im Unterschied zu einer „gemalten Öffentlichkeit“ (Iwand 1948). Das ethische Urteil bekommt unter Umständen den Charakter eines Bekenntnisses, das als Schuld- oder Glaubensbekenntnis sowohl begangenes Unrecht als auch die Möglichkeit zu einem Neuanfang festhält.

Die Möglichkeit eines neuen Anfangs nach einem Scheitern oder Versagen hatte Hannah Arendt als Pointe des Verzeihens herausgearbeitet (*Vita activa*). Die Perspektive der Hoffnung, dass nach einem Scheitern oder einem Bruch im Leben, ist eine begründete Hoffnung geknüpft, die sich von der Utopie unterscheidet (Sauter 1967).

Den Öffentlichkeitscharakter dieser Art von Umkehr hat in seinen Spätschriften Michel Foucault durch die Auseinandersetzung mit der frühchristlichen *parrhesia* herausgearbeitet, in der Manifestation einer Wahrheit über das Selbst ihren Ort findet (Foucault 1980). Judith Butler knüpft mit ihrer Kritik der ethischen Gewalt an, indem die Rechenschaft über das Selbst (*Giving Account of Oneself*) dazu beiträgt, die Brüche des Lebens narrativ zu verwinden und gleichzeitig aus den Zwängen moralischer Vorgaben und ethischer Gewalt zu befreien.

Jedes öffentliche Verfahren zur Aufdeckung von Unrecht, sei es ein Rechtsprozess oder eine Dokumentation des investigativen Journalismus oder eine medizinische Untersuchung, dient nicht nur der Umkehr von Individuen, sondern hat auch die Frage nach der Notwendigkeit systemisch-rechtlicher Innovation zu klären.

Damit aus einem Veränderungswunsch eine soziale Innovation werden kann, sind aus der ethischen Praxis der Buße folgende Schlüsse zu ziehen:

1. Auslöser der Buße ist eine *Krise*, die öffentlich festgestellt werden muss. Wer Reformvorschläge unterbreitet, muss auch benennen, welches Unrecht damit beseitigt werden soll.
2. Die Buße dient der *Überwindung von Gewalt* und widerspricht dem „Mythos der erlösenden Gewalt“ (W. Wink). Auch wenn z.B. für den Strafvollzug der Einsatz von Gewalt nötig wird, darf es dabei nur um einen instrumentellen Einsatz von Gewalt gehen (Arendt, *On Violence*). Gewalt wird im Sinne der Buße niemals zum Selbstzweck.
3. Ein wesentliches Moment der Buße ist die *Reue*, die auf die Einsicht zielt, dass auch das Rechtssystem mit Unrecht konstruiert sein kann. Der säkulare Staat braucht sich nicht vor der Umkehr zu fürchten, denn das biblische Zeugnis erzählt davon, dass selbst der allmächtige Gott umkehrt und Reue zeigt (Gen 6,5; Hos 11,8f. u.ö.).
4. Die ethische Praxis der Buße beruht auf einem *Urteil*, das als *Bekenntnis* einer verfassten Gruppe öffentlich wird. Darin manifestiert sich die Wahrheit über ein soziales Selbst.
5. Die Umkehr zu einem neuen Recht bedarf der *Sühne* als einer Praxis, in der die Geschichten der Opfer von Unrecht erzählt und weitergeführt werden (Espeel 2010).

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Abolishing Death Penalty in India: Public Opinion, Ethics, and the Right to Life

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Keywords: Death Penalty, Abolishment, Right to Life, Rehabilitation

There is a worldwide movement on abolishing Death Penalty. The present study attempts to understand the public perception about Death Penalty in India. In India, death penalty is awarded in rarest of rare cases.¹ The rarest of rare doctrine prevents the Indian Judiciary from giving Death Penalty to convicts for all crimes. Only in certain crimes where the gravity is such that Death Penalty is the only remedy and no other alternative seems fit as a punishment. The Indian Supreme Court has allowed the death penalty to be carried out in only 4 instances since 1995.²

Based on literature review, a self-administered survey was formulated and administered on 25210 respondents and it was found that 20% of the total respondents (n= 5047) supported abolishing death penalty in all its form. The survey had been carried out using a random sampling method. The survey was also done by means of a convenient sample where the data was collected based on the social contacts of the author.

The objective of the research is to examine:

- The purpose was to assess public attitude towards capital abolishment, the level of support among various subpopulation and understanding the reasons, socio- psychological, attitudinal and demographic correlates for abolishing death penalty in India.
- To examine the reasons behind supporting abolishment of death penalty by Indian respondents which includes: Violates right to life, Barbaric & Inhumane, Uneconomical, Not act as a deterrent, Irretrievable in nature, Acts against poor & socially vulnerable, reduced reformative opportunities.
- Assessing alternative forms of penalties if death penalty is to be abolished even for ‘worst of the worst’ crimes.

The results and findings from the research conducted shows that only 20% of the Indian population wants death penalty to be abolished. Logistic regression and association rule analysis revealed that generally people who supported abolishing death penalty tend to be males, young and middle-aged, lower and middle economic status, Muslim, professionals & businessmen. It was further revealed that 16% favor abolishing death penalty because it violates right to life and 23% believed that no person should be subjected to barbaric and inhumane treatment.

¹ Bachan Singh v. Union of India (1980), AIR 1980 SC 898

² Law Commission of India., (2014). Consultation Paper On Capital Punishment. Government of India.

This paper will look at the trend towards abolishing death penalty and give an analysis based on Right to life in Indian Perspective. It will trace the development of right to life and death penalty in India through the public opinion and Judgments of Indian Judiciary.

The perspective will be argued on the lines of Morality and Death penalty. It has been argued that taking away someone's life is immoral.³ Right to Life is a fundamental right of every human.⁴ and based on this many conventions and resolutions have been passed in United Nations. Death Penalty is considered a violation of a person's right to life and the right not to be subjected to cruel, inhumane, and degrading punishment.⁵ Despite the predominance of abolitionists in intellectual community, public support for the death penalty persists. The discussion critically reviews the impact of rehabilitation and reformation on crime and criminal justice, examines at length the questions concerning deterrence and morality of punishment.

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³ Nathanson, S. (2001). *An eye for an eye*. Lanham: Rowman & Littlefield.

⁴ Article 21 of Constitution of India, Article 6 of ICCPR, Universal Declaration on Human rights

⁵ International Bar Association, *The Death Penalty under International Law, A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty (2008)*. Retrieved from http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/death_penalty_resolution.aspx

Mercy and Justice: An Uncomfortable Pair in Penal Law

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Keywords: conflicts between ethics and laws; religion, theology and the law; reconciliation and reparations

Introduction

As Pope Francis proclaimed the Holy Year of Mercy, he stretched the relationship between justice and mercy as of “two dimensions of a single reality that unfolds progressively until it culminates in the fullness of love”¹. Yet by pointing out this relationship he admits the fact that both terms are spontaneously felt as a uncomfortable pair. Within this framework of questioning the relation of both terms I will put and defend the thesis that a penal law which is not based on mercy as ethical principle becomes injustice.

I first will put the question systematically starting by what penal law is about (1). Then, secondly, I try to put in evidence the emotional indications of experienced injustice and requested justice (2). Thirdly I clarify how ethics always focusses on future, which makes mercy to become a ethical principle (3). Finally I show the catholic canon law as a example of a on mercy based human penal law (4) and raise the question about religion as presumption for such a mercy based human penal law (5).

(1) What is penal law about?

The question raised by catholic and protestant ministers in service of prisoners in 1972-73 in Germany while expecting a reform of penal law has been put in a typical way by high court judge Ernst Benda and lawyer Eduard Naegeli². Benda represents the classical position of penal law being first of all an instrument of punishment, whenever it should be a multilateral instrument to serve other aimes as well. Naegeli is a protagonist of abolishment of the current penal law and votes in favor of a so called law of measures (Massnahmenrecht). The classical position says: punishment is necessary to react at non tolerable behaviour as far as it does harm other people, but the punishment has to be limited by the human dignity of the criminal, who as human being has the right of freedom. The new way of looking starts with the circumstances in which one person is harming the other, asking how this behaviour could have been possible and what to do to change the circumstances and prevent the criminal from repeating what he has done. This difference is based on what values are decisive in judging the seriousness of the crime, and this judgement has to do with the emotions caused by the crime. Which feelings arise at serious offences and what do they mean?

1 Pope Francis, *Misericordiae vultus*, 20.

2 S. die Diskussion in Balthasar Gareis/Eugen Wiesner (Hrsg.), *Hat Strafe Sinn?*, Freiburg-Basel-Wien 1974, 15-54.

(2) Justice fed by feelings?

Injustice first of all is a matter of feelings. People are hurt by the harm other persons are afflicting. The main feeling is to be outraged by what happened. Indignation, emotion which point towards the moral fact, i.e. the discrepancy between the reality suffered and the reality which should be. So injustice is a reality felt, suffered and therefore to be blamed as far as it has been shaped by human doing or failing. These feelings seek to be softened, need to be moved away by acts which causes other feelings that satisfy the hunger of justice, of putting right what has been done wrong. This hunger of justice allows, sometimes needs the criminal to be punished. Punishment can afford satisfaction. So the law of punishment follows the human need to satisfy fundamental human feelings.

But this look at punishment as a satisfying process only focus on the harm afflicted, the crime committed, the wound inflicted. Yet this way of looking at the moral fact which is injustice, is unilateral. Because the offender also suffers feelings: either shame or triumph.

(3) Ethics focusing on future

Starting at the other's side the offender will feel guilty looking at the harm he caused, the victim will feel angry towards the offender. Both sentiments reflect a status quo: guilty in accepting the fact of harm which has been caused, angry in having the offender felt the harm. But in both cases victim and offender take each other serious as human persons with their human dignity. That is the ethical base of justice: things should be done in a way that respects the dignity of the human person, of victims as well as offenders. It is the victim who has the key to break open a new future, but the very condition is the readiness of the offender to seek forgiveness. So awareness of guilt at the side of the offender is such a condition, not the key itself, which only can be the mercy of the victim.

(4) Mercy main ethical principle of a human penal law

Penal law should be based on the ethical principle of mercy, not as a privilege but as a matter of justice. At the same time mercy cannot be a juridical principle, since nobody can be forced by law to show mercy to his offender, even if he shows himself guilty and ask for forgiveness. Nevertheless, juridical justice cannot limit itself to revenge and satisfaction by punishment. Justice aims at new relationships between human persons.

This is why Catholic canon penal law, while it is a most elaborated proceeding law, at the same time seems to avoid as much as possible to declare offenders guilty and punish them. Punishments in the eyes of canon law are *per definitionem* medicinal instruments, to have the offenders to become better persons.

(5) Mercy: exigence of humanitarian ethics or fruit of a religious view?

Finally: If penal law should be based on mercy as ethical principle, is this founded in sound humanitarian reasoning or does this view presume religion? This I think depends on the underlying anthropology. Since repentance and mercy cannot be forced or sanctioned the humanitarian base

of this approach can only be an optimistic view upon the capacity of self-consciousness of human persons. Perhaps we need religion not to understand and agree with this necessary optimistic view on humanity but to be able to put it into reality.

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The Foundations of the Philosophy of Human Dignity and the Law

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Keywords: Foundation of Human Rights; Inherent vs. Contingent Dignity; Lawgiving.

The view that human dignity is the basis of human rights is widely endorsed, but also highly problematic. Critics have convincingly shown that both the notion of dignity itself and its relation to human rights are objectionably obscure. This paper defends the view that dignity can be seen as the foundation of human rights against such charges. It develops a novel, detailed analysis of dignity. It integrates inherent and contingent features of dignity in a coherent fashion, explicates the precise relation between dignity and human rights, and shows how human rights can be sensibly conceived as both derived from and protective of dignity.

Contemporary human rights literature typically interprets dignity as what has been called a ‘metaphysical value property’: an inherent, inviolable and inalienable preciousness that all human beings possess, no matter who they are, what they do, or what is done to them. Such an understanding of dignity at first seems attractive as a basis for human rights because it ensures both that all human beings always have dignity and hence human rights, and that human rights can trump all other concerns. This universality and absoluteness also lead to major conundrums, however, as they seemingly make dignity irrelevant for practical purposes. If nothing done to us affects our dignity, then what function do human rights serve in relation to dignity? Take, for example, the common view that human rights protect dignity: if nothing done to us can affect our dignity, then what is it that human rights protect dignity against?

Dignity literature commonly distinguishes inherent conceptions of dignity (like the one just introduced) from contingent ones. Contingently understood, dignity is something that some people have, but not others. It is something that must be bestowed or recognised, and hence also something that can be taken away or lost. Kings, presidents or judges, for instance, are said to have specific dignities, whereas slaves had no dignity at all. Citizenship, too, can thus be thought of as a dignity. If dignity is understood contingently, it is easy enough to explain why we should be concerned about our dignity and would want to see it protected. At the same time, however, contingent understandings of dignity cannot carry the weight human rights advocates want to put on dignity. If we would make human rights dependent on contingent dignity only those people who possess the relevant dignity will have human rights, and we would no longer be able to denounce many gross mistreatments as human rights violations when they are inflicted on people who lack the relevant dignity. To summarise the dilemma: to apply universally dignity must be inherent, but to be practically relevant dignity must be contingent. In this paper I develop a novel account of dignity that brings inherent and contingent features together in a coherent fashion, and show how human rights can be based on dignity thus understood. First, I argue that dignity can be usefully understood as a relational, hierarchical notion – a point taken from Sensen (2011).¹ Then, I argue that only a very specific form of hierarchy is relevant to dignity, namely the hierarchy that is inherent in lawgiving. The connection between lawgiving status and dignity is very prominent in

Kantian ethics, but it is by no means an exclusively Kantian idea and can be found throughout the history of political thought. I develop the notion of lawgiving in more detail and distinguish three essential features of dignity: that of moral-legislative, moral-adjudicative and moral-executive status. I then show that the first two of these features directly follow from faculties that are inherent to personhood, but that the possession of the last will always be a contingent matter. I demonstrate how this allows us to make sense of human rights as protecting dignity. Our inherent dignity is argued to necessarily bring with it a claim to (certain forms of) contingent dignity, as it is crucial to our moral agency that we not only qualify as moral agents, but also that we can express ourselves as such. Human rights are then shown to follow directly from inherent dignity – ensuring that we always have them – whilst what they protect is contingent dignity.

The paper concludes by discussing the implications of conceiving of dignity in this way, exploring the ‘image of man’ that it leads to. It is argued that the propounded account of dignity should be appealing to anyone who (1) believes that it is our moral agency that makes us of special moral concern, and (2) has a view of moral agency that allows for a distinction between inherent faculties that enable us to form moral beliefs on the one hand, and our contingent ability to act on these on the other.

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On Naturalism, Consensus, and Practice

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The philosophies of human rights are now often divided into three basic categories: naturalism; theories of consensus; and the practical or “political” approach (e.g. Beitz, 2009). Furthermore, these three categories are often seen as mutually exclusive.

In my presentation I criticize this view. I show that the three theories in question are different because they respond to three different philosophical problems, respectively, on the philosophical foundation of human rights, on the pervasiveness of doctrinal pluralism, and on the nature or character of the contemporary practice of human rights. The three theories that I mentioned above are not incompatible precisely because they are answers to three different problems.

My aim in this presentation is mainly analytic, but not exclusively. In other words, I distinguish what is not always considered distinct in the Philosophy of Human Rights, but I also suggest that these distinctions are relevant to the definition of what we should mean by human rights today.

Key words: human rights; naturalism; pluralism; consensus; international practice.

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A Future Tinted by the Past – South African Justification Strategies for Peacebuilding

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Keywords: justification, justification strategies, foreign policy, external actors, peacebuilding

Frequent referencing to moral values and ethical principles within foreign policy discourses indicates that ethics has a role to play within the topic of international relations, in parallel as well as intertwined with legal and political reasoning. I am making this argument based on a case study on the foreign policy discourse of South Africa in relation to the country's engagements in peacebuilding missions abroad. The paper contributes both by shedding further light on the normative dimensions of foreign policy as well as with the findings from the case study. Foreign policy is often centered around the realist paradigm with a focus on national security, sovereignty and national interests but regardless of this main focus, ethical principles are continuously being used. Within the liberal paradigm, ethical principles have a more natural place even though still a limited role. In addition to paradigms of how international relations should be organised, foreign policy is also to some extent governed by international law.

The ethical principles being referred to in foreign policy are here operationalised into what I call justification strategies, used in order to justify and create legitimacy for certain decisions and initiatives. A crucial distinction that I make in the paper is the difference between justification and attempts to justify. This theoretical discussion is enriched by the findings from the case study. The analysis of the case study on South African foreign policy shows that three overarching approaches can be clustered into a typology of justification strategies. The typology is also a contribution made by the paper, which is drawn from the case study but which is also applicable to other cases. The analysis is based on reviews of South Africa's main foreign policy documents as well as interviews with decision makers and scholars.

The first justification strategy is the continuous reference to liberal values such as human rights, democracy and multilateralism. The second justification strategy is the African Agenda, or the African Renaissance, which is justifying the primary focus on the African continent. The third justification strategy is the referencing to south-south cooperation. This is explained as a way of taking distance from colonialism and imperialism, and is based on the importance of being in solidarity with the south. South Africa has taken on a role as a voice of the African continent in for example the UN, and has for example been lobbying for a reform of the UN Security Council into a more equal setting. The analysis show that the justification strategies are explained by historical, cultural and geographical explanations in each case they are being used.

The paper contributes to the literature on justification, the ethics of foreign policy and ethics of international law. This is done by the case study and also given the specific focus on the justification strategies of engagement in peacebuilding initiatives, shedding light to a fairly dark corner in previous literature. My analysis is in addition also relevant for the larger discussion on

the relationship between international law, moral and international politics in different countries across the globe.

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Böse oder determiniert? Der determinierte Straftäter und die Folgen für die Strafrechtspraxis

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Keywords: Determinismus, Indeterminismus, Willensfreiheit, Strafrechtstheorie, Strafrechtspraxis, Ethik, Moral, Schuldparadoxon, Schuldfähigkeit, Vergeltung persönlicher Schuld, Neurowissenschaften, normativer Schuldbegriff, moralische Verantwortungsübernahme, Unverträglichkeitsthese, strafrechtliche Vereinigungstheorie, kompatibilistische Freiheitstheorien, inkompatibilistische Freiheitstheorien

Die Willensfreiheit existiert eigentlich nicht. Die neuesten Forschungsergebnisse der Neurowissenschaften gehen zunehmend in diese Richtung. Aber was bleibt ohne Willensfreiheit von Moral, strafrechtlicher Schuld und unserer derzeit bestehenden Strafrechtspraxis übrig? Ist es das Ende von Schuld und Verantwortlichkeit, wenn der Mensch determiniert ist?

Die Frage, ob es eine Willensfreiheit gibt, ist für das staatliche Strafsystem insofern von Bedeutung, als dass Straftäter/-innen, die die Tat nicht in Willensfreiheit, sondern sozusagen determiniert verübt haben, anders zu bestrafen sind. Der determinierte Straftäter ist nicht mehr als Verbrecher, sondern als Opfer einer Krankheit oder als ein Getriebener zu verstehen. Würde es den Neurowissenschaften gelingen, zu beweisen, dass es die Willensfreiheit im Bereich von menschlichen Handlungen nicht gibt, würde es auf der Ebene des Strafsystems bzw. in der Art und Weise, wie Straftaten betrachtet und Strafen konzipiert werden, dazu kommen, dass Straftaten und Strafen nicht mehr länger in den Bereich der Moral, sondern vielmehr in jenen der Medizin fallen. Die Tat des Mörders/ der Mörderin würde dann nicht mehr als unmoralisch, sondern als Ergebnis eines neurologischen Fehlers, eines pathologischen Gehirns¹ begriffen werden. Vergeltungstheorien, welche auf dem Aspekt der Schuld² fußen, würden – wenn die Unmöglichkeit der Willensfreiheit bewiesen wäre – ersetzt werden müssen.

Wenn sich neurowissenschaftlich beweisen ließe, dass es keine Willensfreiheit gibt und somit alles, was der Mensch tut, determiniert erfolgt, hätte dies zur Konsequenz, dass Straftäter/-innen für ihre Straftat nicht mehr zur Übernahme einer moralischen Verantwortlichkeit gezogen werden

1 Gerhard Roth formuliert in Bezug auf Straftäter/-innen die provokante These des „Schuldparadoxons“, welches den folgenden Zusammenhang zwischen begangener Tat und Schuldfähigkeit des Täters/ der Täterin besagt: „Je verabscheuungswürdiger eine Tat ist, desto eher wird man eine hirnorganische oder psychische Störung feststellen, die die Schuldfähigkeit des Täters beeinträchtigt oder gar ausschließt.“ [Pauen, Michael/ Roth, Gerhard: *Freiheit, Schuld und Verantwortung. Grundzüge einer naturalistischen Theorie der Willensfreiheit*. Frankfurt am Main 2008. S.164.]

2 Der heutzutage vorherrschende normative Schuldbegriff, der von Reinhard Frank begründet wurde, besagt, dass Schuld die Voraussetzung dafür ist, dass dem Täter/ der Täterin sein/ihr vorsätzliches oder fahrlässiges Verhalten vorgeworfen werden kann, was wiederum die Willensfreiheit voraussetzt. (Vgl. Frank, Reinhard: *Über den Aufbau des Schuldbegriffs*. 1907) Die Voraussetzung für die Vorwerfbarkeit ist, dass der Täter sich hätte anders entscheiden können. Wenn der Determinismus bewiesen wäre, würde das Schuldprinzip nicht mehr argumentierbar sein, da dem Menschen so die Fähigkeit abgesprochen würde, zwischen Recht und Unrecht zu unterscheiden.

könnten, da alle Handlungen determiniert getätigt werden und es so objektiv betrachtet ungerechtfertigt wird, sie einer moralischen Beurteilung zu unterwerfen. Des weiteren ergibt sich die Frage, ob die derzeit bestehende Strafrechtspraxis, die auf der Idee einer Vergeltung persönlicher Schuld basiert, unter den Rahmenbedingungen, dass alle menschlichen Handlungen determiniert sind, einer grundsätzlichen Modifizierung unterzogen werden muss. Es drängt sich in diesem Kontext die Frage auf, ob es nicht eine moralische Pflicht der Gesellschaft wäre, das Strafrechtssystem, welches auf dem Gedanken der Vergeltung persönlicher Schuld beruht, abzuschaffen und durch ein System zu ersetzen, welches ausschließlich darauf abzielt, menschliches Verhalten durch Prävention zu regulieren. Doch sind Determinismus und moralische Verantwortungsübernahme für Handlungen tatsächlich miteinander inkompatibel? Wenn man eine Inkompatibilität annimmt, dann wären juristische Maßnahmen gegen Straftäter/-innen nicht mehr länger rechtfertigbar. Ted Honderich, um an dieser Stelle ein Beispiel anzuführen, fordert die Abschaffung von Strafrechtssystemen, die nur die Vergeltung persönlicher Schuld zum Ziel haben, wenn der Determinismus bewiesen werden könnte: „Falls der Determinismus zutrifft und falls [...] es eine Strafeinrichtung gibt, für die nichts weiter spricht als der [...] Vergeltungscharakter, dann *sollte* diese Einrichtung abgeschafft werden.“³

Könnte das Argument, dass sich strafrechtliche Schritte, die auf dem Vergeltungsprinzip fußen, unter der Annahme, dass all unsere Handlungen determiniert sind, nicht mehr länger legitimieren lassen, dazu benutzt werden, eine Art moralische Pflicht für deren Abschaffung zu formulieren? Welche Probleme erwarten uns in einer Welt, in welcher alle Handlungen jeglicher moralischen Beurteilung und Verantwortungsübernahme entzogen sind? Lässt sich der Determinismus und die moralische Verantwortungsübernahme von Handlungen doch irgendwie miteinander vereinbaren, wie es die kompatibilistischen Freiheitstheorien behaupten? Kann die Unverträglichkeitsthese widerlegt werden? Was ist von der so genannten Vereinigungstheorie⁴ zu halten? Braucht unser Strafrechtssystem einen Bezug zu moralischen Wertesystemen? In meinem Vortrag möchte ich diese Fragen mit den Zuhörer/-innen diskutieren, den Versuch unternehmen, meinen eigenen Standpunkt zu verteidigen und abschließend darlegen, warum Strafrecht und Moral nicht ohne einander sein können.

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4 Jakobs und Roxin sind an dieser Stelle als Vertreter der so genannten „Vereinigungstheorie“ zu nennen. (Vgl. Jakobs, Günther.: *Strafrecht. Allgemeiner Teil. Die Grundlagen und die Zurechnungslehre*. Berlin. 1991., Roxin, Claus: *Strafrecht. Allgemeiner Teil. Band 1. Grundlagen. Der Aufbau der Verbrechenlehre*. München 2. Auflage 1994.)

Assessing the legitimacy of investment arbitration: Can the EU's 'Investment Court' make Investor-State Dispute Settlement (ISDS) legitimate?

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Keywords: investment arbitration, EU, CETA, TTIP, international adjudication, state consent, democratic legitimacy.

Since the entry into force of the Lisbon Treaty in 2009, the European Union (EU) has competence for the negotiation and conclusion of international investment agreements (IIAs), as a part of the common commercial policy. Unsurprisingly, as foreign direct investment (FDI) has become an important driver of the global economy, investment protection has taken a prominent place in the EU's recent trade negotiations.

Although some agreements also aim to liberalize cross-border investments, the main objective of IIAs is to protect investment in the post-entry phase. The most crucial aspect of international investment law is its distinct mechanisms for the settlement of disputes, known as Investor-State Arbitration or Investor-State Dispute Settlement (ISDS). Contrary to traditional international legal disputes which take place between states, ISDS *gives foreign investors direct access to an international remedy* to pursue claims against states for violations of their treaty obligations. Consequently, the relevant investment treaty provisions become *directly applicable* to investor-state relations. Moreover, even though the procedural rules remain similar to private commercial arbitration, a broad range of governmental activities can be at issue in investor-state disputes, transforming many cases into 'regulatory disputes' rather than private conflicts.¹

In contrast to the scarce attention paid to the numerous IIAs which were previously concluded by almost all European countries, the inclusion of investment provisions in the prospective comprehensive economic agreements with Canada and especially the US have stirred up the debate on the desirability and legitimacy of the international standards of investment protection, specifically in relation to ISDS. For many commentators, ISDS is a dangerously unbalanced and flawed system.

Faced with the growing controversy over ISDS, the EU is trying to redefine its position. Both in the context of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) negotiations and the ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations, the EU has proposed several changes to the rules regarding ISDS, including the establishment of an 'Investment Court System' (ICS). The key question, however, is whether or not these reforms are sufficient to address the most fundamental problems of the system and increase its normative

¹ In this context, it is also important to note that IIAs and arbitral awards often define the concept of 'investment' very broad. By implication, the scope of the jurisdiction of the arbitrators can extend to almost any domain of governmental regulation, on the condition that it directly or indirectly influences a foreign investment.

legitimacy - i.e. 'the moral right' to take binding decisions regarding states' compliance with the relevant substantive standards of investment protection.

Accordingly, we examine what adequate criteria for the legitimacy of ISDS as a mechanism for international adjudication could be and subsequently compare these with the current adaptations to ISDS procedures in the CETA and TTIP texts. In order to address this question, we will draw from insights in legal theory and political philosophy that deal with the question of the legitimacy of international law and institutions more generally. More specifically, we will explain why both traditional approaches to legitimacy of international institutions – i.e. state consent and the goals or expected outcomes of international institutions – are not satisfactory criteria for assessing the legitimacy of ISDS. Based on this analysis, it will become clear that an international investment tribunal can only be minimally legitimate if (1) its procedures guarantee the effective participation of 'all those affected' and (2) legal mechanisms are included that ensure their legitimate interests can be taken into account.

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Refugee Rights: The Ethical Dilemma

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Keywords: investment arbitration, EU, CETA, TTIP, international adjudication, state consent, democratic legitimacy.

Individual refugees, do not pose any big social or economic burden on the host population, however exodus of large population poses a heavy burden. Yet, huge exodus of immigrants is not a usual phenomenon, except at the time of disasters like revolutions, genocides, famine, mass-murderous wars and civil conflicts as of French, Polish, Gypsies and Jews during WWII, during civil wars as in Bosnia, N. Ireland, Cyprus, East Pakistan, Congo, Afghanistan etc., after defeat in wars as of Germans from Poland, Czechoslovakia and other European colonies after WWI and WWII.

However, such conflicts are not always natural and sudden but have often been pre-planned. For example, it was a standard policy of the ancient Roman Empire to displace whole conquered nations into other lands, to plant them into new lands and socially rearranged according to Roman conventions. Jews after Roman conquest of Judea 70 CE were enslaved and planted as Romans agents, mostly in Germany and other parts of Europe. Such policy continued in the Byzantine Empire, and the French, German, British, Spanish, Portuguese, Dutch and now the American empires. Those who refused were slaughtered en masse as Saxons were under Charlemagne. Similar was the fate of rebellious German women who neither fled nor yet accepted Pope and Emperors' hegemony; 100,000 German women were arrested, investigated and tortured by the priests, monks and Jesuits, 50,000 of whom were burnt alive or drowned. The same tactics were used against the unwilling Red Indians in America famously known as "Trail of Tears" for their 1000 miles long travel on foot.

New powers displaced unfavorable populations and planted their favorite tribes and nations in their areas of influence, this creating exodus of large population e.g. wars by Byzantine and the Osmania Islamic Empires created waves of exodus of refugees which crossed the mountain range and arrived in Indian planes further displacing the local populations. According to Professor Asher Susser of the Tel Aviv University, the Jewish refugees started arriving in Palestine after WWI in accordance with the British mid-war promise of creation of Israel, there started the emigration of Palestinians. Soon after WWII as Israel started its nationhood in 1948, it started expanding, particularly after the Arab-Israel wars, Israel controlled most of Palestine and parts of Syria and had a strong influence in Lebanon, and other countries around.

As the politically inexperienced and an eye surgeon Bashar el-Assad took over as the president of Syria and allied himself with Iran, the delicate balance of power in Middle East started crumbling. Saudi Arabia, had been able to create its vast Islamic Sunni spiritual Empire, it recently bought a huge amount of weapons, translating its spiritual empire into a physical empire, on the line of Byzantine and Osmania Empires. While Iran with Shia powers and populations is proving to be a challenge to it.

Direct destabilization and destruction of Iraq by the US and its indirect support for the civil wars in Syria, Yemen and Libya has turned the whole area into turbulence. ISIL duly resulted as a reaction to the US destruction of Iraq and it has started killing Syrians and Iraqis en masse; Israel

sees this as its area of expansion. Suddenly there were strategic Paris and Brussel bombings after which thousands of Jews immigrated to Israel, as have happened after pre-planned anti-Jewish bombs and harassment of Jews in Middle East, as Israel needed more Jewish refugees for its expansion.

ISIL, the American supported anti-Assad rebels, and Israeli undercovers and Western Christian mercenaries started killing people en masse while the Western Christian powers like US, Britain, Canada, Australia, The Netherlands etc. started indiscriminate mass-murders and destruction, killing people by unjustified aerial bombardments, forcing large number of people to seek refuge in Turkey, Jordan, Germany and other European countries. And it is a pity that it is their only chance of survival....

Implications on the host countries: Germany and some other countries have welcomed refugees with open arms, however, such a large number of refugees means a whole lot of problems with economy, health, housing, food, clothing, transport and policing etc. Some of these problems may be seen as temporary, which education, assimilation, integration and later return of refugees may solve, however, problems of national identity and culture of the host countries may find itself under attack. Lebanon's culture and identity changed from Shia to Sunni because of the influx of a large number of Palestinian refugees, a strategy already applied during Western Christian wars of Counter-Reformation. Some may say that the influx of huge number of less developed refugees may be as challenging as the influx of less sophisticated Germanic tribes into the Roman Empire. The rights of refugees have to be balanced with the right of the host population, and that is the dilemma, which always have two horns.

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Moral Grounds for Human Rights: A Dualist Approach

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Keywords: personhood, autonomy, human needs, voluntariness, vulnerability <http://www.ugent.be/>

Exploring moral grounds for human rights has long been a great challenge to legal and political philosophers. The challenge is currently even more enormous as some leading authors, notably Charles Beitz and Joseph Raz, dismiss the project of providing ethical justifications for human rights and instead propose the practical account of these rights. To defend and develop the philosophical conception of human rights as opposed to the practical one, proponents of the former conception must offer solid moral foundations for human rights.

A significant contribution to the project of offering ethical grounds for human rights is James Griffin's *On Human Rights*, in which he maintains that a central idea in justifying human rights is that of personhood. Personhood includes three components: first of all, autonomy demands that a person chooses her path through life; second, the notion of minimum provision requires that an individual has at least the minimum of resources and capabilities to act based on his choice; third, liberty claims that one is not forcibly stopped by another from pursuing what one sees as a valuable life. Thus autonomy is here considered as more fundamental than minimum provision and liberty. However, Griffin's autonomy-based approach fails to cover some of what are recognized as human rights. For instance, this approach does not succeed in justifying infant's liberty from abuse because an infant lacks the capability of autonomous choice of her path. To remedy such problems, we need to pay attention to human vulnerability and basic needs when exploring moral foundations for human rights.

David Miller bases human rights on human needs and criticizes Griffin's personhood view. One of the reasons why he prefers the needs account to the personhood account of human rights is that the latter appeals to such values as autonomy and liberty, which are prominent in liberal societies but are not highly regarded in others. In contrast, the former account can obtain support not merely in liberal societies but in non-liberal societies by admitting that needs of people vary from society to society. When contrasting the needs argument with the personhood argument in this way, he seems to suppose that in a non-liberal country there is a broad, if not overwhelming, consensus among people about various aspects of social life including religion, culture, and politics. The reality is frequently the opposite: people in a non-liberal country are no less divergent than those living in the liberal one. Therefore, religious, cultural, and political minorities in a less liberal society need freedom of religion, free speech, and many other forms of individual liberty, as such people in a liberal society do. At the first glance, Miller's needs approach appears to show tolerance toward non-liberal societies by permitting a variety of interpretations of human needs, but in fact it involves the risk of leaving minorities therein unattended. The examination of Griffin's and Miller's views suggest that the idea of human right requires a twofold theory of moral foundations, which takes into account both individual autonomy and human needs.

To meet the requirement previously mentioned, the current paper begins by noting the significance of developing moral justifications for human rights. Next, Griffin's autonomy-based

approach is closely examined, with a special reference to the cases to which it cannot apply. Then, I turn to the examination of Miller's needs-based view and identify the perils it involves. Based on my assessment of the two conceptions of human rights, I try to develop the third conception by identifying two distinct features of human life and to explain how these features relate to each other. One is voluntariness, which denotes that an individual chooses her course of action, forms her way of life, and pursues her values and goals. The other is vulnerability, by which I mean that a person's life depends on its natural and social environment. Then, the paper goes on to argue that institutional arrangements are required to show respect for human voluntariness on one hand, and to provide a group of particularly vulnerable people with rescue on the other hand. It is argued that the principle of respect is promoted by free speech, freedom of religion, freedom of movement, among others, while that of rescue is served by freedom from want, the right to education, and the right to decent medical care. The paper concludes by saying that this dualist view on human rights is more promising than (semi-)monist views presented by Griffin and Miller.

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Gender, Identity, Ideology: Sex Difference as an Article of Faith

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Affluent countries in Central, Western, and Northern Europe, North America and Australasia seem to have become increasingly accepting of non-traditional gender identifications and non-traditional relationship forms. Same-sex marriage is a legal reality in many countries in the region, and trans and intersex people have become increasingly visible and audible in their quest for legal recognition and legal protection. At the same time, we are now witnessing a cultural backlash against these developments. In the United States, cities and states have passed or tried to pass so-called “bathroom bills” that would make public bathrooms subject to “gender policing” and force many trans person out of the bathrooms that fit with their lived and experienced gender. In Germany, several federal states have had heated public debates about new school curricula, simply for the reason that these new curricula aimed to inform pupils about “sexual diversity” (among other things, gay and trans identities). New extreme-right parties and candidates in many countries have made “traditional family values” a part of their agenda and stoke fear by suggesting that increased acceptance of non-traditional sexualities will undermine the fabric of state and society. A more marginal but no less telling example is the attention paid in professional sports to enforcing gender segregation and “measuring” the true sex of an athlete. Caster Semenya’s case is only the most prominent of several sad examples in this regard. (It deserves mentioning that the last time there was such a public interest in matters of gender in sports was when obligatory gender testing was introduced – at the height of the Cold War).

Generally, we can say that not only is there a clear backlash, there is also a clear gap between gays and lesbians on one side and trans and intersex persons on the other in terms of their general acceptance and their legal protection. Indeed, it could be suggested that trans and intersex identities have become the new battleground of the “culture wars” after same-sex marriage has become an irreversible political reality in many countries – that is, the reactionary energy that was once pumped into resisting civil unions and “gay marriage” now finds its outlet in targeting the more vulnerable groups within the QUILTBAG-umbrella. The flipside of this explanation is so-called “homonationalism”, that is, an attitude that is accepting of non-traditional sexualities as long as these can be read as “contributing” to the national community and identity. In homonationalist fashion, same-sex marriage can be read as a wholesome extension of traditional partnership (thus embodying “traditional” values) while trans identities, for instance, can be read as undermining those same values, because of their connotations of impermanence and fraud.

It is no surprise, then, that in extreme right propaganda, queer persons are often accused of promoting a “dangerous” multiculturalist and pro-immigration agenda – and ridiculed when they fall victim to “immigrant violence” (e.g., religiously motivated attacks on gay persons). There are, indeed, parallels between suspicions toward queer persons and toward immigrants. Both are treated as potentials risk factors and fraudsters, and for both, administrative hurdles are in place

when they aim to “naturalize” their identities. Trans persons, for instance, are typically asked to provide medical proof of their trans status, often in conjunction with requirements for unnecessary surgery. Naturalized citizens must, even if only symbolically, prove their loyalty to their new home. Both, it seems, cannot be taken by their word when it comes to matters of identity.

But why is the issue of identity important in these cases? Neither gender nor nationality are of particular help for the identification of individuals (that is, for matters of national security and policing). On identification documents, we could do without them without any great loss for security. This suggests that the reason these categories are widely viewed as relevant and in need of securitization is symbolic – in other words, that they are based on ideology rather than evidence. What makes this situation particularly ethically sensitive is the fact that in this case, we have an ideology that masks itself as science. That is, sex and gender differences are marked as “natural” differences, based in biological evidence. The question to what extent biology as a science is itself rooted in a certain social agenda is raised only at the social margins. In this regard then, sex differences have become an “article of faith”: they are the basis of (and not the evidence for) particular ways of classifying and policing people.

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Das Recht auf Religionsfreiheit – Status und Stellenwert einer provokativen Norm in der religionspluralen Gesellschaft

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Das Recht auf Religions-, Weltanschauungs- und Gewissensfreiheit bildet einen konstitutiven Bestandteil der Freiheitsrechte jedes Menschen. Es schützt sowohl die Glaubens- und Überzeugungsfreiheit (*forum internum*) als auch die individuelle und gemeinschaftliche Religionsausübungsfreiheit (*forum externum*); es impliziert die positive wie die negative Religionsfreiheit. Ich vertrete *erstens* die These, dass das religiöse Freiheitsrecht in der weltanschaulich pluralen und nicht selten konfliktiven Situation der Gegenwart einer doppelten Infragestellung ausgesetzt ist: Es ist einerseits gegen den Verdacht zu verteidigen, es diene bloßen Partikularinteressen oder Privilegien, sowie andererseits gegen Versuche, Religionsfreiheit tatsächlich partikular zu vereinnahmen und damit ihren menschenrechtlichen Charakter zu unterlaufen. Deshalb ist grundlegend der Charakter als ein Recht der Person hervorzuheben, das unabhängig ist von der individuellen religiösen oder weltanschaulichen Überzeugung. Dieser Ansatz, der nicht mit einer Privatisierung des Religiösen zu verwechseln ist, bildet die zentrale Verknüpfung zwischen dem (säkular durchgesetzten) Recht auf Religions-, Weltanschauungs- und Gewissensfreiheit und der Anerkennung / Aneignung des religiösen Freiheitsrechts in der Lehre der katholischen Kirche im Zweiten Vatikanischen Konzil. Unter den Bedingungen wachsender religiös und weltanschaulicher Pluralität / Heterogenität und einer in vielen Gesellschaften nicht mehr vorauszusetzenden „religiösen Alphabetisierung“ zeigt sich der Charakter des religiösen Freiheitsrechts als Provokation nicht nur für viele säkular denkende Zeitgenossen, sondern auch für die Religiösen und ihre Gemeinschaften in neuer Schärfe.

Unter solchen Bedingungen ist neu nach den Voraussetzungen für Achtung, Schutz und Durchsetzung des religiösen Freiheitsrechts zu fragen. Dazu vertrete ich *zweitens* folgende These: Das Recht auf religiöse Freiheit verpflichtet nicht nur wie alle Grundrechte den Staat zu Achtung, Schutz und Förderung eines Rahmens, in dem die gesellschaftlichen Akteure ihre geistigen Freiheiten entfalten und ausdrücken können. Zugleich fordert es die ganze Gesellschaft und in ihr die religiösen und weltanschaulichen Akteure (Kirchen, Religionsgemeinschaften, Weltanschauungsgemeinschaften) heraus, Mitverantwortung für die sozialmoralischen Grundlagen – für das „Ethos der Religionsfreiheit“ – zu übernehmen. Sie müssen sich dem provokativen Charakter des religiösen Freiheitsrechtes gegenüber dem eigenen Wahrheitsanspruch konsequent stellen, und sie müssen lernen, das, was ihnen an der eigenen religiösen Überzeugung und Praxis als schützenswert gilt, nicht nur als solches zu behaupten, sondern kohärent und nachvollziehbar zu vertreten. .

The Concepts of Personhood and Autonomy as they apply to end-of-life decisions, especially to palliative sedation

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In this presentation I would like to discuss the concepts of personhood and autonomy as they apply to end-of-life decisions. In the article titled “Concepts of personhood and autonomy as they apply to end-of-life decisions in intensive care”, the authors Walker and Lovat propose broadening the classical concept of autonomy – as the ability to make independent decisions based on conscious and rational choices – to include the relational aspect of human nature. A person who is able to make his/her own decisions would make them in consultation with his/her family and close friends. Being in relationships with other persons would be the reason to make end-of-life decisions together. Based on the concept of *relational autonomy* (Mackenzie and Stoljar 2000), Walker and Lovat propose a broader concept of patient autonomy in the context of end of life decisions in intensive care. According to this concept, end-of-life decisions would be made with family and close friends not only in the light of social customs, but also according to law and clinical standards. (Walker, Lovat, 2015, 311-314). In my presentation, I would like to analyse this concept in relation to palliative care [PC], in particular the procedure of palliative sedation.

The idea of holistic patient care is included in the philosophy of PC. Hence, relatives can be involved in this type of care. However, as for decisions on deep palliative sedation, the patient’s own autonomy should come before other factors. In this presentation, I will argue for the widest possible autonomy of the patient in decision-making in situations of death and dying. I believe that each patient has the right to die in accordance with her/his own personal preferences, even when they are not in line with the preferences of those closest to him/her. The right to a dignified death should be closely tied to respect for the autonomy of the dying. My position is not an expression of opposition to accompanying the dying, however. On the contrary, I believe that accompanying persons should have a far-reaching understanding and acceptance of the patient's preferences, even when those choices are difficult for them.

In the concept of personhood and autonomy as they apply to end-of-life decisions in PC, the optimal situation would be a decision based, on the one hand, on the personal preferences of the patient, while on the other hand taking into account the preferences of his / her family and loved ones. In order to come to such a decision, it is necessary to fulfil the conditions of two-way communication based on the mutual acceptance of choices and preferences combined with courage and openness to conversation about dying and death, and the patient must be accompanied. In making such decisions, the recommendations developed by the medical teams undertaking them may prove useful. I propose a similar development of recommendations for the families and loved ones of the dying. Education in this field is a prerequisite for the development of the concept of personhood and autonomy as they apply to end-of-life decisions in PC, which is also an expression of the principles of IT, as holistic care is not just for the patients themselves, but also for their families at the time of death, and later during the mourning period.

The French recommendations for medical staff may be a helpful example in deciding whether to put a patient in a state of palliative sedation. The authors of “La sédation pour détresse en phase terminale. Recommandations de la Société Française d'Accompagnement et de soins

palliatifs” propose that the entire care team making the decision answer the three following questions:

1. Why are we making this kind of decision? (This question concerns discernment of intentions accompanying this sort of decision)
2. For whom we intend to make this decision? (This question is related to ensuring that the patient’s autonomy is respected)
3. For what reasons are we making this decision? (In this question, the most important thing is the values which form the basis of the care staff’s decision; this question is also connected with standards of clinical practice, the law of the country where this decision is made, and the scope of responsibility of the person providing palliative sedation) (p.39).

Similar indications are included in the EAPC recommendations and other documents.

In this presentation I will argue that, on the basis of existing recommendations, it is necessary to develop standard recommendations for the relatives of patients who have entered into a state of deep sedation in PC, as an aid in making a joint decision in this regard [in the sense of the concepts of personhood and autonomy].

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The East meets the West: the Intellectual Solidarity of Abdullahi Ahmed An-Na'im, Naser Ghobadzadeh, and David Hollenbach on Religion and the State

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Keywords: Catholicism, Islam, Shari'a Law, Religion, the State, Society.

What should be the legal relationship of the Church—or the Mosque, or the Synagogue—to the State? In the West, this question has been largely resolved in two broad ways: in the first case, there is a separation of church and state along the lines of the First Amendment of the American Constitution; in the second, the church is deemed subordinate to the state but endowed with various privileges, e.g., the Evangelical Lutheran Church in Scandinavia, the Anglican Church in England, the Orthodox Church in Greece, and the Catholic Church in Liechtenstein, Monaco, and Malta. The Catholic Church, of course, belatedly but nonetheless significantly changed its teachings on this matter at the Second Vatican Council by renouncing its commitment to the ideal of a Catholic State and embracing religious liberty. The question remains one of the most significant issues in the world today, however, because of its pertinence in Muslim lands.

In this paper, I will explore the work of two contemporary Islamic thinkers—the Sudanese-American Sunni thinker, Abdullahi Ahmed An-Na'im, and the Iranian-Australian Shi'ite scholar, Naser Ghobadzadeh—who wish to separate religion, specifically the development and enforcement of Shari'a (religious law), from the state. Both An-Na'im and Ghobadzadeh advocate a “secular” state. But, as they admit, this term tends to imply in a Muslim context the exclusion of religion from public life. To help meet this charge, I will try to show how a Western thinker—the Catholic ethicist, David Hollenbach, S.J.—might shed some light on the efforts of these Islamic scholars.

Hollenbach argues that religion can help people to get engaged in a positive way in their communities and thus contribute to the broader common good. But he does not envisage a “theocracy” in which the church—or any other religious body—constitutes the state or plays an established or direct role in affairs of state. Rather, he upholds a separation of church and state, as taught at Vatican II, whereby the church, like the other bodies of civil society, influences the state *indirectly* through lobbying, contributing to debates, etc.

Thus Hollenbach's distinction between the state (which is deemed “separate” from religion) and society (which is clearly not separate from it) allows him to articulate the positive ways in which religious actors may influence the state (albeit in an indirect manner) and help to build the common good. Seen in this light, the vision of An-Na'im and Ghobadzadeh appears less “irreligious” than some fellow Muslims tend to think.

Working in the tradition of Rashid Rida and Ali Abd al-Raziq, An Na'im contends that the state is a political rather than a religious institution and cannot therefore codify or enforce Shari'a

principles. In his view, Muslims must be able to live their own belief in Islam instead of being coerced by the state. But this does not mean Islam should be excluded from the formulation of public policy or from public life in general. For public policy should reflect the beliefs and values of citizens, including religious values, provided this is not done in an exclusive manner, which might favor the views of those who control the state. Akin to Hollenbach, then, An-Na'im maintains a clear distinction between religion and the state while regulating the connectedness of religion and politics.

Drawing on the work of Abdolkarim Soroush, Ghobadzadeh likewise challenges the legitimacy of the Islamic state. His argument incorporates "two corresponding components": first, Iran's experience demonstrates that the Islamic state transforms religion into a political instrument to justify state policy; and, second, despite the clergy's claim of divine sovereignty, Islam is compatible with the secular democratic state, which offers believers a more conducive environment in which to cultivate their faith.

Where Hollenbach calls for religious convictions to play a prominent public role as part of an "overlapping consensus" regarding moral principles, and An-Na'im calls for religion to be subject to the requirements of civic reason (i.e., consensus and compromise), Ghobadzadeh calls for a democratic state rooted in popular sovereignty in order to capture the true spirit of religion: justice. He calls this vision "religious secularity." It reflects not only an emerging discourse in Iran regarding the appropriate political role of religion, but also, to my mind, an affinity with the work of Hollenbach.

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Ethikkomitees im Justizvollzug - und das Verhältnis von Ethik und Recht

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In diesem Paper werden Forschungsergebnisse und Praxiserfahrungen zu Ethikkomitees in Justizvollzugsanstalten vorgestellt und erste Überlegungen zu den Auswirkungen auf das Verhältnis von Recht und Ethik angestellt.

Ethikkomitees in JVs reflektieren unstimmige Situationen im Alltag des Justizvollzugs: Es geht um Entscheidungen und Praktiken, die rechtlich korrekt sind, bei den Akteuren aber dennoch ein Unbehagen hervorrufen. In der interdisziplinären Diskussion wird das moralische Problem freigelegt, benannt und analysiert, welches das Unbehagen auslöst.

Nach der Skizzierung der Arbeitsweise der Ethikkomitees und der Darlegung einiger aktueller Problemstellungen werden sechs Thesen erörtert:

- Ethik im Justizvollzug ist sinnvoll. Nicht die rechtlichen Vorgaben, sondern die Dominanz des Sicherheitsparadigmas erschweren die ethische Reflexion.
- Ethikkomitees können zu einer besseren Realisierung des Vollzugsziels beitragen.
- Ethikkomitees sind ein Instrument der Organisationsethik. Sie bewegen sich auf einem schmalen Grat zwischen Stabilisierung und Destabilisierung der Organisation.
- Es bleiben (unvermeidliche?) Spannungen zwischen Theorie und Praxis.
- Die ethische Reflexion in den Ethikkomitees stärkt das Rechtsbewusstsein. Das ergänzt die kritische Funktion der Ethikkomitees..

Laws and Their Humanity: Considerations on Erasmus of Rotterdam and His Concept of *humanitas legum*

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Keywords: Erasmus of Rotterdam, Humanity of Law, Philosophy of Law, Political Theology, Political Ethics, History of Ideas, Humanism, Pan-European Peace, Humane State.

The sources of my paper are Erasmus of Rotterdam's political writings, *Institutio Principis Christiani* and *Querela Pacis*. I will try to analyse his central concept of the *humanitas legum* and to embed it in a broader theoretical context: I will show how the Erasmian ethical discourse on *humanitas* (humaneness) – with its patterns of natural philosophy and natural law – determine and frame the concrete concept of the 'Humaneness of Law(s)' in the mentioned works. I will firstly speak in my paper about the historical phenomenon of humanism and its (etymological) connection to 'Humaneness'. The next step is the analysis of Erasmus' understanding of humaneness as cross point of nature, education, and ethical conduct. In the conclusion I will show that the concept of 'humanitas legum' represents the concretization of this philosophical and ethical system around 'humaneness' and describe the two applications, Erasmus proposes for his concept: the Pan-European peace and the 'Humane' (Christian) State.

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Law, Justice, and Juridification of Religion

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Law and human rights play a central role, some would even say crucial role, in how we approach issues of justice, equality, and non-discrimination, be it in the area of religious matters or other issues. Human rights have emerged as an authoritative voice and a language for utopia in times of ‘post-modern insecurity’, having achieved an almost hegemonic position when it comes to envisioning (decent) human life. Thus, their role in relation to perceptions of the human being must not be underestimated. We usually imagine human rights as above and beyond mundane politics, that is the utopian feature. We also attach certain expectations to human rights in their legal configurations. And sure enough, neutrality or impartiality is intrinsic to our image of law. This concerns both international and national law. The same is the case with our understanding of law’s relationship to religion. Even so, law sets forth frames of meaning and shapes our vision of human life and behaviour. Law makes sense of some things while downplaying the significance of other things. Beyond addressing disputes that arise and regulating societal life, law is “a species of social imagination”.¹

In fact, it seems to have become an increasingly significant one if we are to believe those scholars who direct our attention to the various dimensions of what they have titled *juridification*. Juridification denotes the expansion of legal regulation on area after area of human life, as well as the fact that society to an increasing extent seeks to settle conflicts with the help of law. This leads to redistribution and displacement of power, e.g. to lawyers, courts and judges. A certain group is held up as experts and authorities. Lastly, also ‘legal framing’ forms part of this juridification, meaning that individuals, groups and other entities start to articulate their self-understanding ever more in legal terminology, as ‘legal subjects’ with individual rights etcetera, in accordance with the articulation of religion which the legal framework provides.²

What this means, I argue, is, that if our aim is, e.g., to analyse thoroughly the way in which society organises, regulates and meets religious manifoldness and religious minority positions, and to find out if this societal response is to all its part sufficient or in need of constructive revision (and how), we need to analyse the various dimensions and consequences of juridification of religion. We need to move beyond a ‘superficial’ mapping and analysis of the legal framework (consisting of religious law, i.e. religions’ own regulation, and religion law, i.e. ‘external’ regulation of religion of national, regional and international kind). In order for the perspective to be meaningful, it has to be complemented. We have to ask questions like: How does power shift and how is it divided between the state and different religious actors? Where does the decision-making take place, who

¹ Rosen, Lawrence, *Law as Culture*, Princeton: Princeton University Press, 2006, 8-9, 11-12.

² Blicher, Lars C. & Molander, Anders, ‘Mapping Juridification’, 14 *European Law Journal* 1 (2008), 36-54; and as regards the juridification of religion, also e.g. Russell Sandberg, *Law and Religion*, Cambridge: Cambridge University Press, 2011, 193-194.

are held out as experts and what does expertise in religious matters seemingly consist of? What does it mean to formulate oneself about religion in legal vocabulary and to construe religious identity in close affinity to legal positions? What are the results of this process of translation, the distributive consequences?

In my paper, I propose to explore these matters regarding juridification through examples from (primarily) European human rights law and – arbitration, critically analysing the articulation of religion and religious freedom currently put forward there, the conceptual presuppositions and deep structures of the legal framework, and its limits when it comes to envisioning life, freedom and equality in matters of faith. It will lead me to claim that the ‘egalitarian imaginary’ of human rights, e.g., that is ostensibly neutral, ‘non-political’ and ‘agnostic’, when it comes to religion *de facto* privileges some believers over others. Law is exclusionary in a way that contradicts the ideals it praises.

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Die Freiheit des Glaubens aus phänomenologischer Perspektive

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Dieser Beitrag möchte sich aus religionsphilosophischer Perspektive mit der Frage nach der Religions- und Glaubensfreiheit, wie sie sich z.B. in GG Art 4 oder in der AEMR Art 18 wiederfinden lässt, beschäftigen. Diese schon lange brisante Frage scheint besonders in letzter Zeit im gesellschaftlichen Diskurs mit neuer Dringlichkeit aufzukommen: Das Aufeinandertreffen von verschiedenen Religionen und Kulturen verstärkt die Frage nach der Religionsfreiheit im Horizont der Pluralität von Neuem, auch wenn religionsphilosophisch hierüber eher Schweigen herrscht. Dem Staat kommt hier eine gewichtige Aufgabe zu, die sich u.a. in der Gewährleistung der Religionsfreiheit widerspiegelt. Damit verbunden ist jedoch auch eine Artikulation der Grenzen derselben. Wie ist nun jedoch mit dieser Religionsfreiheit aus philosophischer und religionsphilosophischer Perspektive umzugehen? Mit Ricoeur gesprochen: Wie ist die ‚Qualität der Freiheit, die mit dem religiösen Phänomen verbunden ist‘ zu bestimmen? Im ‚historischen Wörterbuch der Philosophie‘ und im ‚Handbuch der politischen Philosophie und Sozialphilosophie‘ wird deutlich, dass Glaubens- und Religionsfreiheit in enger Verbindung aber auch Abhängigkeit mit dem individuellen Freiheitsrecht steht, sodass sie als spezielles Thema des individuellen Freiheitsrechts behandelt werden kann. Es zeichnet sich eine deutliche Tendenz ab, dass das Recht auf Religionsfreiheit von diesem individuellen Freiheitsrecht abgeleitet wird. Wichtig ist dabei immer, dass die Religionsfreiheit ‚im Dienste‘ der öffentlichen Ordnung und Moralität steht, diese unterstützt und sie deshalb eingeschränkt werden muss, sobald sie dieser schadet. Doch so stellt sich dann die Frage: Wie steht es um diese Ableitung der Religionsfreiheit aus der Moralität, vielleicht sogar aus einer durch Kants Autonomie Begriff geprägten Vernunftmoral? Theorien einiger Theologen und Philosophen werden hier kritisch, wenn sie die Gefahr einer Zivilreligion erkennen, eines Deismus, der die positiven Religionen als Ableitungen aus der ‚Religion der öffentlichen Ordnung‘ denkt. Wie auch immer diese Kritik zu bewerten ist, der Gedanke einer Ableitung der Religionsfreiheit aus dem individuellen Freiheitsrecht scheint ‚zumindest‘ religionsphilosophisch nicht befriedigend zu sein: Das Prinzip des Glaubens wird aus dem Prinzip der autonomen Vernunftmoral abgeleitet, vielleicht sogar nur eingeführt, um die Ordnung zu schützen – so z.B. Kants Idee Gottes, der als Garant der Moralität dient – oder um der individuellen Freiheit Ausdruck zu verleihen.

In der Religionsphilosophie zeigen sich nun auch andere Möglichkeiten zum Umgang mit der Thematik um Pluralität und Religion und somit auch der Thematisierung der Religionsfreiheit und deren Qualität. So z.B. Hegel und seine religionsgeschichtliche Tradition welche die Religion als hohe (vielleicht sogar höchste?) Stufe der Entwicklung des Geistes bestimmt und die Stufe der Religion selbst noch einmal in verschiedene Grade der Selbsterkenntnis des Geistes einteilen. Dem Christentum kommt darin die höchste Stufe zu. Natürlich kommen auch hier problematische Fragen auf: Wie ist das Verhältnis von Philosophie und Religion zu fassen? Ist die Religion erneut nur abgeleitet von einem philosophischen Prinzip? Selbst wenn nicht, so ergibt sich das Problem der Hierarchisierung: Dem Christentum als höchste Stufe sind alle anderen Religionen als

‚unterentwickelte‘ untergeordnet. Dies hat eschatologisch sogar die Aufhebung der Pluralität in eine letztendliche Totalität des Christentums zu Folge. Wie steht es hier um die Freiheit des Glaubens oder der Religion? Ist sie denkbar?

Eine weitere Möglichkeit bieten Schleiermacher und seine Tradition. So wird eine allgemeine Bewusstseinslehre, die im Gefühl basiert, entworfen, der kategorialer Status zukommt. Als grundlegendes Moment dieses Bewusstsein wird die Frömmigkeit als schlechthinnige Abhängigkeit bestimmt. Das Bewusstsein bleibt nun nicht für sich, sondern bildet die positiven Religionen aus, die von Schleiermacher je nach Entsprechung zum allgemeinen Modell des Selbstbewusstseins hierarchisiert werden. Das Christentum ist auf der höchsten Stufe verortet. Erneut stoßen wir auf Probleme: der Transzendentalismus des religiösen Bewusstseins, also die religions-anthropologische Grundannahme, die Kategorialisierung und schließlich die Verabsolutierung/Hierarchisierung des Christentums als diesem Kategorialen und Universalen am meisten entsprechende positive Religion. Andere Religionen sind dem Christentum untergeordnet, da sie der Eigentlichkeit weniger entsprechen.

In meinem Beitrag möchte in Auseinandersetzung mit solchen Theorien eine weitere Möglichkeit ins Spiel bringen, die Religionsfreiheit philosophisch zu thematisieren und so die ‚Qualität der Freiheit‘ zu erörtern. Diese Möglichkeit liegt in einer pathisch-gründierten Responsivität, die Bernhard Waldenfels in seiner Phänomenologie des Fremden entwickelt: Die Religionsfreiheit soll so, anstatt aus einem Prinzip abgeleitet zu sein, auf Grund der unterschiedlichen Antwortmöglichkeiten, die auf einen Anspruch ergehen, argumentiert werden. In diesem Modell beziehen wir uns auf verschiedenste Motive der Philosophie Emmanuel Levinas‘, Jacques Derridas und Bernhard Waldenfels‘, wie Anspruch, Antwort, Außerordentliches, Ordnung und Gerechtigkeit. Damit verbunden ist dann auch die Frage nach der Artikulation der Begrenzung der Religionsfreiheit. Nicht weil sie einer kategorialen individuellen Freiheit oder einem universalen Prinzip untergeordnet ist, von der bzw. dem sie abgeleitet ist, sondern auf Grund der Figur des Dritten. Im Anspruch des Anderen begegnet mir immer schon der Dritte. So kommt es zu einem Gleichmachen des Ungleichen, zu einem Moment der Ungerechtigkeit in der Gerechtigkeit, zu einer Begrenzung oder zu einem In-Ordnung-bringen des Außerordentlichen. Den Überlegungen zur Responsivität scheint bereits Politisches, Soziales und Rechtliches inhärent zu sein, sodass auf der Ebene der Gerechtigkeit andere Ansprüche hinzutreten und diese in den politischen und sozialen Diskurs miteinbezogen werden müssen. Dadurch wird jedoch der Eigenwert der religiösen Erfahrung nicht gemindert, da jede Begrenzung nie ein Grundsatzurteil darstellt, sondern immer ein notwendiges Moment der Ungerechtigkeit in Gerechtigkeit..

Die Ableitung der Rechtsgründe aus dem ökonomischen Prinzip bei Adam Smith

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Keywords: Ethics, law, economics, value, reality, exchange, wealth, potentiality, labour theory, market, natural price

Der Anfang der politischen Ökonomie als Wissenschaft ist zugleich der Beginn des Siegeszuges des ökonomischen Prinzips in allen Bereichen menschlichen Handelns. Dieser gesellschaftliche Umbruch, der zweifelsohne bis heute den Rahmen für die Fragen nach Ethik, Recht und Gesetz bestimmt, geht aus einer ideengeschichtlichen Konzeption hervor, die vor allem mit Adam Smiths *Wealth of Nations* verbunden ist. Um der Tragweite und dem Wesen dieser Revolution sowohl im Ganzen als auch in ihrer Entwicklung gerecht werden zu können, müssen in einer philosophisch-ökonomischen Betrachtung der *Wealth* und ebenso Smiths Beiträge zur Moral- und Rechtsphilosophie eigens erörtert werden. Den Ausgangspunkt des Vortrages bilden demzufolge einerseits der *Wealth of Nations* und andererseits sowohl *A Theory of Moral Sentiments* als auch die *Lectures on Justice, Police, Revenue, and Arms*. Da zwischen dem Erscheinen der *Theory of Moral Sentiments* 1759 und dem *Wealth of Nations* 1776 eine langjährige Vorlesungstätigkeit über die Grundlagen des Rechts liegt, besteht die Aufgabe, ausdrücklich nach dem inneren Zusammenhang von Moralprinzipien, Rechtsgründen und dem Entwurf einer auf Wachstum ausgerichteten Industrie-Ökonomie zu fragen. Entgegen der verbreiteten Vorstellung, dass man bei Adam Smith das Ethische vom Ökonomischen trennen könne oder gar müsse, soll hier der Versuch unternommen werden, aufzuzeigen, wie sich das eine und das andere wechselseitig durchdringen und deshalb für eine tiefgründigere Einsicht in die Sache nicht unabhängig von einander in den Blick genommen werden dürfen.

Im Zentrum des Vortrages stehen drei Schlüsselbegriffe, die es erlauben, den genannten inneren Zusammenhang als solchen aufzuzeigen. Es handelt sich dabei um Smiths Verständnis von Wert, Wirklichkeit und Tauschvertrag. Bei der Explikation dieser Begriffe wird deutlich, dass und wie bei Adam Smith alle Fragen, seien es philosophische, ethische, juristische oder eben ökonomische, von vornherein im Horizont von Wertvorstellungen angesetzt werden und sich deshalb letztlich sowohl Moralität als auch Recht und Gesetz aus dem ökonomischen Prinzip ableiten. Dabei tritt bemerkenswerterweise in den Überlegungen von Smith – so die These – eine grundsätzliche Erörterung über Wesen und Begriff des Wertes zugunsten von Betrachtungen über eine mögliche natürliche und gerechte Ordnung der verschiedenen Wertvorstellungen in den Hintergrund.

In dem Vortrag soll gezeigt werden, dass dadurch, dass alles menschliche Tun und Handeln im Horizont von Wertvorstellungen erschlossen wird, zwangsläufig die Fragen nach Rechtsgrundlagen, Moralprinzipien und Ökonomie als eine Form des Abwägens und Berechnens erscheinen müssen, d. h. abgeleitet aus einem Optimierungskalkül.

Die Smith'sche Moralphilosophie ist eine Einfühlungstheorie, deren Grundlage in der Annahme besteht, dass die verschiedenen Handlungen jeweils von verschiedenen Empfindungen bewirkt werden. Die moralischen Empfindungen sind zwar eine besondere Art von Empfindung, aber dennoch sind alle einzelnen Empfindungen darin gleich, dass sie jeweils konkrete Wirklichkeiten darstellen. Durch die menschliche Einfühlungsfähigkeit ist jeder Einzelne in der Lage bzw. mitunter dazu gezwungen, die Empfindungen der Anderen selbst zu vergegenwärtigen. Das fremde Wohl- und Wehgefühl wird somit potentiell zur eigenen wirklichen Empfindung. Weil zudem als moralischer Maßstab vorausgesetzt ist, dass Wohlempfinden im Vergleich mit Schmerzempfindungen einen höheren Wert hat, darf dieses im Einzelfall – moralisch gesehen – auch ein höheres Recht auf Verwirklichung beanspruchen. Alle Handlungen zwischen Menschen sind in diesem Sinn bereits als eine Art des Handels zu verstehen, bei dem Wirklichkeitsansprüche potentieller Empfindungswerte gegeneinander eingetauscht werden können.

Die einzelnen (Tausch-)Handlungen wiederum haben auf der Ebene der Gemeinschaft ihre Bestimmung in einer größtmöglichen Gesamtsumme aller empfundenen Werte, deren Verwirklichung durch mannigfaltige gesellschaftliche Tauschprozesse durch Recht und Gesetz sichergestellt werden soll bzw. muss. Demzufolge bestehen für Smith die entscheidenden Aufgaben des Rechts (*great objects of law*) nicht in einer eigenständigen Gründung sittlicher Maßstäbe – man denke hier etwa an die *volonté generale* bei Rousseau oder die *Metaphysik der Sitten* bei Kant – sondern vielmehr darin für Sicherheit (*public security*) und moderate Güterpreise (*cheapness of commodities*) zu sorgen, so dass zunächst und vor allem die Wohlfahrt des Staats (*opulence of a state*) vorangebracht wird. Und zwar deshalb, weil es die verwirklichte Wohlfahrt einer Gesellschaft ist, die letztlich die Sittlichkeit (*cleanliness*) der Bevölkerung zu befördern vermag.

Sowohl bei den Moralprinzipien als auch bei den Rechtsgrundlagen ist der beherrschende Vorstellungshorizont gekennzeichnet durch Relationen von Werten, die in verschiedenen Arten und Weisen ein Recht auf Verwirklichung beanspruchen. Der Mensch ist dabei so in Anspruch genommen, dass er alle verfügbaren Wertpotentiale im Hinblick auf einen größtmöglichen zu verwirklichenden Gesamtwert gegeneinander abzuwägen hat. Anders gesagt, er muss ihr optimales Tauschverhältnis bestimmen, weil er so schließlich ihre Verwirklichung sicherstellen kann. Innerhalb dieser Konstellation von Wert, Wirklichkeit und Tauschvertrag drängen sich notwendigerweise zwei grundlegende Fragen auf. Einerseits die Frage nach einem objektiven Maßstab der Wertbestimmung (*invariable standard of value*) und andererseits die Frage nach einer kalkulierbaren Regelinstanz für die rückhaltlose Verwirklichung aller verfügbaren Wertpotentiale im wechselseitigen Austausch. Die Ausarbeitung dieser beiden Fragen bildet den ökonomischen Kerngedanken des *Wealth of Nations*. Nämlich die Smith'sche Arbeitswertlehre und ihre auf Arbeitsteilung basierende Wohlstandsvorstellung sowie die Theorie natürlicher und gerechter Preise auf vollständig kompetitiven Märkten. Im Lichte einer philosophisch-ökonomischen Betrachtung, wie sie hier unternommen werden soll, zeigt sich, dass in der ökonomischen Klassik aus dieser Mechanik der Wertsteigerung sowohl die Ursprünge der Moralprinzipien als auch der Rechtsgründe abgeleitet sind.

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International Society as Civil Association: Law, Morality and Responsibility

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In *On Human Conduct* (1975) Michael Oakeshott distinguished between two ‘modes’ of human association, ‘enterprise association’ and ‘civil association’. The former type of association is instrumental to the pursuance of a common cause, common interests, or a specific purpose shared by its members. An enterprise association is a business firm, a football team, a university or a trade union. A civil association, by contrast, is established around pragmatic rules of conduct that are not designed to further particular goals. Civil association first and foremost is a rule-governed activity that flows from what Oakeshott labels the ‘civil condition’ and ‘a relationship in terms of the conditions of a practice’. A practice, he argues, is ‘continuously reconstituted in being used’ and ‘only in virtue of having been learned and understood’ (Oakeshott, 1975, 119-120).

Oakeshott theorised the modern European state as a particular expression of civil association which he labels *societas*. In such an association ‘laws are understood as conditions of conduct, not devices instrumental to the satisfaction of preferred wants’ (Oakeshott, 1975, 202-203). However, as far as contemporary international relations are concerned Oakeshott seems to have been largely a realist rejecting the notion of an international civil association of states. Nevertheless, Oakeshott’s concept of civil association has inspired international society theorists to conceive of international society as not just a ‘purposive association’ in which states pursue their self-interest but also as a ‘practical association’ providing formal and pragmatic rules that are not instrumental to particular goals of state policy, i.e., as a *societas* (Nardin 1983; Jackson 2000). While this paper is generally supportive of the Oakeshottian turn in international society theory it suggests that somewhat different conclusions should be drawn from it. The paper sketches out an alternative conception of international civil association that transcends the boundaries of communities and suggests that such a notion of *societas*, when sustained by a particular legal conception, would promote an effective transformation of moral responsibility into political responsibilities across borders.

The first argument is that the limitation of the two views of ‘civil association’ as either confined to the political life within a state or as applicable to the organised international relations of states is unsatisfactory and that there are good reasons to conceive instead of a third notion when understanding ‘civil association’ as a mode of association that is capable of transcending the boundaries between the two conceptions, i.e., between the ‘civil association’ within the state and the ‘civil association’ in the society of states. The view defended here is that it makes sense to conceive of the modern state and the international society of states as necessarily connected in the sense that both associations are linked when sharing the same mode of association. Drawing on the work of among others Kant and Habermas it is argued that such a notion is not only possible in a philosophical sense but that it is and always has been a practical possibility in the context of modern political relations.

The second argument is that civil association corresponds to particular notions of legal relations. Civil association rejects the idea of an omnipotent law-maker supporting instead the position that law is a practice requiring an intersubjective account of its authority through what H.L.A. Hart once labelled 'the internal point of view' (Hart 1994; Frost & Lechner 2015). Moreover, civil association is consistent with both the notion that of law as the codification of practices as well as the view that law makes moral norms obligatory (Orsi 2015). It is argued that the distinction between, on the one hand, the law of the bounded community and, on the other hand, international law is unsatisfactory for realising the potential of a transnational civil association in international society. International law is too vague and the law of the bounded community is too limited to effectively sustain such practices. What we should look for instead is a transnational legal conception, labelled by Terry Nardin as a 'civil-confederal model' of international law (Nardin 2011).

The third argument is that the notion of international society when understood in this way reconstructs the notion of political space in international society and when sustained by a particular notion of law, is conditional for an effective transformation of moral responsibility into political responsibility across borders. Richard Beardsworth (2015) has recently emphasised the importance of a practical concept political responsibility across borders to be developed 'through a marriage between the national and the global' (p. 89). While sympathetic to Beardsworth's view that political responsibility of this kind is called for in today's world this paper claims that in order to work effectively such an endeavour requires an enhanced practice of civil association across borders.

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Befreiung, Andersartigkeit, Gemeinschaftlichkeit. Fall Slowenien

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Keywords: Einheit, Slowenien, Versöhnung, Bürgerkrieg, Befreiung, Frieden, Religion

Als Lessing noch vor der französischen Revolution sein letztes und wohl auch sehr berühmtes Werk *Nathan der Weise* veröffentlichte, hatte er sicher nicht vorgesehen, dass auch nach mehr als 230 Jahren seine Vision ein unverwirklichtes Ideal bleibt. Abgesehen von dem Unterschied zwischen Fiktion und Realität, ist die Idee einer friedlichen Welt, wo verschiedene Religionen und Kulturen zusammen leben könnten, einfach zu schön um sie zu vergessen und als eine Unmöglichkeit proklamieren. Mehr als 100 Jahre später hat auch ein großer russischer Philosoph Wladimir Solowjow sein letztes Werk zur Frage der Einheit der Religionen gewidmet. Hier war nun die Spaltung des Christentums als Hauptthema gewählt. *Kurze Erzählung vom Antichrist* beschreibt die Welt im Jahre 2077. Europa wand eine langjährige islamische Vorherrschaft über, die eine Mischung von den Religionen zusammenbrachte. Viele Menschen sehnten nach einer Versöhnung, die aber ganz anders als sie vorgeplant wurde, vorkam. Als wöllten die beiden Geschichten uns zeigen, dass Europa auch in aktueller Zwischenzeit eine Vereinigungsgeschichte brauchen würde. Nehmen wir ein einziges Land in Europa und versuchen einige Leitmotive solcher Geschichte herausfinden.

Slowenien ist ein Land, das momentan viel in Medien wegen der Flüchtlingskrise präsent ist. Daneben wurde in letzten Jahren auch infolge der ökonomischen Krise ausgesetzt. Slowenische aktuelle Geschichte zeigt jedoch auch eine starke politische Polarisierung, die sich in allen Bereichen der Gesellschaft zeigen lässt. Ursprüngliche Zerrissenheit der Nation beginnt aber schon am Beginn des 20. Jahrhunderts und eskaliert in dem zweiten Weltkrieg. Es ging um einen Bürgerkrieg zwischen Kommunisten und ihren Gegnern, die letzten Endes auch mit dem deutschen und italienischen Besatzer kollaborierten. Nach dem Krieg handelte es sich um eine massive Mordern von der siegreichen kommunistischen Seite. Nach der Unabhängigkeit im Jahre 1991 verfallen mehrere Versuche für die Versöhnung. Immer wieder kam zu einer politischen Auseinandersetzung. Die letztere verfraß sich so stark in alle Poren des alltäglichen Lebens in Slowenien, dass viele kein Wort über die Versöhnung mehr hören wollen. Heute traute sich kaum jeder über das Thema zu sprechen.

Ein Symposium in einem anderen Land ist die gute Gelegenheit für einen Abstand von der Situation. In unserem Beitrag wollten wir uns jedoch noch eine weitere Aufgabe stellen. Ist es möglich über die Einheit der slowenischen Nation auch mit der Hilfe der Religion zu sprechen? Solche These wurde bisher so gut wie nichts durchgedacht. Wir sehen das für notwendig umso mehr, denn in den politisierten Debatten ist die katholische Kirche immer wieder nur auf eine Seite gesetzt. Wo ist hier die Einheit der Religionen, die Einheit des Christentums?

Mit dem Titel „Befreiung, Andersartigkeit, Gemeinschaftlichkeit. Fall Slowenien“ stellen wir eine direkte Alternative zur Parole der französischen Revolution. In vielen europäischen Ländern, auch in Slowenien, hat dieses Ideal offensichtlich versagt. Auch heute ist mit den

Migranten auf eine Bewährungsprobe gestellt. Kann Slowenien überhaupt sich zu den anderen Kulturen öffnen, wenn sie nicht in ihrer eigenen den Frieden finden kann? Diesen Frieden verschafft nach unserer Meinung nur tiefes spirituelles Leben oder anders gesagt ein neuer Humanismus. Damit kehren wir zurück zu unseren zwei philosophischen Werken.

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The Foundations of the Philosophy of Human Dignity and the Law

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Keywords: human dignity, moral philosophy, limited-value discourse ethics

My lecture points out a few basic problems of the philosophy of human dignity. First a short introduction is given on various meanings of dignity and on the notion of human dignity; then an outline is drawn on the major traditional interpretations of human dignity. Since according to certain views the notion of human dignity is vague, I take a closer look at several critical remarks. This is followed by my attempt to answer the question why it is important today to create a philosophy founded on human dignity. On this ground, only a moral-philosophical theory can be the one against whose backdrop it is essential to have a “minimal” image of man. The principle of respecting human dignity is discussed within the framework of discourse ethics, after which certain aspects of the possible interpretation of this principle are drawn.

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The Aesthetic Sense of Law: Tragedy in Nietzsche and Christianity

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Keywords: Nietzsche, Kierkegaard, Tragedy, Aesthetics, Dionysian, Apollonian, Love, Christian Existentialism, Ethics, Law

In philosophical perspective, ethics and aesthetics are known to be firmly intertwined. Fundamental thought on the relation between ethics and law also implies careful reflection on the subject matter of the aesthetics of law. This field of interest necessitates a philosophical inquiry into the art and beauty of jurisprudence, lawgiving and legal adjudication. It needs to clarify the aesthetic dimensions of law, to explore to what extent law is aesthetically conditioned and in what sense legal judgments can be seen as aesthetic judgments.

While in general, the relevancy of philosophical aesthetics with respect to law is rather underappreciated, the importance of Nietzsche, and in particular his *The Birth of Tragedy* (1872), has been largely ignored. This is remarkable considering what this work has to offer for anyone interested in the art of law as *ars inveniendi*. Nietzsche's inspiring intuitions and impressions concerning the archaeology of philosophy and science emerging out of music and tragedy, radically question the existential and aesthetic legitimacy of any subsequent system of law. Since Socrates' 'emancipation' of thought (of the Apollonian from the Dionysian element), the art of politics and law has been founded almost exclusively on scientific knowledge, on logic and rational deliberation. As a consequence to this historical process of rationalization, universal laws and regulations (legal, moral and religious) have taken on an unhealthy importance in almost every part of life. Justice however remains illusory when the autonomous reason and its self-evident necessities are left to determine the limits of the possible and the impossible (e.g. negativities, contradictions and paradoxes).

With respect to jurisprudence, this tradition of 'optimistic socratism' - the 'primal sin' of philosophy and science - eventually culminated in a nihilistic legalism and legal positivism that almost entirely subdued the acknowledgement of life, tragedy, subjectivity and creativity. This also explains why traditionally questions concerning the aesthetics of law did not arise, or were ruled out of order.

Against this pervading Socratic tradition and in accordance with Nietzsche, the paper explores the prospective - in the theory and practice of jurisprudence - of a 'rebirth of tragedy'. In contrast to Nietzsche however, the paper designates this rebirth to develop from out of the spirit of Christianity. To this account, it argues that early modern and contemporary Christian existentialism best interprets this original spirit, in sharp contrast to the (Socratic) religious traditions of natural law (Thomas Aquino) and idealism (Kant and Hegel). The religious thoughts of Pascal, Kierkegaard, De Unamuno, Berdyaev and Shestov typically resound a tragic sense of law, which is strongly affiliated with the Nietzschean concept of tragedy. Their biblical personalism in relation to God (*sola fide*) and the neighbor inspires towards an essential critical

stance in respect to the rule of law. It also fuels a vital sensitivity towards a creative ethics of a beauty *beyond Good and Evil*. It is tragic wisdom not to see the good in goodness. Christianity seeks a God who is higher than 'the good'. It seeks a God for whom 'everything is possible'. 'Lead us not into temptation': the renaissance of tragedy works against the sickening temptation of reason that threatens to degenerate ethics into a rigid and legalistic morality that tends to undermine the legitimacy of law.

The paper argues that law is much the same as faith. Law is a form of art in service of which man's natural desire for knowledge, a desire credited so highly by Aristotle (Met. I 980 a 25), needs to be critically assessed and held in check. The further exploration of the aesthetic dimensions of jurisprudence (their theoretical development and methodological deployment) can very much benefit from the tragic theology of Christianity as well as from 'the religious turn' in postmodern philosophy (Derrida).

Catholic Church and its defense of human rights during Second World War

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Keywords: Catholic Church, Church's doctrine, communism, human rights, right to life, necessity of defending human rights, World War II, Slovenia, moral authority

Catholic Church as institution of moral authority and defender of individuals symbolical and religious nature, has a right and an obligation to defend human rights, especially in the time of war. Because the war, laws of ethics are often disrupted and the state as a primary protector and an insurance of human rights fails in this task. During the WWII the Church tried to protect human rights in many different ways. Most of the defence was closely related to Church's doctrine, other forms featured individuals that took an active role in defence against communist regime. Such actions are against Jesus's commandment of love: »But I tell you to love your enemies and pray for anyone who mistreats you. Then you will be acting like your Father in heaven. (Mt 5,44-45)

In this paper I will try to verify which methods were acceptable and compatible with the Church's doctrine in order to secure human rights and dignity against communism and why it was necessary for the Church to protect those rights. I will also investigate the motives of Church's actions during the WWII (self-interest motives and motives to help human beings according to Church's doctrine). At first the Church has been the main component in the social, economical, political and cultural life of individuals, but later other philosophical, social and political systems tried to override this role. They also tried to take over the Church's and religion's place in defending human rights. But Church remained as moral authority (Juhant 2012, 148). In time of WWII the Church played an important role in social life, although it was independent of a state. Priests were often the only source of information among class of rural and poor people. Church is an important apologist of faith, belief and moral institutions.

As an example I will concentrate on Slovenian territory during the time of WW II, basing my investigation on pastoral letters, encyclicals, apostolic constitutions and speeches and historical account of the events (Granda 2008, 210-220; Griesser Pečar 2004, Lowe 2012, 265-280). The former will give us an insight into Church's doctrine toward communism as a system that threatens human life, and the latter will present concrete actions of Slovenian clerics in the time of war. Slovenian people were divided. On one hand we had communists, and on the other there were those, who tried to resist communist regime. Communists formed Liberation Front at first to protect Slovenians against occupying force. That is why many Slovenians joined Liberation Front, lead by Communist Part, regardless communists ideology. Others were marked by communist party as traitors, even if they did not cooperate with occupying force. That makes those the direct enemy of communist party, which resulted in assassinations. Such differentiation remains today, even if the war is long gone. Slovenia struggled with the occupying force and also revolution (Granda 2008, 211). Church's doctrine is obligatory for its clergy. Slovenian clerics were convinced that resistance towards communism is necessary in order to defend human rights, which were violated by it (Juhant 2010, 73). Fajdiga claims that Church did everything it could and should be done (Fajdiga 33, 1945).

There is well known golden rule: »Treat others as you want them to treat you. This is what the Law and the Prophets are all about.« (Mt 7,12). Similarly Kant explains his categorical imperative, where he states that we must act in such a way that the maxim of our action could be accepted as a universal law. This imperative concerns all rational beings without exceptions. An individual normally tends toward peace, happiness (eudaimonia) (Aristotel 2002, 312-328), which surely excludes killings, concentration camps and starvation. In the time of war there were some people who were psychopaths, but on the other hand some serious crimes were committed by ordinary people. That is why it is hard to explain what happened to human's natural tendency to peace and happiness. Communists tried to infiltrate into people minds the idea of communism is good and that everything should be subsidiary to its ideology. Church's and also intellectuals' role should be in defending human life and freedom, which were seriously endangered in communism. Because of direct attack of communism toward the Church, the defence was also meant to protect the Church itself. The first defender of human rights should be state. Regarding state's failure in defending human rights, the only competent institution to step into its place was the Church (Stres 1989, 9-11).

That is why we will discuss Church's defense of human right to life against communism, to individual freedom and freedom of speech and religion. Communism often presents itself as moral system and as system that contains basic values. But it can be claimed that it opposes Christians ethics, based on natural intellect and also Holy Bible, since communism neglects and violates all commandments, especially the ones from 4th to 10th. It also uses lies and violence to overcome the old social system (Besancon 2014, 49-54). Primarily it can not be put in a position to judge who is to live and who not. And here lies the problem of the period of WWII. Communist leaders, wanted to fit all the people in the system, regardless their interest and their freedom. This is represented by »tendency of dictators to be guided by their fears and to turn into enemies all who could conceivably threaten their power— including the more idealistic among their own original adherents.« (Bennett 1948, 123) That is why pose the question what was the Church's role in defending individual's life and dignity as a basic human right.

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Rights Depending on Ethics: Sharing the Responsibility for the Undocumented Migrants' Right to Health

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Keywords: Migration, Right to Health, Humanitarian Aid, Global Justice, European Union, Third Sector

Encountering the New Fragility of Health Rights

The conflicts in Syria and its surroundings as well as the subsequent mass migration to Europe have brought about an escalated challenge to the right to health. In 2015, the worst year in this respect in the Syrian war to date, 122 attacks on hospitals were documented by Physicians for Human Rights (2016). Yet the right to health is notoriously fragile also among the millions of displaced persons on their way towards Europe.

Securing the asylum seekers' and the undocumented migrants' right to the access to basic health care has a firm grounding in the human rights thought and law. The magnitude of the present migration phenomenon, however, indicates a need for a profound reassessment of also the corresponding responsibilities. How far is each European state responsible for the displaced persons' right to health within its territory, within the European Union, and also beyond? And given that the European states have so far been unable to shoulder all their proper responsibilities, how then should we understand the role of voluntary organizations in this field?

This article provides, first, an analytical review of certain relevant European level guidelines about health care for the undocumented migrants, particularly those delineated by Picum (2007; 2009). Second, it takes a look at some voluntary organization endeavoring to fill in the deficit in the emerged public sector health care provision, especially The Global Clinic operating in Finland. And third, it will argue that the law has become in this context unreasonably dependent on ethics stemming from the civil society. For one thing, without a sufficiently viable transnational ethics, the politicians of each European country are unable to make balanced decisions on the undocumented migrants' rights. For another, until such balanced decisions have been reached, the rights of these migrants depend on the ethical virtues of individual third sector actors to a worrying degree.

The Idea of a Fair Nation-Wide Cooperation and beyond

Struggling under public sector austerity, the most European countries have found it challenging to finance a sufficient range of health services to the undocumented migrants. But there are issues of principle involved as well. In particular, given that these migrants do not belong to the societal collaboration scheme of the nation in question, usually neither *de jure* nor *de facto*, should they nevertheless be entitled to similar health services as the natives?

A possible negative reply to this question gains support by the idea of a liberal democratic society as a fair nation-wide collaboration scheme, an idea most famously developed by American Philosopher John Rawls (1993). Subsequently, Thomas Pogge (2002) and many others have argued for justice with a global scope. Neither Rawls nor Pogge has addresses the case of undocumented migrants explicitly, but their approaches can be helpful in the elaboration of a balanced stance on the issue.

The present paper supports, on the one hand, the idea of the persistent political relevance of the Rawlsian idea of a fair nation-wide collaboration. Even the above-mentioned Picum documents, although they are specifically devoted to promote the rights of the undocumented migrants, distinguish rather clearly between the relevant human rights standards and national standards. On the other hand, it will be reminded that already the human rights conventions, perhaps most importantly the *The International Covenant on Economic, Social and Cultural Rights* (ICESCR, Art. 12), affirm “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” It will thereby be argued that a proper human rights approach implies no cynical health rights minimalism but a rather strong sense of transnational ethics among the citizenry of each European nation.

Dependency on the Virtues in the Third Sector

What then is actually attainable in practice depends not only on state policies. Indeed, the provision of commonsensical or reasonable standards of the right to health in the case of undocumented migrants has so far heavily depended on the responsibilities that voluntary organizations have been able to shoulder.

The Red Cross and Red Crescent Movement, Time to Help, and many other humanitarian organizations have assumed big roles in the field. In the present paper, the case to be analyzed in more detail is The Global Clinic operating in Finland. Supported by certain Finnish Evangelical Lutheran deaconess institutions in addition to some non-confessional associations, it has crucially complemented the health services provided by the public sector institutions to the undocumented migrants. This case thereby warrants further the main argument of the paper: presently the undocumented migrants’ right to health depend on voluntary ethical virtues rather heavily—in many cases arguably to an unreasonable degree.

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From ethical analysis to legal reform: Methodological reflections on translation and incorporation

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Keywords: institutional characteristics of law, global legal pluralism, legal moralism, moral pluralism, ethical pluralism

Ethicists frequently provide evaluations of law and recommendations on legal reform, based on their ethical analysis. For example: “The tax system is unjust, as it favours the rich.” “The law with regard to euthanasia (or biotechnology, abortion etc.) should be changed.” This is an important and legitimate role for ethicists.

However, in order to do so properly, they should be aware of the characteristics of the law they want to change and of the legal order in which this law is embedded. Ethical analysis needs to be translated and incorporated into a legal framework. This paper attempts to identify a number of issues that need to be addressed when an ethical analysis is the basis for legal reform. Its specific angle is that of analysing how these issues are made more complex by various forms of pluralism. There are three major clusters of issues to be addressed: the institutional characteristics of a legal order, the question under which conditions morality can or should be translated into law, and the problem of ethical (as distinct from moral) pluralism.

First, law is a relatively autonomous practice with its own institutional characteristics (Taekema 2011). For example, law usually relies on general rules and thus cannot deal adequately with exceptional cases: hard cases often make bad law. Legal orders have specific rules of proof, as proof has to be assessed from a third person perspective, whereas ethical theories usually presuppose a first person perspective. Law is an institution in which often enforcement agencies with substantive powers play a role. Moreover, as Fuller has argued, law has its internal morality – or principles of legality – based on its institutional characteristics. As Selznick and Taekema (2003) have argued, law is oriented towards distinctly legal ideals such as legality and justice. If we want to translate our ethical analysis into suggestions for legal reform, we should take these institutional characteristics seriously. Moreover, we should take account of the differences between certain subfields of law (such as criminal law, administrative law, tort law and disciplinary law), each with their own institutional peculiarities.

This is made even more complex by the phenomenon of global legal pluralism (Berman). Whereas most studies of law and morality in the literature implicitly presuppose sovereign legal orders associated with the state apparatus, such a restricted view of law is no longer tenable. Global legal pluralism recognizes different types of law, such as international law, *lex mercatoria*, EU Law, Council of Europe law, but also contractual law and internal regulations of certain organizations and groups. This leads to a pluralism of conceptions of law – each type having its own distinct institutional characteristics and its own internal morality.

Second, even if we accept that law and morality cannot be separated, they are at least distinct (Van der Burg). Not every moral norm can or should be translated into legal norms. There are sociological restraints: because of its own institutional characteristics, it is often not effectively

possible to legislate morality, as both Prohibition and the war on drugs have shown (Cotterrell). Similar remarks can be made for actions that are effectively protected by privacy or professional confidentiality, such as consensual sexual acts and euthanasia. There are also straightforward normative restraints, discussed in the famous legal moralism debate. Here too, the issue has become more complex than was presupposed in the Hart-Devlin debate and the ensuing literature. Even if, *arguendo*, the thesis of a conceptual separation between law and morality could be defended – a thesis which the author has criticised recently – in modern societies law and morality are intertwined in many ways, e.g., through the use of open norms and vague clauses. More importantly, Devlin’s presupposition that there is a shared social morality has become even much more problematic than in the early 1960s. Even if on many issues there is an overlapping consensus, in most of the debates to which ethicists contribute, there is not. Moral pluralism provides an important challenge.

Third, there is ethical pluralism. It is surprising how often in legal debates ethicists argue as if there is only one objective ethical analysis, namely, their own. Of course, in the academic debate, authors can consistently elaborate the implications of a Kantian, utilitarian or Thomist perspective. However, from the point of view of a legislator, there is no good reason to choose for one of those theories over the alternatives. That would be a partial and arbitrary choice. Therefore, ethicists, if giving advice on legal reform should address ethical pluralism. There are at least four possible strategies here: the search for an overlapping ethical consensus, ethical triangulation, restriction to *prima facie*, partial advice, or restriction to critical analysis rather than positive analysis.

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